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Contents

Federal Register

Vol. 86, No. 179

Monday, September 20, 2021

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.

14 CFR

Proposed Rules:

39 (3 documents) 52106, 52109, 52111
93.....52114

19 CFR

351.....52300

32 CFR

310.....52071

38 CFR

17.....52072
38.....52076

40 CFR

180 (3 documents) 52077, 52082, 52083

47 CFR

2.....52088
5.....52101
25.....52102
95.....52088
97.....52101

Proposed Rules:

8.....52120
64.....52120
76.....52120

50 CFR

622 (2 documents) 52103, 52104
648.....52104

Rules and Regulations

Federal Register
Vol. 86, No. 179
Monday, September 20, 2021

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD–2020–OS–0094]

RIN 0790–AL17

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense (DoD or Department) is issuing a final rule to amend its regulations to exempt portions of the DoD–0005, Defense Training Records system of records from certain provisions of the Privacy Act of 1974. Specifically, the rule exempts portions of the Defense Training Records system of records from certain provisions of the Privacy Act because of national security requirements and to preserve the objectivity and fairness of testing and examination material.

DATES: This final rule is effective October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Lyn Kirby, *OSD.DPCLTD@mail.mil,* (703) 571–0070.

SUPPLEMENTARY INFORMATION:

I. Background

On December 28, 2020 (85 FR 84316–84319), DoD published a notice of a new system of records (SORN) establishing the DoD–0005, Defense Training Records system of records. This system covers DoD's collection, use, and maintenance of records about training delivered to DoD Service members, civilian personnel, and other DoD-affiliated individuals. The training data includes enrollment and participation information, information pertaining to class schedules, programs, and instructors, training trends and needs, testing and examination materials, and assessments of training efficacy. No comments on the Routine Uses were received during the SORN's 30-day public comment period.

II. Privacy Act Exemption

The Privacy Act permits Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records and accountings of disclosures of such records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption.

Because this system of records may contain classified information or information the release of which could compromise the fairness or objectivity of the testing or examination process, DoD proposed to exempt this system of records from certain provisions of the Privacy Act by a notice of proposed rulemaking (NPRM) published at 85 FR 84278–84279 concurrently with the SORN. The NPRM proposed to modify DoD's Privacy Act regulations at 32 CFR part 310 to exempt portions of records maintained in DoD–0005 from the requirements of 5 U.S.C. 552a(c)(3) and (d)(1)–(4) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1) and (k)(6) of the Privacy Act. The public comment period ended on February 26, 2021, and DoD did not receive any comments on the NPRM. This final rule adds to the DoD's Privacy Act exemptions for Department-wide systems of records found in 32 CFR 310.13. Records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record.

Regulatory Analysis

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been previously determined that Privacy Act rules for the DoD are not significant rules. The rules do not: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), it has been determined that Privacy Act rules for the DoD are not major rules, as defined by 5 U.S.C. 804(2).

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been determined that the Privacy Act rules for the DoD do not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rules will not significantly or uniquely affect small governments.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

The Director of Administration and Management certified that Privacy Act rules for the DoD do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the DoD.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the DoD impose no additional reporting or recordkeeping requirements on the public under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

It has been determined that the Privacy Act rules for the DoD do not have federalism implications. The rules do 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.

Executive Order 13175, ''*Consultation and Coordination With Indian Tribal Governments*''

It has been determined that Privacy Act rules for the DoD do not have substantial effects on Indian tribal governments. The rules do not impose substantial direct compliance costs on one or more Indian tribes, preempt tribal law, or effect the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

PART 310—[AMENDED]

■ 1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

■ 2. Section 310.13 is amended by adding paragraph (e)(4) to read as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(4) *System identifier and name.* DoD–0005, ''Defense Training Records.''

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (d)(1), (2), (3), and (4).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (6).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)—*(*1*) *Exemption (k)(1).* Training records in this system of records may contain information concerning DoD personnel or training materials that is properly classified pursuant to executive order. Application of exemption (k)(1) for such records may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(*2*) *Exemption (k)(6).* Training records in this system of records may contain information relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) for such records may be necessary when access to and amendment of the records, or release of the accounting of disclosure for such records, may compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring testing and examinations to be continuously re-administered.

(B) *Subsections (d)(3) and (4).* These subsections are inapplicable to the extent an exemption is claimed from subsection (d)(2). Moreover, applying the amendment appeal procedures to training and examination materials could impose a highly impractical administrative burden by requiring testing and examinations to be continuously re-administered.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

* * * * *

Dated: September 14, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20221 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AQ31

Elimination of Copayment for Opioid Antagonists and Education on Use of Opioid Antagonists

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its medical regulations that govern copayments to conform with recent statutory requirements. VA is eliminating the copayment requirement for opioid antagonists furnished to veterans who are at high risk of overdose of a specific medication or substance in order to reverse the effect of such an overdose. VA is also clarifying that no copayment is required for the provision of education on the use of opioid antagonists. This final rule is an essential part of VA's attempts to help veterans at high risk of overdose.

DATES: This rule is effective October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Joseph Duran, Director of Policy and Planning. 3773 Cherry Creek North Drive, Denver, CO 80209. (303) 370–1637. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 6, 2020, VA published a proposed rule in the **Federal Register** (85 FR 71020) that would eliminate the copayment requirement for opioid antagonists furnished to veterans who are at high risk of overdose of a specific medication or substance in order to reverse the effect of such an overdose and for the provision of education on the use of opioid antagonists. VA provided a 60-day comment period, which ended on January 5, 2021. VA received 19 comments on the proposed rule.

In an effort to reduce the incidence of overdose among the veteran population, Congress, in two separate statutes, has required that VA must exempt from copayment (1) opioid antagonists furnished under chapter 17 to a veteran who is at high risk for overdose of a specific medication or substance in order to reverse the effect of such an overdose, and (2) education on the use of opioid antagonists to reverse the effects of overdoses of specific medications or substances. See Public Law 114–198, sec. 915 (July 22, 2016) and Public Law 114–223, Division A, sec. 243 (Sept. 29, 2016). These provisions were effective upon enactment and have already been implemented. These provisions assist veterans by eliminating copayments for life-saving medication and education on the use of such medication, with the goal of reducing the incidence of overdose deaths among the veteran population. This final rule amends two of VA's copayment regulations, 38 Code of Federal Regulations (CFR) 17.108 and 17.110, to accurately implement these changes in law. This final rule also adds an explanation of how VA would identify a veteran at high risk for overdose under the new provisions.

Positive Comments

Most commenters were in support of the proposed rule. One commenter stated that the rule would be a crucial part of VA's efforts to help veterans at an extreme risk of overdose. Another commenter stated that the rule is critical in creating cross-governmental cohesion in the fight against the opioid crisis in our veteran population, and it solidifies the message of a united front against the

opioid crisis in our veteran community. The commenter suggested that adding a clear definition of who VA considers high risk is also an essential step in ensuring that any veteran needing these measures will have the availability of lifesaving opioid antagonists afforded to them. A commenter stated that the opioid crisis in the United State is getting worse every day and it is VA's duty to eliminate copays for opioid antagonists and education on use of opioid antagonists. Another commenter stated that high-risk veterans should have adequate access to opioid antagonists and that veterans should also have access to counseling and educational information on the subject of opioid addiction.

A commenter stated that eliminating the copayment for opioid antagonists and the education on the use of opioid antagonists will relieve a veteran of those financial burdens while receiving treatment. The commenter added that veterans have sacrificed enough to protect the people of this country and it is our responsibility to provide proper health care and encourage healthy living. Eliminating the copayment will allow veterans to fight this battle with focus and determination and removing a stressor such as a copayment can increase the chances of a successful recovery.

A commenter was in favor of the rule and added that VA has several programs in place to help veterans manage pain that do not include the use of opioids. This same commenter stated that the use of naloxone rescue treatments is an option for opioid risk mitigation and that proper education on naloxone should be given with frequent observation of the veteran and documentation in the veteran's medical records. This commenter also stated that eliminating the copayment will allow a veteran to fight this battle with focus and determination. Treatment timeframe varies per situation, but when trying to heal the mind and body simultaneously, removing a stressor can increase the chances of a successful recovery.

Another commenter was in support of the proposed rule and stated that the rule will be impactful to veterans battling opioid use disorder. Several commenters stated that by waiving the requirement to pay a copayment to receive opioid antagonists or education on their use for qualifying veterans, VA is recognizing that costs can pose a barrier for veterans to health care accessibility and it is taking the right steps to alleviate those barriers. A commenter added that this rule is a statement by VA of support of their at-risk patients and that it places the values of their patients' lives over the cost of this drug. Another commenter similarly stated that removing copayment requirements for veterans will likely result in increased access to these potentially life-saving medications. The commenter praised VA's efforts and believes that this rule will help reduce the incidence of overdose deaths among the veteran population.

A commenter stated that the proposed rule was a fine example of an executive agency ensuring compliance with Congressional direction.

VA thanks the commenters for their support of the rule. We are not making any changes based on these comments.

Comment on use of term opioid antagonist.

One commenter was in support of the rule but stated that VA should change the wording in the proposed rule from antagonist to something that is more relatable and not so demeaning to people who will interpret it the wrong way.

VA notes that the utilization of the term antagonist in the proposed rule is the correct medical term to describe the specific class of medications being authorized for provision to at risk veterans. An antagonist is a chemical that acts within the body to reduce the physiological activity of another chemical substance (such as an opioid). Since the term specifically describes this class of medication, VA is not making changes based on this comment.

Comments on education on opioid antagonists.

A commenter was in general support of the rule but indicated that the copayment for the outpatient visit should be eliminated regardless of whether the veteran's medical visit is solely for education on the use of opioid antagonists or the education is provided in conjunction with other types of care.

Under 38 United States Code (U.S.C.) 1710 and 38 CFR 17.108(c) VA is required to charge copayments for outpatient and inpatient health care services when certain criteria are met. VA clarifies, in 38 CFR 17.108(c)(2), a veteran will only be charged one copayment per day even if there are multiple encounters. In accordance with section 1710(g)(3)(B) of title 38, United States Code, VA is exempting from the copayment requirement those outpatient health care visits whose sole purpose is to provide education on the use of an opioid antagonist. However, when the outpatient visit provides health care services in addition to the education on an opioid antagonist, VA must assess the veteran's copayment for the additional services in accordance with 38 U.S.C. 1710. VA emphasizes that the veteran will not be charged a separate copayment for the education but will be assessed one copayment for the entire encounter. VA notes this results in the same outcome as the veteran would have experienced if the veteran had not received education on the use of an opioid antagonist. VA is not making any changes based on this comment.

Comments on definition of at high risk veterans.

Several commenters were generally in support of the rule but were concerned that the rule only focused on veterans who VA classified as high risk. The commenters stated that all veterans, not just those with a diagnosed risk of opioid overdose, should be eligible for the waived copayment. A commenter stated that if a veteran needs the opioid antagonist, then costs should not be a concern whether they are high risk or not. The commenter added that the fact the veteran is in need of the antagonist is sufficient evidence the veteran is at high risk. Also, the commenter stated that while the proposed rule would be an improvement and would lead to more lives being saved, more aggressive action to expand the target population to all veterans would be warranted and welcomed by the American people.

VA defined a high risk veteran in the proposed rule as a veteran who is prescribed or using opioids, or has an opioid use history, and who is at increased risk for opioid overdose as determined by VA. VA also stated that, in the alternative, a high risk veteran is one whose provider deems, based on their clinical judgment, that the veteran may benefit from ready availability of an opioid antagonist. VA believes this definition is broad enough to allow health care professionals the discretion to provide opioid antagonists and related education to any veteran who needs it without charging a copayment. In addition, VA has programs in place to assist veterans who are suffering financial hardship or who would face difficulties in making copayments; these efforts include measures to identify barriers for veterans at high risk due to substance use and to review the veteran's financial barriers and provide assistance as needed. VA is not making any changes based on this comment.

Another commenter stated that the proposed rule assumes that all those who are considered high risk would be appropriately identified to meet the requirements for the copayment waiver. The commenter added that this approach runs the risk of missing vulnerable individuals who may not fall within the parameters outlined by VA

that are used to generate a high-risk status and thus, a waived copayment. The commenter recommended that VA expand the rule to capture not only those considered high-risk, but also those residing in highly impacted regions, such as rural communities. Another commenter similarly recommended including additional items in the definition of high risk, such as considering all veterans who requested opioid antagonists in geographical areas that see higher rates of opioid use and areas considered rural by the Federal Office of Rural Health Policy to be high risk. The commenter indicated that veterans in rural areas have limited access to health care and treatment centers, and delays in emergency medical services become critical when an accidental overdose occurs. The commenter added that VA should create the most inclusive definition possible and consider other, less obvious, circumstances veterans may face that could render them at ''high risk'' of opioid addiction. The commenter also stated that by utilizing a model which casts a wider net for assistance, more veterans and those in their immediate circles are likely to benefit from these proposals.

As previously stated in this rulemaking, VA's definition of high risk veteran is broad enough to allow health care professionals the discretion to provide opioid antagonists and education on those medications to any veteran without charging a copayment. In addition, VA has developed numerous resources to support identification of patients at risk for overdose, including the VA Opioid Overdose Education and Naloxone Distribution (OEND) Risk Report (which includes patients with various opioid pharmacotherapy and Opioid Use Disorder risk factors); VA Stratification Tool for Opioid Risk Mitigation (STORM), which uses predictive analytics to identify patients prescribed opioids who are at high risk for overdose and/or suicide; and incorporating the Risk Index for Overdose or Serious Opioid-induced Respiratory Depression (RIOSORD) into multiple reports to assist with patient identification. VA clinicians provide patient-centered care that takes into account the complexity of conditions and circumstances with which patients present—including their work, home, support system, and community—when conducting risk assessments and developing treatment plans. Based on the broad definition for this rule, which allows clinicians to provide opioid antagonists and related education to any veteran they deem may benefit from ready availability of an opioid antagonist, VA is not making any changes to its definition of high risk in response to this comment.

Another commenter stated that opioid overdoses can occur even when someone is taking an opioid exactly as prescribed by their doctor, and even veterans who are not considered ''high risk'' can still die of an overdose or be left with long term brain damage. Therefore, the commenter concluded, it is imperative that all veterans taking opioids are educated on the dangers of opioid induced respiratory depression (OIRD) and are provided the monitoring technology to help keep them safe. The commenter encouraged VA to utilize continuous physiologic monitoring with notifications for all patients using opioids, particularly during periods of sleep and rest. The commenter added that such monitoring has been shown to reduce opioid overdose deaths through earlier interventions and rapid response team activations when necessary. The commenter recommended that VA include the following in the list of factors that indicate that an individual is at high risk of overdose: Individuals taking other sedating medications, including alcohol, marijuana, benzodiazepines and/or gabapentin; older adults; depression or mental health conditions; sleep apnea.

VA notes the specific modalities for treatment, such as monitoring for OIRD, are determined by the VA national program office responsible for developing guidance to VA staff overseeing the provision of care at the facility level. The establishment of such modalities are outside the scope of the proposed rulemaking. VA believes that the proposed definition of a high risk veteran is broad enough to grant health care professionals the discretion to identify veterans who such professionals consider to be high risk; the addition of the factors identified by the commenter would not enhance the proposed definition. Moreover, VA's aforementioned STORM model takes into consideration many of the factors described by the commenter that are available in VA data (*e.g.,* substance use disorders, benzodiazepine and gabapentin prescriptions, age, mental health diagnoses, and sleep apnea). These factors are displayed in a VA-provider facing clinical dashboard for patients prescribed opioids as well as patients with opioid use disorders. VA is not making any changes based on these comments.

Comments on elimination of other types of copayments.

A commenter was generally in support of the rule but recommended the rule also eliminate any cost to veterans relating to substance use disorder counseling, rehabilitation, psychological treatment, and inpatient care. The commenter added that care coordination between providers must become an equal priority to prevent over-prescription. In addition, the commenter stated that opioid antagonists should be treated as the last resort in reducing overdose deaths and not a course of treatment. The commenter stated the proposed rule should be only the first step in ensuring that high risk veterans face no obstacles in gaining access to the treatment that they need ahead of any possible overdose incident.

As previously stated in this rulemaking, section 915 of Public Law 114–198 and section 243 of Division A of Public Law 114–223 provide for the elimination of a copayment for the provision of opioid antagonists and for outpatient visits whose sole purpose is for the provision of education on the use of opioid antagonists. The elimination of copayments for substance use disorder counseling, rehabilitation, psychological treatment, and inpatient care are beyond the scope of the proposed rule. However, VA's implementation of opioid antagonist education emphasizes the importance of connecting patients, including those with opioid use disorder, with treatment (*e.g.,* a standardized patient education brochure recommends considering seeking help for substance use disorder [SUD] treatment and includes a link to the VA SUD Program Locator). VA has also streamlined Prescription Drug Monitoring Program (PDMP) checks—incorporating an integrated Information Technology solution that allows providers to check for controlled substance prescriptions outside VA. This mechanism makes it easy for providers to check the PDMP for opioid prescriptions external to VA within the Computerized Patient Record System. VA also has programs in place to assist veterans experiencing financial hardship, including measures to identify barriers for veterans at higher risk due to SUD. VA is not making any changes based on this comment.

Comments on Outreach

One commenter suggested that the rule should also ensure that VA provide outreach services to identify high-risk veterans, encourage educational outpatient visits, and follow-up before or after both outpatient and inpatient visits for treatment and education. The commenter indicated that providing

outreach services will increase the number of veterans who receive antagonist prescriptions, aid in tracking the most at risk of the high-risk population, aid in the dissemination of pain management alternatives, and overall reduce the risk of opioid misuse and overdose events. The commenter also stated that outreach has proven effective in several studies conducted all over the US for people suffering with Opioid Use Disorder and is a main factor is reducing repeat overdose events. The commenter stated that these outreach practices are already occurring in VA and should be folded into the regulation to ensure their continuation as outreach is an integral part of increasing the effectiveness of this rule's stated goal.

VA notes that this rulemaking is limited to the exemption of copayments for opioid antagonist education and dispensing of opioid antagonists to veterans identified by VA health care professionals as being at high risk of overdose. VA already has treatment programs and outreach programs in place for identification and treatment of veterans at risk of opioid use disorder. The provision of VA outreach programs for opioid use disorder is outside the scope of the proposed rulemaking, and VA generally seeks to avoid regulating outreach practices to allow for innovative approaches to be adopted to support safe and effective patient care. VA is not making any changes based on this comment.

Comments on the impact analysis.

A commenter had concerns regarding the impact analysis that accompanied the rulemaking. The commenter stated that the impact analysis projected a loss of revenue of more than $150,000 with increases for each year of this rule's existence due to the copayment exemptions. The commenter noted that the impact analysis did not state where this revenue stream would be diverted from internally and how this may impact other veteran services of equal or greater importance. The commenter queried whether VA plans to apply for a grant under the Food, Drug, and Cosmetic Act (chapter 9 of title 21, U.S.C.) for the emergency treatment of opioid overdose, which can offset at least $200,000 of antagonist costs that is greater than the yearly projected loss of revenue from this rule.

VA believes the benefits of educating veterans on the risks of opioids and utilization of opioid antagonists during an overdose to potentially save a life outweighs any loss of revenue from VA copayments. VA anticipates no reduction or diversion of funds from other programs as a result of this rulemaking. VA has already been implementing this authority, and VA's budget requests already reflect the loss identified in the impact analysis. We are not making any changes based on this comment.

Based on the rationale set forth in the Supplementary Information to the proposed rule and in this final rule, VA is adopting the proposed rule with no changes.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). The adoption of the rule does not directly affect any small entities. There are no small entities involved with VA's process or adjustment of veteran's copayments for medications or services. The provisions of this rulemaking only apply to the internal operations of VA and to individual veterans.

Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501– 3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this final rule are as follows: 64.009, Veterans Medical Care Benefits; 64.012, Veterans Prescription Service; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.041, VHA Outpatient Specialty Care; 64.045, VHA Outpatient Ancillary Services; 64.047, VHA Primary Care; 64.048, VHA Mental Health Clinics.

Congressional Review Act

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

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 10, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 17 as set forth below:

PART 17—MEDICAL

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

Authority: 38 U.S.C. 501, and as noted in specific sections.

* * * * *

■ 2. Amend § 17.108 by revising paragraphs (e)(16) and (17) and adding paragraph (e)(18) to read as follows:

§ 17.108 Copayments for inpatient hospital care and outpatient medical care.

* * * * *

(e) * * *

(16) In-home video telehealth care;

(17) Mental health peer support services; and

(18) An outpatient care visit solely for education on the use of opioid antagonists to reverse the effects of overdoses of specific medications or substances.

* * * * *

■ 3. Amend § 17.110 by adding paragraph (c)(12) to read as follows:

§ 17.110 Copayments for medication.

* * * * *

(c) * * *

(12) Opioid antagonists furnished to a veteran who is at high risk for overdose of a specific medication or substance in order to reverse the effect of such an overdose.

(i) For purposes of this paragraph (c)(12), a veteran who is at high risk for overdose of a specific medication or substance in order to reverse the effect of such an overdose is a veteran:

(A) Who is prescribed or using opioids, or has an opioid use history, and who is at increased risk for opioid overdose as determined by VA; or

(B) Whose provider deems, based on their clinical judgment, that the veteran may benefit from ready availability of an opioid antagonist.

(ii) Examples of a veteran who is at high risk for overdose of a specific medication or substance in order to reverse the effect of such an overdose include, but are not limited to, the following:

(A) A veteran with an opioid or substance use disorder diagnosis;

(B) A veteran receiving treatment for an opioid or substance use disorder diagnosis, such as receiving opioid agonist therapy or inpatient, residential, or outpatient treatment for such diagnosis, or attending a support group for such diagnosis;

(C) A veteran with a history of prescription opioid misuse or injection opioid use;

(D) A veteran with a history of previous opioid overdose;

(E) A veteran who is taking an extended-release or long-acting prescription opioid;

(F) A veteran with household or community access to opioids who is at increased risk for overdose (*e.g.,* psychiatric disorder or high risk for suicide) as determined by VA; or

(G) A veteran predicted to be at high risk for overdose based on standardized assessments or predictive models (*e.g.,* Risk Index for Overdose or Serious Opioid-induced Respiratory Depression [RIOSORD]; Stratification Tool for Opioid Risk Mitigation [STORM]).

Note 1 to paragraph (c)(12). The examples in paragraphs (c)(12)(ii)(A) through (G) of this section apply even if the veteran has had a period of abstinence from opioids (*e.g.,* due to treatment, detoxification, incarceration) because loss of tolerance can increase the risk for an overdose.

[FR Doc. 2021–20196 Filed 9–17–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 38

RIN 2900–AR03

Referral for VA Administrative Decision for Character of Discharge Determinations

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations to clarify that, when determining eligibility for interment or memorialization benefits, the National Cemetery Administration (NCA) will refer cases involving other than honorable (OTH) discharges, certain other discharges, or potential statutory or regulatory bars to benefits, to the Veterans Benefits Administration (VBA) for character of discharge determinations. VA is merely updating its regulations to conform with statute and current practice.

DATES: This rule is effective October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Jerry Sowders, Division Chief, Eligibility Verification Division, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Telephone: 314–416–6369. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 18, 2020, VA published in the **Federal Register** (85 FR 82399) a proposed rule revising its regulations to clarify that, when determining eligibility for interment or memorialization benefits, NCA will refer cases involving OTH discharges or other character of discharge issues to VBA for an administrative decision. The public comment period ended on February 16, 2021.

VA received one comment that expressed disagreement with the proposed rule, stating that the referral of cases for a character of discharge determination was ''morally and ethically reprehensible.'' The commenter also asserted that the proposed rule sought to assume Congress's role ''to write statute'' by redefining the term ''veteran,'' and suggested that VA use an automated formula to evaluate whether an individual satisfies the statutory definition of veteran. We thank the commenter for this comment.

However, we disagree that this rule redefines the term ''veteran'' in any way. While the supplemental information in the proposed rule explained that eligibility for NCA-administered benefits is tied to an individual establishing ''veteran'' status or meeting other specified conditions, this rule does not affect the statutory definition of ''veteran'' as provided by Congress in 38 U.S.C. 101(2). The rule only amends 38 CFR 38.620 by adding a note following paragraph (i) to inform that a benefit request, pertaining to a decedent whose character of discharge may potentially bar eligibility to that benefit, may be referred to VBA for review in accordance with 38 CFR 3.12 (Character of discharge) or other applicable sections. As such, we make no changes based on the comment.

We appreciate the commenter's suggested alternative approach to determining whether an individual satisfies the statutory definition of ''veteran'', but Congress has delegated to VA the authority to promulgate reasonable regulations on VA benefits eligibility, which it has done in 38 CFR 3.12. *See Garvey* v. *Wilkie,* 972 F.3d 1333 (Fed. Cir. 2020). It is not 38 CFR 38.620 or this rule (which merely clarifies NCA current practice), but 38 CFR 3.12, that seems to pertain more to the commenter's concern.

Under 38 CFR 3.12(a), some discharges, such as honorable and general (under honorable conditions) automatically convey ''veteran'' status. However, other types of discharges require in-depth examination under the provisions of 38 CFR 3.12(d) to determine whether the discharge should be considered to have been issued under dishonorable conditions. Moreover, the provisions of 38 CFR 3.12(c), commonly referred to as the statutory bars to benefits (since they are derived from 38 U.S.C. 5303(a)) may also be implicated. Because of VBA's expertise and familiarity with 38 CFR 3.12, NCA has

historically referred character of discharge issues to VBA. Doing so helps ensure VA-wide consistency on benefits determinations and helps prevent confusion in claimants and beneficiaries that would likely result from VBA and NCA having differing standards. The amendment this final rule makes merely adds an explanatory note to inform the public of this long standing process. As such, we make no changes based on the comment regarding the complexity of character of discharge determinations, or the commentor's suggestion that VA utilize automated formulas to determine the character of a discharge.

Finally, the commenter indicated that the proposed rule was not available for comment for the entire 60 days following publication in the **Federal Register**, and requested an extended period for comment. We note that the proposed rule was published in the **Federal Register** on December 18, 2020, and the comment period closed on February 16, 2021, which is a period of 60 days. Consequently, we take no action based on this comment.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The provisions associated with this rulemaking are merely internal administrative processes to VA specifically and do not involve or impact any external entities outside of VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.201, National Cemeteries; and 64.202, Procurement of Headstones and Markers and/or Presidential Memorial Certificates.

Congressional Review Act

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

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 14, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 38 CFR part 38 as set forth below:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 101, 107, 112, 501, 512, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 5303, 7105.

■ 2. Amend § 38.620 by adding a note to the section to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

Note 1 to § 38.620: A benefit request pertaining to a decedent whose character of discharge may potentially bar eligibility to that benefit may be referred to the Veterans Benefits Administration for review in accordance with 38 CFR 3.12 (Character of discharge) or other applicable sections.

[FR Doc. 2021–20220 Filed 9–17–21; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0245; FRL–8664–01–OCSPP]

Fluazinam; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of fluazinam in or on multiple commodities that are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 20, 2021. Objections and requests for hearings must be received on or before November 19, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2020–0245, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with

limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2020–0245 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before November 19, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2020–0245, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 30, 2020 (85 FR 61681) (FRL–10014–74), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0E8827) by IR–4, IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested the establishment of tolerances in 40 CFR 180.574 for residues of the herbicide fluazinam in or on multiple commodities. For a complete list, please refer to the September 30, 2020 notification (85 FR 61681) (FRL–10014–74). Additionally, the petitioner proposed removing established tolerances for residues of fluazinam in or on the raw agricultural commodities; vegetable, legume, edible podded, subgroup 6A, except pea at 0.10 ppm; pea and bean, succulent shelled, subgroup 6B, except pea at 0.04 ppm; pea and bean, dried shelled, except soybean, subgroup 6C, except pea at 0.02 ppm; vegetable, *brassica* leafy, group 5, except cabbage at 0.01 ppm; and turnip, greens at 0.01 ppm. That document referenced a summary of the petition prepared by ISK Biosciences, the registrant, which is available in the docket, *http://www.regulations.gov.* Two comments were received in response to the notice of filing. One was about geographic pesticide concentration but not about fluazinam specifically, and the other was associated with a different chemical.

Based upon review of the data supporting the petition, EPA is establishing tolerances at different levels than petitioned-for and modified some of the commodity definitions used. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.''

This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .''

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

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections that repeat what has been previously published for tolerance rulemakings of the same pesticide chemical. Where scientific information concerning a particular chemical remains unchanged, the content of those sections would not vary between tolerance rulemakings and republishing the same sections is

unnecessary; EPA considers referral back to those sections as sufficient to provide an explanation of the information EPA considered in making its safety determination for the new rulemaking.

EPA has previously published a number of tolerance rulemakings for fluazinam, in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to fluazinam and established tolerances for residues of that chemical. EPA is incorporating previously published sections from those rulemakings as described further in this rulemaking, as they remain unchanged.

Toxicological profile. For a discussion of the Toxicological Profile of fluazinam, see Unit III.A. of the April 8, 2016 rulemaking (81 FR 20545) (FRL–9942–99).

Toxicological points of departure/Levels of concern. For a summary of the Toxicological Points of Departure/Levels of Concern used for the safety assessment, see Unit III.B. of the November 7, 2012 rulemaking (77 FR 66723) (FRL–9366–6).

Exposure assessment. Much of the exposure assessment remains the same, although some updates have occurred to accommodate exposures from the petitioned-for tolerances. The updates are discussed in this section.

The acute dietary analysis is based on tolerance-level residues for all commodities and uses high-end residue estimates for the metabolite 3-[[4-amino-3-[[3-chloro-5- (trifloromethyl)-2-pyridinyl]amino]-2-nitro-6-(trifluoromethyl) phenyl] thio]-2-(beta-Dglucopyranosyloxy) propionic acid), known as AMGT. In addition, the acute assessment assumes 100 percent crop treated (PCT) and incorporates modeled EDWCs that account for both parent fluazinam and its transformation products. The chronic dietary analysis is based on tolerance level residues for all commodities except apples. For apples, the average field trial value was used. As with the acute assessment, the chronic assessment incorporates high-end estimates for AMGT and default processing factors for all relevant processed commodities without a separate tolerance, and modeled EDWCs that account for both parent and transformation products. The chronic assessment also incorporated PCT data.

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

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

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

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

The following average PCT estimates were used in the chronic dietary risk assessments for the crops that are currently registered for fluazinam: Apples (<1%), beans (5%), cabbage (<1%), carrots (<1%), dry beans/peas (<2.5%), lima beans (5%), onions (<1%), peanuts (<2.5%), potatoes (15%), pumpkin (<1%), and soybeans (<1%).

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and California Department of Pesticide Regulation (CalDPR) Pesticide Use Reporting (PUR) for the chemical/crop combination for the most recent 10 years. EPA uses an average PCT for chronic dietary risk analysis and a maximum PCT for acute dietary risk analysis. The average PCT figures for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding up to the nearest 5%, except for those situations in which the average PCT is less than 1% or less than 2.5%. In those cases, the Agency would use less than 1% or less than 2.5% as the average PCT value, respectively. The maximum PCT figure is the highest observed maximum value reported within the most recent 10 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%, except where the maximum PCT is less than 2.5%, in which case, the Agency uses less than 2.5% as the maximum PCT.

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

Dietary exposure from drinking water. The Agency used screening-level water exposure models in the dietary exposure analysis and risk assessment for fluazinam in drinking water. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the FQPA Index Reservoir Screening Tool (FIRST) and Pesticide Root Zone Model for Groundwater (PRZM–GW), EPA used an EDWC of 226 ppb for the acute dietary assessment and 141 ppb in the chronic dietary risk assessment.

Non-occupational exposure. See Unit III.C.3. of the April 8, 2016 rulemaking for a discussion of non-dietary exposure, which included residential exposures to golf course turf.

Cumulative exposure. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a

common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to fluazinam and any other substances, and fluazinam does not appear to produce a toxic metabolite produced by other substances. For the purposes of this action, therefore, EPA has not assumed that fluazinam has a common mechanism of toxicity with other substances.

Safety factor for infants and children. EPA continues to conclude that there is reliable data to support the reduction of the Food Quality Protection Act (FQPA) safety factor. See Unit III.D. of the April 8, 2016 rulemaking for a discussion of the Agency's rationale for that determination.

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

Acute dietary risks are below the Agency's level of concern of 100% of the aPAD: They are 37% of the aPAD for females 13 to 49 years old, the population subgroup with the highest risk estimate. Chronic dietary risks are below the Agency's level of concern of 100% of the cPAD: they are 88% of the cPAD for all infants, the population subgroup with the highest exposure estimate. The short-term aggregate risk assessments resulted in MOEs that are greater than the Agency's level of concern of 100 and therefore are not of concern. The MOEs are 381 for children 6 to less than 11 years old; 470 for youths 11 to less than 16 years old; and 420 for adults. Intermediate-term and long-term residential exposures are not expected.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to fluazinam residues. More detailed information about the Agency's analysis can be found at *http://www.regulations.gov* in the document titled ''Fluazinam. Human Health Risk Assessment for the Proposed Use on Individual Commodities of Proposed Crop Subgroup 6–19B; Edible Podded Pea Legume Vegetable Subgroup, Crop Subgroup 6–19D: Succulent Shelled Pea Subgroup, Crop Subgroup 6–19F: Dried Shelled Pea Subgroup, Crop Subgroup 8–10A: Tomato Subgroup, Papaya, and Crop Group Conversions.'' in docket ID number EPA–HQ–OPP–2020–0245.

IV. Other Considerations

A. Analytical Enforcement Methodology

For a discussion of the available analytical enforcement method, see Unit IV.A of the April 8, 2016 rulemaking.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). No Codex MRLs have been established for fluazinam.

C. Revisions to Petitioned-For Tolerances

Most of the proposed commodity definitions have been modified to be consistent with Agency nomenclature. In addition, EPA adjusted the tolerances for the edible podded bean commodities by removing the trailing zero to be consistent with the OECD Rounding Practice.

V. Conclusion

Therefore, tolerances are established for residues of fluazinam in or on Bean, adzuki, dry seed at 0.02 ppm; Bean, American potato, dry seed at 0.02 ppm; Bean, asparagus, edible podded at 0.1 ppm; Bean, asparagus, dry seed at 0.02 ppm; Bean, black, dry seed at 0.02 ppm; Bean, broad, dry seed at 0.02 ppm; Bean, broad, succulent shelled at 0.04 ppm; Bean, catjang, edible podded at 0.1 ppm; Bean, catjang, dry seed at 0.02 ppm; Bean, catjang, succulent shelled at 0.04 ppm; Bean, cranberry, dry seed at 0.02 ppm; Bean, dry, dry seed at 0.02 ppm; Bean, field, dry seed at 0.02 ppm; Bean, French, dry seed at 0.02 ppm; Bean, French, edible podded at 0.1 ppm; Bean, garden, dry seed at 0.02 ppm; Bean, garden, edible podded at 0.1 ppm; Bean, goa, dry seed at 0.02 ppm; Bean, goa, edible podded at 0.1 ppm; Bean, goa, succulent shelled at 0.04 ppm; Bean, great northern, dry seed at 0.02 ppm; Bean, green, dry seed at 0.02 ppm; Bean, green, edible podded at 0.1 ppm; Bean, guar, dry seed at 0.02 ppm; Bean, guar, edible podded at 0.1 ppm; Bean, kidney, dry seed at 0.02 ppm; Bean, kidney, edible podded at 0.1 ppm; Bean, lablab, dry seed at 0.02 ppm; Bean, lablab, edible podded at 0.1 ppm; Bean, lablab, succulent shelled at 0.04 ppm; Bean, lima, dry seed at 0.02 ppm; Bean, lima, succulent shelled at 0.04 ppm; Bean, morama, dry seed at 0.02 ppm; Bean, moth, dry seed at 0.02 ppm; Bean, moth, edible podded at 0.1 ppm; Bean, moth, succulent shelled at 0.04 ppm; Bean, mung, dry seed at 0.02 ppm; Bean, mung, edible podded at 0.1 ppm; Bean, navy, dry seed at 0.02 ppm; Bean, navy, edible podded at 0.1 ppm; Bean, pink, dry seed at 0.02 ppm; Bean, pinto, dry seed at 0.02 ppm; Bean, red, dry seed at 0.02 ppm; Bean, rice, dry seed at 0.02 ppm; Bean, rice, edible podded at 0.1 ppm; Bean, scarlet runner, dry seed at 0.02 ppm; Bean, scarlet runner, edible podded at 0.1 ppm; Bean, scarlet runner, succulent shelled at 0.04 ppm; Bean, snap, edible podded at 0.1 ppm; Bean, sword, dry seed at 0.02 ppm; Bean, sword, edible podded at 0.1 ppm; Bean, tepary, dry seed at 0.02 ppm; Bean, urd, dry seed at 0.02 ppm; Bean, urd, edible podded at 0.1 ppm; Bean, wax, edible podded at 0.1 ppm; Bean, wax, succulent shelled at 0.04 ppm; Bean, yardlong, dry seed at 0.02 ppm; Bean, yardlong, edible podded at 0.1 ppm; Bean, yellow, dry seed at 0.02 ppm; Brassica, leafy greens, subgroup 4–16B at 0.01 ppm; Chickpea, dry seed at 0.04 ppm; Chickpea, edible podded at 0.15 ppm; Chickpea, succulent shelled at 0.03 ppm; Cowpea, dry seed at 0.02 ppm; Cowpea, edible podded at 0.1 ppm; Cowpea, succulent shelled at 0.04 ppm; Gram, horse, dry seed at 0.02 ppm; Grass pea, dry seed at 0.04 ppm; Grass pea, edible podded at 0.15 ppm; Jackbean, dry seed at 0.02 ppm; Jackbean, edible podded at 0.1 ppm; Jackbean, succulent shelled at 0.04 ppm; Kohlrabi at 0.01 ppm; Lentil, dry seed at 0.04 ppm; Lentil, edible podded at 0.15 ppm; Lentil, succulent shelled at 0.03 ppm; Longbean, Chinese, dry seed at 0.02 ppm; Longbean, Chinese, edible podded at 0.1 ppm; Lupin, Andean, dry seed at 0.02 ppm; Lupin, Andean, succulent shelled at 0.04 ppm; Lupin, blue, dry seed at 0.02 ppm; Lupin, blue, succulent shelled at 0.04 ppm; Lupin, grain, dry seed at 0.02 ppm; Lupin, grain, succulent shelled at 0.04 ppm; Lupin, sweet white, dry seed at 0.02 ppm; Lupin, sweet white, succulent shelled at 0.04 ppm; Lupin, sweet, dry seed at 0.02 ppm; Lupin, sweet, succulent shelled at 0.04 ppm; Lupin, white, dry seed at 0.02 ppm; Lupin, white, succulent shelled at 0.04 ppm; Lupin, yellow, dry seed at 0.02 ppm; Lupin, yellow, succulent shelled at 0.04 ppm; Papaya at 3 ppm; Pea, blackeyed, dry seed at 0.02 ppm; Pea, blackeyed,

succulent shelled at 0.04 ppm; Pea, crowder, dry seed at 0.02 ppm; Pea, crowder, succulent shelled at 0.04 ppm; Pea, dry, dry seed at 0.04 ppm; Pea, dwarf, edible podded at 0.15 ppm; Pea, English, succulent shelled at 0.03 ppm; Pea, field, dry seed at 0.04 ppm; Pea, field, hay at 40 ppm; Pea, field, vines at 6 ppm; Pea, garden, dry seed at 0.04 ppm; Pea, garden, succulent shelled at 0.03 ppm; Pea, green, dry seed at 0.04 ppm; Pea, green, edible podded at 0.15 ppm; Pea, green, succulent shelled at 0.03 ppm; Pea, pigeon, dry seed at 0.04 ppm; Pea, pigeon, edible podded at 0.15 ppm; Pea, pigeon, succulent shelled at 0.03 ppm; Pea, snap, edible podded at 0.15 ppm; Pea, snow, edible podded at 0.15 ppm; Pea, southern, dry seed at 0.02 ppm; Pea, southern, succulent shelled at 0.04 ppm; Pea, sugar snap, edible podded at 0.15 ppm; Pea, winged, dry seed at 0.02 ppm; Pea, winged, edible podded at 0.1 ppm; Soybean, vegetable, dry seed at 0.02 ppm; Soybean, vegetable, edible podded at 0.1 ppm; Soybean, vegetable, succulent shelled at 0.04 ppm; Tomato subgroup 8–10A at 1.5 ppm; Vegetable, *brassica,* head and stem, group 5–16, except cabbage at 0.01 ppm; Velvetbean, dry seed at 0.02 ppm; Velvetbean, edible podded at 0.1 ppm; Velvetbean, succulent shelled at 0.04 ppm; and Yam bean, African, dry seed at 0.02 ppm.

Additionally, the following tolerances are removed as unnecessary: Pea and bean, dried shelled, except soybean, subgroup 6C, except pea; Pea and bean, succulent shelled, subgroup 6B, except pea; Turnip, greens; Vegetable, *brassica,* leafy, group 5, except cabbage; and Vegetable, legume, edible podded, subgroup 6A, except pea.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 13, 2021.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.574, revising the table to paragraph (a)(1) to read as follows:

§ 180.574 Fluazinam; tolerances for residues.

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
Apple	2.0
Apple, wet pomace	5.0
Bean, adzuki, dry seed	0.02
Bean, American potato, dry seed	0.02
Bean, asparagus, edible podded	0.1
Bean, asparagus, dry seed	0.02
Bean, black, dry seed	0.02
Bean, broad, dry seed	0.02
Bean, broad, succulent shelled	0.04
Bean, catjang, edible podded	0.1
Bean, catjang, dry seed	0.02
Bean, catjang, succulent shelled	0.04
Bean, cranberry, dry seed	0.02
Bean, dry, dry seed	0.02
Bean, field, dry seed	0.02
Bean, French, dry seed	0.02
Bean, French, edible podded	0.1
Bean, garden, dry seed	0.02
Bean, garden, edible podded	0.1
Bean, goa, dry seed	0.02
Bean, goa, edible podded	0.1
Bean, goa, succulent shelled	0.04
Bean, great northern, dry seed	0.02
Bean, green, dry seed	0.02
Bean, green, edible podded	0.1
Bean, guar, dry seed	0.02
Bean, guar, edible podded	0.1
Bean, kidney, dry seed	0.02
Bean, kidney, edible podded	0.1
Bean, lablab, dry seed	0.02
Bean, lablab, edible podded	0.1
Bean, lablab, succulent shelled	0.04
Bean, lima, dry seed	0.02
Bean, lima, succulent shelled	0.04
Bean, morama, dry seed	0.02

TABLE 1 TO PARAGRAPH (a)(1)—Continued

Commodity	Parts per million
Bean, moth, dry seed	0.02
Bean, moth, edible podded	0.1
Bean, moth, succulent shelled	0.04
Bean, mung, dry seed	0.02
Bean, mung, edible podded	0.1
Bean, navy, dry seed	0.02
Bean, navy, edible podded	0.1
Bean, pink, dry seed	0.02
Bean, pinto, dry seed	0.02
Bean, red, dry seed	0.02
Bean, rice, dry seed	0.02
Bean, rice, edible podded	0.1
Bean, scarlet runner, dry seed	0.02
Bean, scarlet runner, edible podded	0.1
Bean, scarlet runner, succulent shelled	0.04
Bean, snap, edible podded	0.1
Bean, sword, dry seed	0.02
Bean, sword, edible podded	0.1
Bean, tepary, dry seed	0.02
Bean, urd, dry seed	0.02
Bean, urd, edible podded	0.1
Bean, wax, edible podded	0.1
Bean, wax, succulent shelled	0.04
Bean, yardlong, dry seed	0.02
Bean, yardlong, edible podded	0.1
Bean, yellow, dry seed	0.02
Brassica, leafy greens, subgroup 4–16B	0.01
Bushberry subgroup 13–07B	7.0
Cabbage	3.0
Carrot, roots	0.70
Chickpea, dry seed	0.04
Chickpea, edible podded	0.15
Chickpea, succulent shelled	0.03
Cowpea, dry seed	0.02
Cowpea, edible podded	0.1
Cowpea, succulent shelled	0.04
Ginseng	4.5
Gram, horse, dry seed	0.02
Grass pea, dry seed	0.04
Grass pea, edible podded	0.15
Jackbean, dry seed	0.02
Jackbean, edible podded	0.1
Jackbean, succulent shelled	0.04
Kohlrabi	0.01
Lentil, dry seed	0.04
Lentil, edible podded	0.15
Lentil, succulent shelled	0.03
Lettuce, head	0.02
Lettuce, leaf	2.0
Longbean, Chinese, dry seed	0.02
Longbean, Chinese, edible podded	0.1
Lupin, Andean, dry seed	0.02
Lupin, Andean, succulent shelled	0.04
Lupin, blue, dry seed	0.02
Lupin, blue, succulent shelled	0.04
Lupin, grain, dry seed	0.02
Lupin, grain, succulent shelled	0.04
Lupin, sweet white, dry seed	0.02
Lupin, sweet white, succulent shelled	0.04
Lupin, sweet, dry seed	0.02
Lupin, sweet, succulent shelled	0.04
Lupin, white, dry seed	0.02
Lupin, white, succulent shelled	0.04
Lupin, yellow, dry seed	0.02

TABLE 1 TO PARAGRAPH (a)(1)—Continued

Commodity	Parts per million
Lupin, yellow, succulent shelled	0.04
Mayhaw	2.0
Onion, bulb, subgroup 3–07A	0.20
Papaya	3
Pea, blackeyed, dry seed	0.02
Pea, blackeyed, succulent shelled	0.04
Pea, crowder, dry seed	0.02
Pea, crowder, succulent shelled	0.04
Pea, dry, dry seed	0.04
Pea, dwarf, edible podded	0.15
Pea, English, succulent shelled	0.03
Pea, field, dry seed	0.04
Pea, field, hay	40
Pea, field, vines	6
Pea, garden, dry seed	0.04
Pea, garden, succulent shelled	0.03
Pea, green, dry seed	0.04
Pea, green, edible podded	0.15
Pea, green, succulent shelled	0.03
Pea, pigeon, dry seed	0.04
Pea, pigeon, edible podded	0.15
Pea, pigeon, succulent shelled	0.03
Pea, snap, edible podded	0.15
Pea, snow, edible podded	0.15
Pea, southern, dry seed	0.02
Pea, southern, succulent shelled	0.04
Pea, sugar snap, edible podded	0.15
Pea, winged, dry seed	0.02
Pea, winged, edible podded	0.1
Peanut	0.02
Pepper/eggplant subgroup 8–10B	0.09
Soybean, hulls	0.05
Soybean, seed	0.01
Soybean, vegetable, dry seed	0.02
Soybean, vegetable, edible podded	0.1
Soybean, vegetable, succulent shelled	0.04
Tea, dried [1]	6.0
Tomato subgroup 8–10A	1.5
Vegetable, brassica, head and stem, group 5–16, except cabbage	0.01
Vegetable, cucurbit, group 9	0.07
Vegetable, tuberous and corm, subgroup 1C	0.02
Velvetbean, dry seed	0.02
Velvetbean, edible podded	0.1
Velvetbean, succulent shelled	0.04
Yam bean, African, dry seed	0.02

[1] There is no U.S. registration as of January 19, 2017.

* * * * *

[FR Doc. 2021–20254 Filed 9–17–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0526; FRL–8962–01–OCSPP]

Spinetoram; Pesticide Tolerances; Corrections

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendment.

SUMMARY: EPA issued a final rule in the **Federal Register** of April 7, 2021, establishing tolerances for residues of the insecticide spinetoram in or on multiple commodities requested by the Interregional Research Project Number 4 (IR–4) under the Federal Food, Drug, and Cosmetic Act (FFDCA). That document inadvertently instructed the **Federal Register** to add a tolerance for ''vegetable, leafy, except *Brassica,* group 4'' and to remove a tolerance for ''vegetable, leafy, group 4–16''. This document corrects the final regulation.

DATES: Effective on September 20, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0526, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

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

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

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

The Agency included in the April 7, 2021 final rule a list of those who may be potentially affected by this action.

II. What do these corrections do?

EPA issued a final rule in the **Federal Register** of April 7, 2021 (86 FR 17907) (FRL–10020–24) that established tolerances for residues of spinetoram in or on multiple commodities and removed some tolerances in response to a petition filed by IR–4. EPA inadvertently reversed the instructions to the **Federal Register** regarding the entries for ''vegetable, leafy, except *Brassica,* group 4'' and ''vegetable, leafy, group 4–16'' in the tolerance table in paragraph (a) of 40 CFR 180.635. The instructions inadvertently directed the **Federal Register** to add an entry in the table for ''vegetable, leafy, except *Brassica,* group 4''. The instructions should have directed the **Federal Register** to remove that entry from the table, as described in Unit V. of the April 7, 2021 final rule and as reflected in the amended table in the regulatory text of the final rule. Additionally, the instructions inadvertently directed the **Federal Register** to remove the entry in the table for ''vegetable, leafy, group 4–16''. The instructions should have directed the **Federal Register** to add that entry to the table, as described in Unit V. of the April 7, 2021 final rule and as reflected in the amended table in the regulatory text of the final rule.

EPA's instructions in the April 7, 2021 final rule regarding tolerances for ''vegetable, leafy, except *Brassica,* group 4'' and ''vegetable, leafy, group 4–16'' were not consistent with its authority under FFDCA section 408(d)(4)(A) or with the preamble or regulatory text of the April 7, 2021 final rule. Therefore, EPA is rescinding those instructions and directing the **Federal Register** to remove the entry for ''vegetable, leafy, except *Brassica,* group 4'' and add an entry for ''vegetable, leafy, group 4–16'' in the tolerance table in paragraph (a) of 40 CFR 180.635.

III. Why are these corrections issued as a final rule?

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)(B)) provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making these correcting amendments final without prior proposal and opportunity for comment, because EPA inadvertently reversed the instructions to the **Federal Register** so that the new tolerance for ''vegetable, leafy, group 4–16'' was not established and the existing tolerance for ''vegetable, leafy, except *Brassica,* group 4'' was not removed. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

IV. Do any of the statutory and executive order reviews apply to this action?

No. For a detailed discussion concerning the statutory and Executive order review refer to Unit VI. of the April 7, 2021 final rule.

V. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 13, 2021.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA corrects 40 CFR part 180 by making the following correcting amendments:

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

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

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

■ 2. In § 180.635, amend Table 1 to Paragraph (a) as follows:

■ a. Remove the entry for ''Vegetable, leafy, except *Brassica,* group 4''; and

■ b. Add alphabetically an entry for ''Vegetable, leafy, group 4–16''.

The addition reads as follows:

§ 180.635 Spinetoram; tolerances for residues.

(a) * * *

TABLE 1 TO PARAGRAPH (a)

Commodity	Parts per million
* * * * *	
Vegetable, leafy, group 4–16	10
* * * * *	

* * * * *

[FR Doc. 2021–20248 Filed 9–17–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0227; FRL–8857–01–OCSPP]

Pyraclostrobin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of pyraclostrobin in or on pomegranate. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 20, 2021. Objections and requests for hearings must be received on or before November 19, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2020–0227, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and

Reading Room, please visit *http://www.epa.gov/dockets.*

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2020–0227 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before November 19, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2020–0227, by one of the following methods:

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

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 30, 2020 (85 FR 61681) (FRL–10014–74), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0E8826) by IR–4, IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested to establish tolerances in 40 CFR 180.582 for residues of the sum of pyraclostrobin, (carbamic acid, [2-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester) and its desmethoxy metabolite (methyl-N-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl] phenylcarbamate), calculated as the stoichiometric equivalent of pyraclostrobin, in or on the raw agricultural commodity pomegranate at 0.3 ppm. That document referenced a summary of the petition prepared by BASF, the registrant, which is available in the docket, *http://www.regulations.gov.* No comments were received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

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

The primary target tissues following repeated pyraclostrobin exposure appear to be mucosal membranes, with histopathology or secondary effects (*e.g.,* diarrhea) observed in different species. The primary effects were decreased body weight and food consumption in addition to diarrhea. There was no observed neurotoxicity, mutagenicity, genotoxicity, or immunotoxicity in the database. Also, there was no evidence of increased susceptibility following pre-natal exposure to rats and rabbits in the developmental toxicity studies, nor following pre- and post-natal exposure to rats in the multi-generation reproduction study. Pyraclostrobin is classified as ''not likely to be carcinogenic to humans.''

Additional information on the toxicological profile can be found at *http://www.regulations.gov* in the

document titled ''Pyraclostrobin; Human Health Risk Assessment for a New Use on Pomegranate'' (hereinafter ''Pyraclostrobin Human Health Risk Assessment'') in docket ID number EPA–HQ–OPP–2020–0227.

B. Toxicological Points of Departure/ Levels of Concern

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

A summary of the toxicological endpoints for pyraclostrobin used for human risk assessment can be found on pages 10–11 in the Pyraclostrobin Human Health Risk Assessment.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to pyraclostrobin, EPA considered exposure under the petitioned-for tolerances as well as all existing pyraclostrobin tolerances in 40 CFR 180.582. EPA assessed dietary exposures from pyraclostrobin in food as follows:

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

In conducting the acute dietary exposure assessment, EPA used the 2003–2008 food consumption data from the U.S. Department of Agriculture's National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). A partially refined acute dietary exposure assessment was conducted for pyraclostrobin. The analysis used tolerance-level residues or highest average field trial residues (HAFT) and 100 percent crop treated (PCT).

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used the 2003–2008 food consumption data from the USDA's NHANES/WWEIA. A partially refined chronic dietary analysis was conducted for pyraclostrobin. The chronic dietary analysis included tolerance-level or average field trial residues and average PCT estimates when available.

iii. *Cancer.* Pyraclostrobin is classified as ''Not Likely to Be Carcinogenic to Humans'' therefore, a cancer assessment is not needed.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

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

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

The following average PCT estimates were used in the chronic dietary risk assessments for the crops that are currently registered for pyraclostrobin: Almonds 45%; apples 20%; apricots 30%; barley 10%; green beans 5%; blueberries 40%; broccoli 5%; Brussels sprouts 15%; cabbage 10%; caneberries 50%; cantaloupes 15%; carrots 35%; cauliflower 5%; celery 2.5%; cherries 55%; chicory 5%; corn 10%; cotton (seed treatment) 10%; cucumber 5%; dry beans/peas 10%; garlic 10%; grapefruit 35%; grapes 30%; hazelnuts 20%; lemons 5%; lettuce 5%; nectarines 15%; oats 5%; onions 30%; oranges 5%; peaches 25%; peanuts 20%; pears 20%; green peas 5%; pecans 5%; peppers 15%; pistachios 30%; potatoes 20%; pumpkins 15%; soybeans (seed treatment) 10%; spinach 5%; squash 15%; strawberries 65%; sugar beets 50%; sugarcane 5%; sweet corn 5%; tangerines 10%; tomatoes 25%; walnuts 10%; watermelons 25%; wheat 5%.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and California Department of Pesticide Regulation (CalDPR) Pesticide Use Reporting (PUR) for the chemical/crop combination for the most recent 10 years. EPA uses an average PCT for chronic dietary risk analysis and a maximum PCT for acute dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than 1% or less than 2.5%. In those cases, the Agency would use less than 1% or less than 2.5% as the average PCT value, respectively. The maximum PCT figure is the highest observed maximum value reported within the most recent 10 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%, except where the maximum PCT is less than 2.5%, in which case the Agency uses less than 2.5% as the maximum PCT.

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

consumption surveys, EPA does not have available reliable information on the regional consumption of food to which pyraclostrobin may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for pyraclostrobin in drinking water. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Pesticide in Water Calculator (PWC), for the acute dietary risk assessment, EPA used an estimated drinking water concentration (EDWC) of 22 ppb into the DEEM–FCID Model. For the chronic exposure assessment, EPA used a value of 0.99 ppb.

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

Pyraclostrobin is currently registered for uses that may result in residential handler and post-application exposures, including commercial and residential use on lawns, as well as commercial use on ornamental turf and trees, golf courses, and parks.

Based upon the hazard analysis for pyraclostrobin, short-term residential exposure that is available to be aggregated include incidental oral exposure (*e.g.,* hand-to-mouth or object-to-mouth). Hand-to-mouth and object-to-mouth scenarios are considered inter-related, and it is likely that they occur interspersed amongst each other across time; combining these scenarios would be overly conservative. Residential short and intermediate-term dermal exposures (from children, youth, or adult scenarios) are not being combined with incidental oral exposure due to differing endpoints selected. Based upon the available scenarios, incidental oral (hand-to-mouth) exposures were used in the pyraclostrobin short-term aggregate assessment.

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

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

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to pyraclostrobin and any other substances and pyraclostrobin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that pyraclostrobin has a common mechanism of toxicity with other substances.

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* In the rat developmental toxicity study, skeletal variations occurred at doses greater than or equal to those doses causing maternal toxicity (*i.e.,* diarrhea, decreased body weight, food consumption, and clinical signs of toxicity). In the rabbit developmental study, increased resorptions per litter, increased post-implantation loss, and dams with total resorptions were observed. Since the cause of fetal death is undetermined and may be attributed to either maternal or direct embryo fetal toxicity, the effect is part of both the maternal and developmental LOAEL. In one rat reproduction study, systemic toxicity manifested as decreased body weights in both the parents and offspring, with offspring effects occurring at a higher dose level than parental toxicity. In the second rat reproduction study, no toxicity was observed in both parents and offspring. Therefore, there was no evidence of increased susceptibility (quantitatively) following pre-natal exposure to rats and rabbits in the developmental studies nor following pre- and post-natal exposure to rats in the multi-generation reproduction studies.

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

i. The toxicity database for pyraclostrobin is complete.

ii. There are no indications in any of the studies available that the nervous system is a target for pyraclostrobin. In the absence of definitive neurotoxicity or neuropathology findings in the neurotoxicity battery or elsewhere in the database, a developmental neurotoxicity study is not required.

iii. For the reasons summarized in section III.D.2, the degree of concern for prenatal and postnatal toxicity is low.

iv. There are no residual uncertainties identified in the exposure databases. The acute dietary exposure assessments were performed assuming 100 percent of the crops were treated with pyraclostrobin and incorporating tolerance-level or highest field trial residues. The chronic dietary exposure assessments were performed using average PCT estimates and tolerance-level or average field trial residues for crops in the screening level use analysis (SLUA), while 100 PCT was used for crops not included in the SLUA. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to pyraclostrobin in drinking water. Although the acute and chronic assessments included minor refinements, the use of field trial and PCT estimates ensures that actual exposures/risks from residues in food will not be underestimated. Although some of the residue values used in the dietary exposure assessment were refined, these assessments will not underestimate the dietary exposure to pyraclostrobin.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. Using the exposure assumptions described in this unit for acute exposure, EPA has concluded that acute exposure to pyraclostrobin from food and water will utilize 86% of the aPAD for females 13 to 49 years old, the only

population group of concern because no appropriate toxicological effect attributable to a single dose was observed for the general US population or any other population subgroup.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to pyraclostrobin from food and water will utilize 28% of the cPAD for all children 1 to 2 years old, the population group receiving the greatest exposure. Chronic residential exposure to residues of pyraclostrobin is not expected.

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

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

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in an aggregate MOE of 430 for children 1 to 2 years old. Because EPA's level of concern for pyraclostrobin is a MOE of 100 or below, this MOE is not of concern.

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

A separate intermediate-term adverse effect was identified for pyraclostrobin. However, pyraclostrobin is not registered for any use patterns that would result in intermediate-term residential exposures that can be combined with background dietary exposures. Because there is no intermediate-term residential aggregate exposures and chronic dietary exposure has already been assessed under the appropriately protective cPAD, no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for pyraclostrobin.

5. *Aggregate cancer risk for U.S. population.* Pyraclostrobin is classified as ''Not Likely to Be Carcinogenic to Humans''; therefore, EPA does not expect pyraclostrobin exposures to pose an aggregate cancer risk.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Two adequate methods are available for enforcement purposes for residues of pyraclostrobin and its metabolites in/on plant commodities: a liquid chromatography with tandem mass spectroscopy (LC/MS/MS) method (BASF Method D9908) and a high-performance liquid chromatography/ultraviolet (HPLC/UV) method (Method D9904).

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

There is no Codex MRL for pyraclostrobin in or on pomegranate.

V. Conclusion

Therefore, a tolerance is established for residues of pyraclostrobin in or on pomegranate at 0.3 ppm. Additionally, the Agency is putting back a footnote that states ''There is no U.S. registration on coffee, bean, green as of September 30, 2009'' to the table in paragraph (a)(1) that was inadvertently removed in 2013.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure,

Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 13, 2021.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.582, amend the table in paragraph (a)(1) by adding in alphabetical order the commodity ''Pomegranate'' and a footnote 1 at the end of the table to read as follows:

§ 180.582 Pyraclostrobin; tolerances for residues.

(a) * * *

(1) * * *

Commodity	Parts per million
* * * * *	
Pomegranate	0.3
* * * * *	

[1] There is no U.S. registration on coffee, bean, green as of September 30, 2009.

* * * * *

[FR Doc. 2021–20251 Filed 9–17–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 95

[ET Docket No. 20–382; FCC 21–72; FR ID 43219]

Allowing Earlier Equipment Marketing and Importation Opportunities

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission (Commission) adopts targeted enhancements that will modernize the Commission's marketing and importation rules to allow radiofrequency (RF) equipment manufacturers to better gauge consumer interest and prepare for new product launches. These steps will further the communications sector's ability to drive innovation that will advance America's global competitiveness and promote economic growth. As product development cycles have accelerated, new marketplace models and assessment tools have emerged that rely on individual interest to fund products, optimize production, and match imports to anticipated sales. The rules the Commission is adopting will allow manufacturers to better use these tools to quickly deploy new technologies and devices to consumers while ensuring that communications equipment subject to equipment authorization continues to meet the Commission's stringent program requirements.

DATES: Effective October 20, 2021, except for §§ 2.803(c)(2)(i) and 2.1204(a)(11), which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

FOR FURTHER INFORMATION CONTACT: Jamie Coleman, Spectrum Policy Branch Chief, Policy and Rules Division, Office of Engineering and Technology, at (202) 418–2705 or *Jamie.Coleman@FCC.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Nicole Ongele, Office of Managing Director, at (202) 418–2991 or *Nicole.Ongele@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* ET Docket No. 20–382, FCC 21–72, adopted and released June 17, 2021. The complete text of this document is available by downloading the text from the Commission's website at *https://www.fcc.gov/document/allowing-earlier-equipment-marketing-and-importation-opportunities-1.* When the FCC Headquarters reopens to the public, the full text of this document also will be available for public inspection and copying during regular business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format) by sending an email to *FCC504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Final Regulatory Flexibility Analyses

The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' As required by the RFA, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) (86 FR 2337, Jan. 12, 2021). The Commission sought written public comment on the proposals in the *NPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in this document on small entities. This present FRFA conforms to the RFA.

Paperwork Reduction Act

This document contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens will invite the general public to comment on the information collection requirements contained in this document as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

In this present document, we have assessed the effects of requiring marketing disclosures on RF equipment manufacturers, some of which may be small entities, to market and import RF equipment, and find that the Commission's rules are not unduly burdensome. We believe the regulatory burdens the Commission is implementing are necessary to ensure that the public receives the benefits of innovative products and technologies in a prompt and efficient manner, and those burdens apply equally to large and small entities without differential impact.

Congressional Review Act

The Commission has determined, and Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is ''non-major''

under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of the *First Report and Order* and *Order of Proposed Modification* to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

Synopsis

I. Background

The Commission's rules generally require that RF devices may be marketed within or imported to the United States only after they have been subjected to the appropriate equipment authorization procedure—certification or supplier's declaration of conformity (SDoC). These procedures require, among other things, that RF devices are tested to show compliance with the Commission's rules and technical standards. Currently the Commission's rules include some exceptions that provide for limited marketing and importation of RF devices that have not yet been subject to a complete equipment authorization process. For example, some marketing prior to equipment authorization is permitted in the form of conditional sales contracts between manufacturers and retailers of RF devices; and, in the early stages of the production process, such devices may be marketed to business, commercial, industrial, scientific, or medical users. In both instances, marketing to the general public is not permitted and the devices may not be delivered prior to equipment authorization. Similarly, limited quantities of unauthorized devices may be imported, but not marketed, for testing, demonstration, or personal use.

In June 2020, the Consumer Technology Association (CTA) filed a petition seeking to modify the rules pertaining to RF device marketing and importation. *See* Petition of Consumer Technology Association to Expand Marketing Opportunities for Innovative Technologies, RM–11857 (filed June 2, 2020) (CTA Petition). CTA asserted that the Commission's current equipment authorization rules can slow the process of developing and deploying new products and services, and it proposed rule revisions targeting the prohibition on conditional sales to consumers and the limited ability to import devices prior to authorization. In December 2020, after considering the petition, and the general support expressed in the associated record, the Commission initiated this proceeding, in which it proposed changes to the Commission's equipment marketing and importation rules that were informed to a large extent by the CTA Petition.

In the *NPRM,* the Commission proposed to broaden the existing conditional sales contract marketing exception beyond the limitation of ''retailers and wholesalers.'' The Commission acknowledged that new sales models increasingly involve online marketplaces that provide product developers and manufacturers direct access to consumers, thus involving customers in the product development process to a greater extent than before. As a result, device developers are provided with investment and incentive to produce innovative products and consumers benefit by seeing new products and features rolled out in a much shorter timeframe. While the Commission proposed the new marketing rule to allow manufacturers to better leverage this new development paradigm, it nonetheless recognized the continued importance of keeping unauthorized RF devices from becoming available, and it proposed that, even under the new rule, delivery or physical transfer of devices to consumers prior to equipment authorization would still be prohibited.

In addition, acknowledging industry's desire to speed the launch of new products to keep pace with the increasingly compressed innovation cycle, the Commission also proposed to broaden the conditions under which RF devices can be imported prior to equipment authorization. The Commission proposed to allow up to 4,000 RF devices to be imported prior to equipment authorization for the purposes of certain pre-sale activities, such as packaging and physical transfer to retail locations. Under this proposal, the RF devices could not be displayed to consumers prior to equipment authorization and the party responsible for importation would be required to take steps to ensure that appropriate device control is maintained until authorization is obtained.

Sixteen comments and one reply comment were filed in response to the *NPRM.* While some commenters suggest modifications to the Commission's proposals, all filers are generally supportive of the overall marketing and importation proposals.

II. Discussion

The Commission recognizes that, in some instances, developments in the modern device marketplace have outpaced those in the Commission's equipment authorization regime. As a result, the Commission's rules may limit the ability to market and import RF devices in new efficient and cost-effective ways. The Commission therefore takes this opportunity to adopt the rule changes proposed in the *NPRM,* with clarifying revisions, which will provide additional options for taking advantage of modern product development practices while ensuring against the use of unauthorized RF devices. Accordingly, the Commission modifies its rules to include an additional option that will allow for more importation of RF devices prior to equipment authorization. Further, the Commission modifies its rules to allow conditional sales of RF devices prior to authorization, subject to certain requirements. In both instances, the Commission is adopting rules that are crafted in a manner to not undermine the Commission's equipment authorization program by continuing to prevent end users from having access to unauthorized RF devices. The Commission also makes targeted changes to its proposals to clarify its intent regarding the interaction between the revised marketing and importation rules. These changes eliminate a potential conflict between the proposed importation and marketing provisions, whereby imported and domestically-produced devices could be subject to disparate requirements. The rules the Commission are adopting remove this disparity and provide more consistent treatment by permitting similar opportunities prior to equipment authorization regardless of the device's country of origin.

In summary, the Commission is adopting a new condition under § 2.1204 and a revised exception under § 2.803 of the Commission's rules to allow the importation and marketing of certain RF devices, under specified constraints, prior to equipment authorization. In general, the Commission is allowing the importation of a maximum of 12,000 RF devices for pre-sale activity if those devices: (1) Are subject to a certification application that has been submitted to a Telecommunication Certification Body (TCB); (2) include an externally-visible temporary label prohibiting display to consumers, operation, and delivery of the device prior to the grant of certification; and, (3) remain under legal ownership of the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker (who has a device retrieval process in place). Further, the Commission is revising an existing exception in the Commission's rules to expand to consumers the limited marketing and conditional sales of certain RF devices prior to equipment authorization. The existing exception generally allows conditional sales

contracts between manufacturers and wholesalers or retailers provided that delivery is made contingent upon compliance with the applicable equipment authorization and technical requirements. The Commission's revisions to this condition expand conditional sales, and advertisements for such sales, to include other entities, including consumers, provided that the prospective buyer is advised at the time of marketing that delivery of the device is conditional upon successful completion of the applicable equipment authorization process. All devices must remain under the legal ownership of the initiating party (*i.e.,* the manufacturer or developer), but physical transfer may be permissible depending on the applicable device authorization requirement. Physical transfer is prohibited for devices subject to the Supplier's Declaration of Conformity equipment authorization process. Devices subject to certification can be physically transferred to contracting parties, other than the end user, for pre-sale activity if the devices include a temporary label and the initiating party has retrieval processes in place. The Commission also adopts the proposed revision to § 95.391, which prohibits the manufacturing, importation, and sales of non-certified equipment for the Personal Radio Services, to reflect the marketing exception the Commission adopts and adds an additional reference to reflect the import condition the Commission adopts.

A. Importation of RF Devices Prior to Equipment Authorization

The Commission is adopting the proposal to modernize its rules to allow a limited number of RF devices to be imported into the United States prior to equipment authorization for pre-sale activities, including packaging and transferring physical possession to retail locations, if those devices are subject to equipment authorization via the certification process. The rule the Commission adopt adds a new condition to § 2.1204 of the Commission's rules to allow the importation of up to 12,000 RF devices for pre-sale activity before the equipment successfully completes certification. The imported devices must be subject to the equipment authorization certification process (*i.e.,* excluding devices subject to Supplier's Declaration of Conformity process) for which an application has been submitted to a TCB. As noted above, the imported devices must include an externally-visible temporary label noting the prohibition of display to consumers, operation, and delivery of the device prior to the issuance of certification. The devices must also remain under legal ownership of the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker, who must have in place a device retrieval process to be implemented in the event that the certification process is not successfully completed. The Commission believes this action will allow device manufacturers to better prepare for new product launches while guarding against a proliferation of unauthorized and non-compliant devices that might increase the risk of causing harm to consumers or other radio operations.

The rule proposed by the Commission in the *NPRM* largely reflected the proposal made by CTA in its petition. The Commission proposed to allow up to 4,000 RF devices to be imported for pre-sale activities prior to being certified. In this case, such pre-sale activities would include imaging, packaging, and delivery of devices to retail locations, but ''exclude the displaying of the device to consumers prior to equipment authorization.'' CTA Petition at 12, n. 44. Under the proposal, limited importation could occur if the manufacturer has a reasonable belief that the device would receive authorization within thirty days of importation. Additionally, the Commission proposed that the device include a temporary label regarding related compliance restrictions and the manufacturer would be required to maintain legal ownership of the devices, even after delivery to retail locations, until authorization is received, and have a process in place to retrieve the devices in the event that authorization is not obtained.

While all comments received support the proposal's intent, they include several requests to modify specific aspects, including the numerical limitation on the devices imported, the requirement that a manufacturer have a reasonable belief that authorization will be granted within 30 days of importation, and labeling requirements. The Commission addresses the various issues below and modifies the Commission's proposed rules, as appropriate, based on the comments received.

Numerical Limitation. The Commission is adopting rules that limit to 12,000 the number of RF devices that can be imported for pre-sale activities. While the Commission proposed to limit this new import condition to 4,000 devices, it asked whether a higher level, such as 8,000, would be more appropriate, whether a smaller number of devices would provide less risk of unauthorized devices becoming available to the general public, and whether any safeguards beyond a simple numerical limit would be necessary in this regard. Only HP Enterprise supports the proposed 4,000 device limit. Otherwise, commenters generally suggest that the Commission increases the device limit. Suggestions ranged from a non-specific increase, to a 10,000 device limit, and a more widely supported 12,000 device limit. Comments proposing 12,000 devices generally state the larger limit would account for the number of potential retailers throughout the country based upon the estimated numbers of ''big box'' stores and wireless provider locations, among others. Comments also note that a limit greater than 10,000 devices would increase the likelihood of more even distribution to both urban and rural areas while still being small enough to mitigate the potential risk of unauthorized widescale distribution.

Based on the record, the Commission finds that the proposed importation limit of 4,000 devices would not be sufficient to achieve the intended benefits. The Commission therefore adopts rules permitting up to 12,000 units of a particular device to be imported for pre-sale activities prior to the equipment being certified. As proposed, the Commission also adopts a provision to allow the importation of devices in excess of 12,000 subject to prior written approval from the Chief of the Office of Engineering and Technology. Overall, the Commission finds that a device limit of 12,000 will meet manufacturer and importer needs while not compromising the integrity of the Commission's equipment authorization program. The 12,000-unit limit is a maximum limit for a particular device across all ports of entry into the United States. Importation in excess of 12,000 units without prior written approval of the FCC is prohibited and may subject the manufacturer or importer to enforcement action.

The Commission's proposal did not specifically address how to differentiate devices when determining compliance with the maximum import quantity. Garmin provided comments suggesting that, in defining the importation limit for a device, the Commission applies the permissible quantity based on SKU number rather than to general product names or model brands. The Commission notes that restricting the importation limit to product name or model brand would restrict manufacturers from importing the full range of a new product, such as different sizes and product options. The Commission agrees with Garmin that

additional clarification is necessary to provide certainty to manufacturers and importers that take advantage of the additional flexibility the Commission is providing regarding importation for pre-sale activity. As such, the Commission is adopting an additional provision to clarify that devices with different FCC IDs are considered to be separate devices; *i.e.,* up to 12,000 devices with the same FCC ID number may be imported for pre-sale activities. The Commission adopts this requirement as opposed to a SKU number-based requirement as suggested by Garmin because FCC ID is the officially recognized method for identifying equipment, is required by FCC rules to be labelled on the device, and can be tracked through the FCC equipment authorization system database; SKU numbers, on the other hand, have no regulatory meaning under FCC rules. Moreover, use of FCC ID will not be burdensome for manufacturers and importers because, as discussed below, devices subject to the Commission's new rules may not be imported until an application for certification has been submitted and therefore an FCC ID will already be associated with such equipment.

Submission of Application for Certification. In the *NPRM,* the Commission proposed to require that manufacturers importing devices under the proposed exception have ''a reasonable belief that authorization will be granted within 30 days of importation.'' The Commission asked several questions related to how manufacturers could comply with this requirement. Most commenters stating that 30 days would not be sufficient suggest that 90 days would be more appropriate. Two filers, Information Technology Industry Council and the Joint Commenters (Telecommunications Industry Association, Association of Home Appliance Manufacturers, Engine, The internet Association, INCOMPAS, the Rural & Agriculture Council of America, and TechFreedom), suggest that 60–90 days would be generally sufficient and, for devices that require a TCB to coordinate with the OET Lab prior to taking action on the certification application, via the pre-approval guidance procedure, 120–180 days would be ''reasonable.'' One commenter, Information Technology and Innovation Foundation, states that the increased complexity of devices would make enforcing an expectation requirement difficult and suggests that the Commission allow manufacturers options for ''demonstrating reasonable belief of imminent authorization,'' such as relying on process milestones. Similarly, Samsung suggests that delivery to an accredited test lab or TCB for testing would be an appropriate basis for a reasonable expectation of authorization. R Street Institute (R Street) also notes that determining compliance with the criterion would be difficult and suggests that the Commission provides manufacturers flexibility in this regard, provided that they maintain documentation ''demonstrating their internal logic regarding authorization.''

The Commission believes that parties who avail themselves of the new importation exception should be permitted to do so only if they reasonably believe that a certification will be issued as close to the importation date as is possible. However, based upon the record, the Commission declines to adopt the 30-day timeframe. As many commenters suggest that the timeframe needed for certification can be unpredictable depending on device complexity and other factors, the Commission is adopting a rule that does not include a specific timeframe but is instead based on the submission of the equipment certification application. As the commenters' recommendations are informed by their experiences with the equipment authorization process, requiring a reasonable belief of completion of certification activities within a specific timeframe would not accurately reflect the ''real world'' process in many circumstances. Similarly, if the Commission were to specify multiple timeframes to cover different situations, there would still be numerous scenarios not covered, thus adding an unnecessary level of complexity to the rule that could limit its utility and result in confusion and inconsistent applicability.

Accordingly, the Commission is adopting a requirement that importation for pre-sale activities prior to the device receiving certification can only occur after compliance testing is complete and an application for certification has been submitted, in good faith, to a TCB. At that point, an applicant will have expended considerable time, effort, and money to develop a product as well as entered into a testing and approval process that requires expending additional resources. The Commission finds that this specific milestone reflects a point in the certification process by which the applicant can reasonably expect a grant. Allowing importation prior to the completion of compliance testing would increase the risk associated with distributing the unauthorized devices because the testing could reveal compliance issues that require device modification. The Commission will not require any additional process milestones to be tracked to demonstrate compliance with the adopted rule. The Commission notes that some aviation and maritime devices subject to the equipment certification process require additional reviews and approvals, such as from the Federal Aviation Administration and the United States Coast Guard. In some cases those additional approvals from other agencies must be done prior to submitting an application for FCC equipment certification and in some instances approval may be obtained concurrently. The rule the Commission adopts here has no impact on those requirements, but entities intending to avail themselves of this new import condition should consider the processing time and technical requirements of those reviews and approvals in relation to the certification process to determine when to begin importation under the new condition. Further, the Commission notes that parties must satisfy all conditions required for their equipment and comply with all conditions imposed by all relevant agencies under which the equipment is regulated; permission to market devices under FCC rules does not provide similar approval from other relevant agencies and all requirements must be satisfied in accordance with those agencies' rules. The Commission expects applications to be filed in good faith, with accurate data and as completely as possible, and applicants must be responsive to any TCB requests for additional data.

B. Marketing of RF Devices Prior to Equipment Authorization

The Commission is adopting its proposal to allow expanded conditional sales of RF devices prior to authorization, with appropriate clarifications regarding applicability and conditions. The internet provides today's consumer with numerous opportunities to obtain innovative new products both directly—via crowd-funding platforms at the developmental stages, and through sales and distribution services offered by manufacturers and developers—and indirectly, through third party marketplaces, both online and in person. This new-found ability to more easily obtain the latest products has led to savvier consumers, who have a greater awareness of technological developments and expect to obtain the newest products as soon as possible. At the same time, the ability to deal directly with consumers at the earliest

stages of development has created new efficiencies and investment opportunities that provide smaller entities a chance to enter the competitive marketplace. The Commission's new rule will allow innovators to take advantage of modern product development practices and better satisfy the expectations of today's consumer without diminishing the protections that the Commission's overall marketing rules provide.

In the *NPRM,* the Commission proposed to modify its marketing rules in a manner that would allow consumers to participate in the conditional sales of devices that have not received authorization. The Commission did not receive any comments objecting to its overall marketing proposal. Commenters did note generally that, in addition to allowing consumers to receive new devices sooner, the proposal would provide benefits throughout the supply chain that would allow production to better match expected demand, thus providing efficiencies that would lower costs and reduce waste in raw materials and energy. One comment suggests that the new marketing exception apply to the broadest category of devices and no commenters suggest excluding any devices.

The Commission remains mindful that it must continue to protect against the possibility of unauthorized RF devices making their way to consumers and adopt rules intended to prevent such occurrences while expanding marketing opportunities for innovators. Additionally, the rules the Commission proposed in the *NPRM* to allow pre-sale activities for imported devices would not have permitted similar flexibility for domestically-produced devices. Thus, in adopting rules to permit marketing activities prior to equipment certification, the Commission also provides flexibility in the Commission's marketing provisions to allow for pre-sale activities similar to those that the Commission is allowing for imported devices. This action implements more consistent measures for similarly-situated devices with similar safeguards to prevent unauthorized devices from getting to consumers. Further, the Commission's action will also benefit consumers, who will be able to see and examine devices earlier so that they can make more timely purchase decisions, and retailers, who will gain the opportunity to become familiar with the features associated with new devices to better prepare those devices for display and sale once they are certified and may be operated.

As proposed in the *NPRM,* the Commission is broadening the applicability of the prior conditional sales contract provision found in § 2.803(c) of the Commission's rules, which now will allow for conditional sales to consumers. Specifically, the Commission is modifying § 2.803(c)(2)(i) to allow conditional sales contracts and advertising for RF devices that have not yet received authorization, under particular delivery and physical transfer conditions and a requirement that the contracting party advises the buyer at the time of marketing that the equipment is subject to FCC rules and delivery is conditional upon successful completion of the applicable equipment authorization process.

In the *NPRM,* the Commission proposed to allow conditional sales contracts between manufacturers and potential customers. The intent was to broaden the rule that originally limited conditional sales to contracts between manufacturers and wholesalers or retailers, which was based on a concern that unauthorized devices that made their way to consumers could cause harmful interference to radio communications. Ensuring that unauthorized RF devices do not cause harm remains among the Commission's highest concerns. However, recognizing that product marketing and distribution methods have evolved due to the internet and new crowd-funding practices which bring the consumer into direct contact with the developer or manufacturer, and based on the comments received in response to the *NPRM,* the Commission is adopting a more flexible rule that does not limit conditional sales contracts to transactions only between manufacturers and potential customers.

In the *NPRM,* the Commission declined to propose a rule that included the term ''responsible party'' in lieu of ''manufacturer'' as suggested by CTA, and instead proposed conditional sales contracts between manufacturers and potential customers. The Commission explained its concerns that, given the specific meaning of the term, ''responsible party'' would not be appropriate in this context. Further, the Commission asked for comment on this determination and asked questions about more suitable alternatives. While no commenter suggests replacing ''manufacturer'' with ''responsible party,'' Samsung Electronics America (Samsung) suggests that the Commission clarifies that affiliates and related corporate entities should be considered acceptable in the context of ''manufacturer.'' Additionally, while not providing specific rule changes, Samsung and CTA suggest the Commission clarifies that the rule would also cover contracts between manufacturers and retailers/wholesalers.

The Commission's intent in proposing to expand conditional sales contract to ''manufacturers and potential customers'' was to broaden the pool of parties allowed to enter into conditional sales contracts with manufacturers, specifically to include consumers. Considering the information in the record, the Commission finds that inclusion of the phrase ''between manufacturers and potential customers'' would raise confusion as to who may enter into conditional sales contracts. The Commission recognizes that modern product development and distribution systems can be complex and involve multiple entities in various roles. As discussed in the *NPRM,* the Commission understands that, with the proliferation of internet-based direct-to-consumer sales and e-commerce platforms, various entities can access multiple distribution models to reach consumers. To ensure that the language of the Commission's revised marketing regulation does not hinder innovation or provide unfair advantage or disadvantage to particular entities, the Commission finds that it is not necessary to specify the permissible parties to the conditional sales contracts. Thus, manufacturers, developers, or other entities responsible for new device creation, development, or production will be able to define their own role in the distribution and supply chain of their devices. The Commission finds this to be particularly important for smaller or new device developers who may not manufacture their devices but wish to engage in the sale and distribution process so they can appropriately plan for manufacturing and distribution. By expanding the pool of parties to the conditional sales contracts, the Commission is implementing rules that encourage and expand opportunities for innovation and allow developers or other parties that are not themselves a manufacturer to participate in the sale and marketing of a device. At the same time, as noted below, the Commission continues to prohibit delivery to consumers prior to completion of the equipment authorization process.

In this regard, the Commission modifies § 2.803(c)(2)(ii), a separate provision that allows limited marketing, in the form of sales, to a narrow class of specialized entities. As noted in the *NPRM,* CTA had asked that the provision be deleted or replaced with language specifically addressing

manufacturers' ability to engage in activities related to the Commission's importation proposal. The Commission in the *NPRM* sought comment on whether a change to the provision was necessary to achieve the proposal's discrete objective and whether doing so could eliminate an important avenue for limited marketing that exists outside the conditional sales contract context. In response to the *NPRM,* CTIA requests that the Commission deletes § 2.803(c)(2)(ii), as it believes the new rule would eliminate the need for this section and retaining it in the rules would be confusing.

In light of the information in the record and the changes the Commission is making to § 2.803(c)(2)(i) by expanding applicability to all parties, the Commission finds that § 2.803(c)(2)(ii) is no longer necessary and the Commission removes it. The language that the Commission is adopting in § 2.803(c)(2)(i) encompasses conditional sales to all parties, including business, commercial, industrial, scientific, or medical users, thereby negating the need for a separate exception targeted at those users.

The Commission also clarifies the conditions under which conditional sales contracts may be made. The proposed rule would have provided that delivery of devices subject to conditional sales contracts would be conditional upon *a determination* that the equipment complies with the applicable equipment authorization and technical requirements. To clarify the requirement, the rule the Commission is adopting instead states that delivery is conditional upon ''successful completion of the equipment authorization process.'' This change does not eliminate the need for determining compliance with the Commission's technical requirements, but it more accurately reflects both of the Commission's equipment authorization processes and the required milestone for delivery. This better conveys the Commission's intent by removing the ambiguity of a subjective condition referenced only to ''a determination that the equipment complies with the applicable equipment authorization and technical requirements'' rather than the actual completion of the equipment authorization process.

C. Device Delivery and Possession

While the Commission now will permit conditional sales of RF devices prior to equipment authorization, the Commission reiterates the importance of continuing to ensure that unauthorized RF devices do not reach consumers. No commenter suggests otherwise and several explicitly express support for retaining the prohibition. Thus, the rule the Commission is adopting continues to prohibit delivery of RF devices to consumers prior to completion of the equipment authorization process. The Commission expects that the disclosure requirements discussed below will ensure that there is no consumer expectation of early delivery. Likewise, the other process safeguards the Commission discusses below should ensure that sellers take all necessary steps to prevent operation of unauthorized devices and delivery to consumers. These safeguards include provisions, previously introduced in the *NPRM*'s proposed importation provision, to allow devices subject to certification to physically move through the supply chain as far as the retailer, stopping short of the consumer.

In the *NPRM,* the Commission noted that the proposed rule could be seen as lessening the barriers between device developers, manufacturers, distributers, and consumers and asked whether any additional safeguards would be warranted to protect against harmful interference. Specifically, the Commission asked, with regard to both marketing and importation, whether there are certain types of devices for which conditional sales to consumers would not be appropriate, citing as examples devices that would operate in bands that are subject to rigorous coordination or installation requirements and devices that operate to ensure safety of life onboard ships and aircraft. The Commission also asked whether there are ways to prevent devices from being marketed that have no likelihood of being approved due to compliance issues and whether equipment that could operate only under a Commission waiver should be prohibited from marketing prior to the Commission granting a waiver. One comment suggests that the new rule permitting conditional sales apply to the broadest category of devices and no commenters suggest excluding any devices.

Equipment authorization of RF devices can be completed by one of two processes. Certification involves rigorous testing by an FCC-recognized accredited testing laboratory and listing in a Commission database. By contrast, SDoC is a self-certification process that gives the manufacturer substantially greater control over determining when a product meets the Commission's equipment authorization requirements. While not adopting any specific device exclusions at this time, the Commission finds that requiring devices to complete the existing equipment authorization processes will facilitate movement of devices through the supply chain while maintaining controls to ensure against unauthorized use and delivery to consumers. Specifically, the Commission sees the two equipment authorization processes as providing a means by which to distinguish between types of devices in implementing various controls to limit physical access to unauthorized RF devices.

Upon further analysis of its proposals, the Commission observes that the proposal to permit conditional sales prior to completion of the applicable equipment authorization process applied to all devices whether they originated from domestic or foreign sources. However, the Commission's new importation rules as adopted herein allow for pre-sale activities where certain imported devices can be physically transferred to retail locations, but the same flexibility was not specifically proposed for other devices. Allowing transfer of physical possession of certain imported devices to retailers, but not other devices, would result in a disparity in the treatment of similar devices based on whether they are imported or manufactured or developed in the U.S. To ensure consistent measures between similarly situated devices regardless of their origin, the Commission will permit devices subject to the equipment authorization certification process to engage in the same pre-sale activities and under similar conditions the Commission adopts for imported devices. Specifically, the Commission will allow the physical possession of devices subject to certification to be transferred to distributers and retailers. Neither in the Commission's import nor marketing provision does it extend this flexibility to devices subject to SDoC because, unlike the more rigorous requirements associated with the certification process, the SDoC process provides manufacturers more flexibility in determining compliance with the FCC's technical requirements.

The marketing rule provision the Commission is adopting will permit physical transfer of devices subject to certification procedures, and for which an application has been submitted to a TCB and compliance testing is complete, for the sole purpose of pre-sale activity, which includes packaging and transferring physical possession of devices to distribution centers and retailers. Pre-sale activity does not include display or demonstration of devices to consumers. This provision prohibits physical transfer of RF devices subject to Supplier Declaration of

Conformity prior to completion of that process. It also requires that the party initiating the first conditional sales contract maintain legal ownership of the relevant devices.

The *NPRM* proposed to require manufacturers that engage in pre-sale activities to maintain legal ownership of imported RF devices that had not received equipment authorization, even after physically transferring them to retailers. When it made the proposal, the Commission asked whether the requirement would further the Commission's goal of keeping unauthorized devices from causing harm to consumers or other radio operations, whether additional restrictions related to the delivery and location of devices after importation would be necessary, and about the manufacturer's responsibility in the event of unauthorized operation. The Commission also asked several questions related to the specific process of complying with the requirement and whether the benefits of the rule would outweigh any burdens that it would place on those involved in the process, such as manufacturers and retailers.

Samsung states that requiring manufacturers to retain legal ownership of imported RF devices will incentivize manufacturers to ensure that retailers and other partners abide by the labeling rules and other safeguards. Samsung recommends that the Commission clarify that agreements exercising the new importation condition to deliver devices to retail locations prior to authorization do not violate the § 2.803 marketing rules. Samsung argues that the current text of § 2.803(c)(2) may constrain the ability of manufacturers and retailers (as well as others in the distribution chain) to exercise the new importation condition to deliver devices to retail locations while extracting representations and warranties to abide by the Commission's safeguards. As an alternative to adding a new subsection to § 2.803, Samsung recommends that the Commission clarifies that contracts exercising the new condition, including physical transfer to retail partner locations, do not constitute marketing pursuant to § 2.803. Similarly, CTA recommends that the Commission clarifies that the proposed new importation condition does not violate the Commission's marketing rules, but rather allows physical transfer of RF devices to retail locations with the safeguard of a manufacturer retaining legal ownership of those devices. CTA observes that manufacturers and retailers must have agreements in place to ensure that those devices are properly labeled, delivered, and stored until they are authorized for consumer use.

The intent of the Commission's proposed rule on ownership of imported RF devices was to protect consumers by ensuring that devices that have not yet been authorized are not operated. The Commission finds that it can achieve that important goal for both marketed and imported devices that have completed certification testing and been submitted to a TCB for approval by providing a process that allows for physical transfer of marketed devices while legal ownership is maintained by the first party to initiate a conditional sales contract (*i.e.,* a developer or manufacturer, or similar party) or, in the case of imported devices, by the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker.

By permitting the physical transfer of devices, the Commission will allow entities to take full advantage of modern marketing and importation practices while still protecting against unauthorized use of devices that have not completed the equipment authorization process. The Commission is adding a new subsection to § 2.803 of the Commission's rules establishing the requirements applicable to ownership and physical transfer of such devices.

D. Disclosures and Labeling

The Commission believes that most consumers today are generally familiar with conditional sales and delayed delivery of new devices. However, it needs to ensure that consumers purchasing devices that have not yet received authorization are aware of the conditions for delivery before entering into a conditional sales agreement. The Commission is therefore adopting, as proposed, a requirement that the prospective buyer be advised at the time of marketing, through a prominent disclosure, that the equipment is subject to FCC rules and delivery to the end user is conditional upon successful completion of the applicable equipment authorization process.

In the *NPRM,* the Commission asked several questions regarding the implementation and scope of this disclosure requirement. For example, the Commission asked whether additional disclosures should be required throughout the equipment authorization process and, in the event that authorization is not obtained, how consumers would be notified, and whether the Commission should require refund information to be provided in the required disclosure. The Commission also asked about the responsibility of online retailers to ensure that all device advertisements involving conditional sales include the required disclosures, and whether unique identifying information (*e.g.,* model numbers, expected FCC ID) that may be known at the time of marketing, should be required in online advertisements. Finally, the Commission asked whether it should require manufacturers to include a label on device packaging noting that it must not be delivered to consumers prior to obtaining equipment authorization and, if so, what additional information to require on the label.

While two commenters suggest that the Commission provide specific disclosure language, most commenters suggest a more general requirement. However, INCOMPAS suggests that the Commission specifically require a refund for consumers when device authorization is not obtained. Information Technology Industry Council also argues in favor of a refund requirement and disclosures on how consumers can obtain refunds. The Public Interest Organizations (New America's Open Technology Institute, Public Knowledge, Consumer Reports, and Access Humboldt) went further, requesting the Commission require companies utilizing the marketing exception to establish escrow funds for such refunds. On the other hand, regarding a consumer refund process, many commenters state the Commission should not adopt specific requirements or, generally, that no additional requirements beyond the proposal are necessary.

The Commission finds that it is necessary and appropriate for parties initiating conditional sales contracts to advise buyers at the time of marketing, through a prominent disclosure, that the equipment is subject to FCC rules and delivery is conditional upon successful completion of the appropriate equipment authorization process. To ensure that the Commission's new rules for conditional sales to consumers do not lead to unanticipated problems, the Commission will also require this disclosure to make clear that these rules do not address the applicability of consumer protection, contractual, or other provisions under federal or state law. The contractual nature of these conditional sales, along with the relevant contractual remedies available to the buyers, should provide sufficient incentive for the sellers to ensure that buyers are adequately informed of the conditions of sale, including a refund process, if device authorization is not successfully completed. Nevertheless, the Commission will require the initiating party to include in their disclosure notification of any

responsibility of the initiating party to the buyer in the event that the applicable equipment authorization process is not successfully completed, including information regarding any applicable refund policy. While most consumers are familiar with conditional sales, the Commission finds that requiring this information will minimize potential confusion for consumers who are unfamiliar with conditional sales. Although CTA suggests that such disclosure could confuse consumers who are already aware of the applicable refund policy, the Commission finds such confusion unlikely, and finds on balance that the public interest is better served by making this information available to all consumers as part of the disclosure the Commission is requiring here. The Commission does not find that it is necessary to require standardized language for the disclosures nor does the Commission believes that it needs to take any additional measures to ensure that buyers are informed of the conditional nature of the sales contracts.

However, the Commission does find that it is important to ensure that devices are not delivered to consumers and that distributers, retailers, consumers, and other relevant entities are aware that the devices must not be operated before equipment authorization is complete. In addition to disclosures, the Commission is adopting the temporary labeling requirement for RF devices when parties engage in pre-sale activities that the Commission proposed for imported devices and extending that requirement to devices under the marketing provisions adopted by this document for those same pre-sale activities. In the *NPRM,* the Commission requested comment about requiring a temporary label on device packaging and what information that label should include. The Commission went on to propose that devices imported prior to certification under the new exception include a temporary removable label that includes a specific warning against premature operation, display, offers for sale, marketing, or sales and asked whether additional information should be incorporated into such a label. Garmin, INCOMPAS, and Hewlett Packard Enterprise specifically opposed such a requirement, generally stating that it would not be worth the investment in time and material. While R Street agreed with the requirement, other supportive comments generally suggested that existing labeling requirements would be sufficient, or pointed to Commission guidance for temporary physical labels under the e-labeling procedures for RF devices. No comments supported a temporary labeling requirement beyond that proposed by the Commission.

The Commission continues to believe that a temporary label indicating the status of RF devices will provide a necessary safeguard against the inadvertent transfer of such devices to consumers and the Commission is adopting the rule in both the importation and marketing provisions with some modifications to the required language for consistency with other provisions in the new rules. Specifically, when parties engage in pre-sale activities, the Commission clarifies that the device or its packaging must prominently display a visible temporary label. This will ensure that the temporary label is not hidden inside the device packaging where it would not be visible. The Commission also clarifies that the device cannot be displayed to consumers, operated, or delivered to end users until successful completion of the applicable FCC equipment authorization process. The Commission is not adopting the Commission's proposal that the label on imported devices include language prohibiting offers of sale and marketing, thus ensuring consistency in labeling for both imported and domestic devices. The devices must not be available to consumers until after the successful completion of the certification process and the Commission expects that at the time of sale they will be in compliance with all pertinent information, technical, labeling, and other requirements within the Commission's rules. Because the labels are temporary, the Commission finds that it would be unduly burdensome to require the inclusion of any additional information such as authorization status or specific contact information or otherwise include any specific compliance guidance with the rules. As to compliance via the Commission's existing requirements for electronic labeling (e-labeling) of RF devices, it appears likely that commenters are referring to § 2.935(f) of the Commission's rules which requires an external removable label that addresses compliance with any applicable Commission requirements. However, in this case, as the temporary label requirement is specifically codified in the Commission's new rule, strict compliance with § 2.935(f) is not necessary and would likely not be desirable.

Once authorization has been completed, the RF devices must comply with all pertinent Commission labeling and disclosure requirements. The Commission adopts its proposal to allow, but not require, the anticipated FCC ID to be included if obscured by a temporary label until equipment authorization is successfully completed. Otherwise, the Commission is not adopting requirements that specifically detail actions required to ensure compliance in this regard.

E. Retrieval and Tracking of Unauthorized Devices

As proposed in the importation provision of the *NPRM,* the Commission is requiring processes to retrieve equipment to be in place prior to the commencement of pre-sale activities, and clarifying that those processes must be implemented, in the event that authorization is not successfully completed. In this regard, the Commission also asked several questions about the level of detail of the process that should be codified and the requirements for records retention and submission. With the exception of R Street, commenters do not offer any specific suggestions regarding retrieving equipment if authorization were to be denied, but generally indicate that existing Commission processes are adequate, and advocate a ''light touch'' regulatory approach. R Street recommends that the Commission require RF device manufacturers to submit formal plans to retrieve devices to limit the ability for bad actors to let devices simply remain in the public sphere, rather than bear the cost of retrieving the devices. R Street suggests that these risks could be further limited by features such as a remote shutdown requirement on the devices, but notes that the benefits of such an approach may be limited by the costs of implementing it. The Commission had asked about this remote shutdown approach, noting some similarity to scenarios in which unauthorized devices operate under a part 5 experimental authorization.

In light of the expanded physical transfer provisions the Commission is adopting in its marketing rule, the Commission finds it necessary that the marketing provisions also require a process for retrieval of devices, and completion of that process, in the event that authorization is not successfully completed when parties engage in pre-sale activities. Although the Commission is adopting this retrieval requirement in both the Commission's importation and marketing rules, the language of the two provisions varies slightly to accurately designate the party responsible for the retrieval activities. For marketed devices, the burden is on the first party to initiate a conditional

sales contract or to physically transfer devices, while for imported devices, the burden is on the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker. In both instances, this will ensure that the party in legal ownership of the devices, regardless of the devices' physical location, will be responsible for maintaining and implementing a process for retrieval if the applicable equipment authorization cannot be successfully completed. The language the Commission adopts in the importation provision, which was limited to the manufacturer in the Commission's proposal, is consistent with party designations referenced in the Commission's other existing importation conditions.

F. Recordkeeping

In the *NPRM,* the Commission proposed a recordkeeping requirement for devices imported prior to equipment authorization that would require manufacturers to maintain, for a period of 5 years, records identifying the recipient of the devices along with information about the devices and the shipping. The Commission asked several questions related to the need for recordkeeping and related reporting and responsibility issues. The Commission's recordkeeping questions were informed by its concerns about situations where pre-ordered devices are not ultimately authorized and enforcement actions may be required. Commenters generally recommend either no new recordkeeping or minimal requirements. No commenter supports additional reporting requirements. Samsung states that adopting new record retention requirements is not necessary because manufacturers regularly retain records related to equipment authorization that must be presented to the Commission upon request. Amazon states that an overly prescriptive approach or burdensome reporting and recordkeeping requirements are not necessary to protect consumers.

The Commission finds that the recordkeeping requirement proposed in the NPRM is the minimal required to ensure that, should it become necessary, the Commission will have access, as needed for enforcement or other purposes, to information regarding devices imported prior to authorization. The Commission therefore adopts the recordkeeping requirement with a change to the party responsible for recordkeeping. Specifically, recordkeeping will be the responsibility of the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker. In addition to being consistent with other importation recordkeeping requirements in the Commission's rules, this change also acknowledges that entities other than a device manufacturer may be responsible for the importation of these devices.

Because the new marketing exception the Commission adopts here expressly prohibits the delivery to end users any of the subject devices prior to authorization, it follows that compliant entities would maintain legal or physical possession, as appropriate, of the pre-ordered devices as provided in the Commission's rules. Thus, the Commission does not see a benefit to imposing reporting requirements, as they would not directly further the Commission's underlying goal of keeping unauthorized devices from becoming available to the general public. Further, the Commission believes that it is good business practice to maintain sales documentation and thoroughly track customers, particularly when, as with the Commission's marketing exception, sales are conducted through conditional sales contracts. The Commission expects that sellers, through the normal course of business, will maintain records of the conditional sales contract permitted by the marketing rule the Commission is adopting through this Report and Order. So, the Commission is not adopting any new reporting requirements, but the it is adopting a recordkeeping requirement consistent with that adopted for devices imported prior to equipment authorization. The party initiating a conditional sales contract or physically transferring devices under the Commission's new marketing exception must maintain, for a period of five years, records identifying each entity to whom a device is conditionally sold or physically transferred, the device name and product identifier, the quantity conditionally sold or physically transferred, the date on which the device authorization was submitted, and the expected FCC ID number. The party initiating the conditional sales contract or physically transferring devices must provide these records upon the request of Commission personnel.

G. Enforcement

In the *NPRM,* the Commission asked several questions about the appropriate enforcement actions that should be taken in the event of non-compliance with any of the new importation requirements and the effect the marketing proposal would have on enforcement activities. It specifically asked questions about appropriate sanctions for instances where unauthorized devices are delivered to consumers prior to receipt of the equipment authorization, including, for example, whether the base forfeiture for such violations should be based on the number of units delivered and whether the Commission should deny future equipment authorization applications from grantees who deliver unauthorized devices to consumers. Additionally, the Commission asked about how to hold online vendors accountable and what penalties would apply to any consumer who operates an unauthorized device that was obtained through a violation of the Commission's conditional sale procedure.

Commenters did not specifically address enforcement related to the importation proposal. While some commenters expressed concerns about risks to consumers in the event that equipment authorization is not ultimately obtained, none cited this concern as a reason to not adopt the proposed rule. No commenters provided specific recommendations regarding the consideration of violations or the determination of appropriate penalties. Any comments that addressed enforcement generally stated that existing enforcement tools would provide sufficient means to address compliance issues without any modification.

Commenters generally concurred that the FTC and state agencies and courts would be appropriate venues for consumer contractual complaints. Information Technology and Innovation Foundation states that there is always a risk of bad actors knowingly flouting regulations or small, unsophisticated parties unknowingly failing to comply, but that the risk of non-compliant radios becoming publicly available does not seem to increase with the Commission's proposed rule changes. However, Information Technology and Innovation Foundation recommends that the Commission should always view enforcement as a primary concern. Information Technology Industry Council notes existing safeguards that are currently in place via not only the Commission, but also the FTC and states' attorneys general, and argues that new Commission enforcement mechanisms are not necessary. Similarly, CTA argues that consumer redress mechanisms are in place, if necessary, and that if a manufacturer does not deliver a device where a customer remitted some consideration, the FTC and state consumer protection agencies are experts in redressing such harms.

The Commission finds that other agencies, including the Federal Trade

Commission and the various states' attorneys general, would be the appropriate venues for consumer complaints about these issues and the Commission will not implement additional enforcement measures at this time. The Commission's rules already include exceptions for marketing prior to equipment authorization. Although the exception that the Commission adopts today provides for a greater scale of pre-authorization device marketing, the Commission believes that its existing enforcement measures will be sufficient to mitigate and address potential harm.

H. Open Proceeding

In the *NPRM,* the Commission acknowledged an open equipment authorization proceeding, ET Docket 15–170, which also asked questions about importation, and tentatively concluded that the Commission's new marketing and importation proposals may be acted upon separately. *See* Amendment of Parts 0, 1, 2, 15 and 18 of the Commission's Rules regarding Authorization of Radiofrequency Equipment, ET Docket No. 15–170, Notice of Proposed Rulemaking, 30 FCC Rcd 7725 (2015) (*2015 Equipment Authorization Notice*); and Amendment of Parts 0, 1, 2, 15 and 18 of the Commission's Rules regarding Authorization of Radiofrequency Equipment, ET Docket No. 15–170, First Report and Order, 32 FCC Rcd 8746 (2017) (*2017 Equipment Authorization Order*). Two commenters specifically requested that the Commission also take action on two proposals from ET Docket 15–170.

In the context of the Commission's importation exception, Garmin suggests that the Commission revisit its outstanding proposal for ''provisional certification.'' In the *2015 Equipment Authorization Notice,* the Commission discussed the idea of a ''provisional certification'' as a potential method for addressing the confidentiality concerns of applicants for certification in which granted certifications would not be included in the Commission's public database before the RF device is made available for sale. The Commission also suggested that a provisionally certified device could also be imported prior to acknowledgement in the Commission's database. Garmin submitted several filings in support of the proposal in ET Docket 15–170. As a provisional grant of certification procedure would affect all stakeholders in the equipment authorization process, it goes beyond the narrow focus of this proceeding, the marketing and importation rules. Thus, the Commission does not believe that this Report and Order provides an appropriate venue for the proposal's consideration. Additionally, as an alternative to the provisional grant proposal, Garmin also includes an entirely new proposal for a ''deferred grant eligibility confirmation letter'' which would be issued by a TCB prior to the grant of certification. Such a letter would indicate the device has met the equipment authorization requirements and the grant would not occur until a date specified by the applicant. This proposal would similarly impact many aspects of the equipment authorization process, and the responsibilities of TCBs, in particular, so the Commission likewise believes it is beyond the scope of this proceeding.

Additionally, one commenter, CTIA suggested that the Commission also act on outstanding proposals related to the certification of modular transmitters. A modular transmitter is a completely self-contained RF transmitter device that typically is incorporated into another product and is subject to, among others, the requirements of § 15.212 of the Commission's rules. The *2015 Equipment Authorization Notice* included proposed changes to these requirements and compliance with such requirements in the context of the certification process. These proposals relate to the certification process and it is not necessary for us to take action at this time to allow us to adopt the instant marketing and importation rules.

III. Final Regulatory Flexibility Analysis

A. Need for, and Objectives of, the Report and Order

In June 2020, the Consumer Technology Association (CTA) filed a petition for rulemaking seeking modification of the Commission's rules pertaining to the marketing and importation of radiofrequency (RF) devices. CTA argued that those rules were out-of-date and may hinder development and deployment of state-of-the-art RF products and services. In December 2020, after considering the petition, and the general support expressed in the associated record, the Commission initiated this proceeding, proposing changes to the Commission's marketing and equipment rules that were informed to a large extent by the CTA Petition.

In this Report and Order the Commission adopts targeted enhancements to the Commission's marketing and importation rules that will allow equipment manufacturers to better gauge consumer interest and prepare for new product launches. Given the rapid and widespread deployment of the radiofrequency (RF) devices integral to nearly all aspects of modern life, these steps will further the communications sector's ability to drive innovation and promote economic growth. As product development cycles have accelerated, new marketplace models and assessment tools have emerged that rely on individual interest to fund products and allow sellers to optimize the number of products they produce or import to match anticipated sales. The rules the Commission adopts will allow manufacturers to better utilize these tools to speed the newest technologies and must-have devices to consumers. The Commission has crafted these rules in a manner that will not harm the underlying goals of the Commission's equipment authorization program: Ensuring that the communications equipment Americans rely on every day, such as their cellphones and Wi-Fi devices, comply with the Commission's technical rules; and providing assurance to all spectrum users that their devices will work as intended and operate free from harmful interference.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments filed that specifically addressed the rules and polices proposed in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the

Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

Small Businesses, Small Organizations, Small Governmental Jurisdictions. The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.

Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

Radio Frequency Equipment Manufacturers (RF Manufacturers). Neither the Commission nor the SBA has developed a small business size standard applicable to Radio Frequency Equipment Manufacturers (RF Manufacturers). There are several analogous SBA small entity categories applicable to RF Manufacturers—Fixed Microwave Services, Other Communications Equipment Manufacturing, and Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. A description of these small entity categories and the small business size standards under the SBA rules are detailed below.

Fixed Microwave Services. Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service, Millimeter Wave Service, Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. There are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services. The Commission has not yet defined a small business with respect to microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1,000 employees or more. Thus under this SBA category and the associated size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies discussed herein. The Commission notes, however, that the microwave fixed licensee category includes some large entities.

Other Communications Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment). Examples of such manufacturing include fire detection and alarm systems manufacturing, Intercom systems and equipment manufacturing, and signals (*e.g.,* highway, pedestrian, railway, traffic) manufacturing. The SBA has established a size standard for this industry as all such firms having 750 or fewer employees. U.S. Census Bureau data for 2012 shows that 383 establishments operated in that year. Of that number, 379 operated with fewer than 500 employees and 4 had 500 to 999 employees. Based on this data, the Commission concludes that the majority of Other Communications Equipment Manufacturers are small.

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA has established a small business size standard for this industry of 1,250 employees or less. U.S. Census Bureau data for 2012 show that 841 establishments operated in this industry in that year. Of that number, 828 establishments operated with fewer than 1,000 employees, 7 establishments operated with between 1,000 and 2,499 employees and 6 establishments operated with 2,500 or more employees. Based on this data, the Commission concludes that a majority of manufacturers in this industry are small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

In the Report and Order, the Commission adopts rules that affect reporting, recordkeeping, and other

compliance requirements for small entities. Regarding marketing of RF devices, the Report and Order will require that the seller of a conditionally-purchased RF device advise the conditional purchaser that the device is subject to FCC rules, and that delivery of the device to the purchaser is contingent upon device compliance with applicable FCC equipment authorization and technical requirements. Regarding importation of RF devices into the United States prior to equipment authorization for pre-sale activities—including imaging, packaging, and delivery to retail locations—the Report and Order will require that each imported RF device display a temporary removable label stating that it cannot be displayed, operated, offered for sale, marketed to consumers, or sold prior to proper FCC equipment authorization has been granted, and will further require that importing manufacturers have processes in place to retrieve any equipment transferred to a conditional purchaser, in the event that such authorization is denied by the FCC. Moreover, importing manufacturers will be required to maintain, for a period of 60 months, records identifying the recipients of RF devices imported for pre-sale activities. Such records must identify several factors such as the device name and product identifier, the quantity shipped, the date on which the device authorization was sought, the expected FCC ID number, and the identity of the recipient, including address and telephone number.

The Report and Order also particular recordkeeping requirements that will be imposed on RF manufacturers so that RF equipment that is conditionally sold can be accounted for if equipment authorization is ultimately not granted or enforcement action needs to be taken, and the period of time that manufacturers should be required to retain those records and provide them to the FCC upon request. Additionally, the Report and Order requests that a manufacturer that imports an RF device should be required to document (and provide such documentation to the FCC upon request) the basis for its belief that the FCC will authorize that device.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

The Report and Order rules set forth are minimal, and the Commission believes would significantly assist RF equipment manufacturers, some of which may be small entities, to market and import RF equipment. Although the Commission believe that the Commission's rules are not unduly burdensome, the Commission sought comment on a number of alternatives or supplements to those rules and procedures, such as whether the Commission should require marketing disclosures at all or just some points of the pre-authorization process, whether the Commission should require specific language or instead permit parties to choose how they word their disclosures, and whether all or only certain importation safeguards are needed.

The Commission believes that the regulatory burdens that the Commission is implementing are necessary in order to ensure that the public receives the benefits of innovative products and technologies in a prompt and efficient manner, and those burdens apply equally to large and small entities, thus without differential impact. The Commission will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities.

IV. Ordering Clauses

It is ordered that, pursuant to sections 4(i), 301, 302, 303(c), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302a, 303(c), 303(f), and 303(r), this Report and Order *is adopted* as set forth above.

It is further ordered that the amendments of the Commission's rules as set forth in Appendix A *are adopted*, effective thirty days from the date of publication in the **Federal Register**, except for §§ 2.803(c)(2) and 2.1204(a)(11), which contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act and *will become effective* after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

It is further ordered that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

It is further ordered that the Commission *shall send* a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Parts 2 and 95

Communications equipment, Radio, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 2 and 95 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 2. Amend § 2.803 by revising paragraph (c)(2)(i) and removing and reserving paragraph (c)(2)(ii) to read as follows:

§ 2.803 Marketing of radio frequency devices prior to equipment authorization.

* * * * *

(c) * * *

(2) * * *

(i) Conditional sales contracts (including agreements to produce new devices manufactured in accordance with designated specifications), and advertisements for such sales, are permitted under the following conditions:

(A) The initiating party must provide to the prospective buyer at the time of marketing, through a prominent disclosure:

(*1*) Notification that the equipment is subject to the FCC rules and delivery to the end user is conditional upon successful completion of the applicable equipment authorization process;

(*2*) Notification that FCC rules do not address the applicability of consumer protection, contractual, or other provisions under federal or state law; and

(*3*) Notification of any responsibility of the initiating party to the buyer in the event that the applicable equipment authorization process is not successfully completed, including information regarding any applicable refund policy.

(B) For devices subject to Supplier Declaration of Conformity procedures under subpart J of this chapter, physical transfer of equipment from the initiating party to other entities, including delivery to the end user, prior to successful completion of the equipment authorization process is prohibited.

(C) For devices subject to Certification procedures under subpart J of this chapter, delivery to the end user prior to successful completion of the equipment authorization process is prohibited; transfer of physical possession of devices to other entities for the sole purpose of pre-sale activity is permitted only after compliance testing by an FCC-recognized accredited testing laboratory is completed and an application for Certification is submitted to an FCC-recognized Telecommunication Certification Body pursuant to § 2.911. Pre-sale activity includes packaging and transferring physical possession of devices to distribution centers and retailers. Pre-sale activity does not include display or demonstration of devices.

(*1*) Each device, or its packaging, physically transferred for the purpose of pre-sale activity must prominently display a visible temporary removable label stating: ''This device cannot be delivered to end users, displayed, or operated until the device receives certification from the FCC. Under penalty of law, this label must not be removed prior to receiving an FCC certification grant.''

(*2*) The first party to initiate a conditional sales contract under paragraph (c)(2)(i) of this section or to physically transfer devices must have processes in place to retrieve the equipment in the event that the equipment is not successfully certified and must complete such retrieval immediately after a determination is made that the equipment certification cannot be successfully completed.

(D) Notwithstanding § 2.926, radiofrequency devices marketed pursuant to paragraph (c)(2)(i) of this section may include the expected FCC ID if obscured by the temporary label described in paragraph (c)(2)(i)(B)(*1*) of this section or, in the case of electronic labeling, if the expected FCC ID cannot be viewed prior to authorization.

(E) All radiofrequency devices marketed under paragraph (c)(2)(i) of this section must remain under legal ownership of the first party to initiate a conditional sales contract.

(F) The first party to initiate a conditional sales contract or any party that physically transfers devices under paragraph (c)(2)(i) of this section must maintain, for a period of sixty (60) months, records of each conditional sale contract. Such records must identify the device name and product identifier, the quantity conditionally sold, the date on which the device authorization was sought, the expected FCC ID number, and the identity of the conditional buyer, including contact information. The first party to initiate a conditional sales contract or any party that physically transfers devices under paragraph (c)(2)(i) of this section must provide these records upon the request of Commission personnel.

* * * * *

■ 3. Amend § 2.1204 by adding paragraph (a)(11) to read as follows:

§ 2.1204 Import conditions.

(a) * * *

(11) The radio frequency device is subject to Certification under § 2.907 and is being imported in quantities of 12,000 or fewer units for pre-sale activity. For purposes of this paragraph, quantities are determined by the number of devices with the same FCC ID.

(i) The Chief, Office of Engineering and Technology, may approve importation of a greater number of units in a manner otherwise consistent with paragraph (a)(11) of this section in response to a specific request.

(ii) Pre-sale activity includes packaging and transferring physical possession of devices to distribution centers and retailers. Pre-sale activity does not include display or demonstration of devices. Except as provided in § 2.803(c)(2)(i), the devices must not be delivered to end users, displayed, operated, or sold until equipment Certification under § 2.907 has been obtained.

(iii) Radiofrequency devices can only be imported under the exception of paragraph (a)(11) of this section after compliance testing by an FCC-recognized accredited testing laboratory is completed and an application for certification is submitted to an FCC-recognized Telecommunication Certification Body pursuant to § 2.911 of this part;

(iv) Each device, or its packaging, imported under this exception must prominently display a visible temporary removable label stating: ''This device cannot be delivered to end users, displayed, or operated until the device receives certification from the FCC. Under penalty of law, this label must not be removed prior to receiving an FCC certification grant.''

(v) Notwithstanding § 2.926, radiofrequency devices imported pursuant to paragraph (a)(11) of this section may include the expected FCC ID if obscured by the temporary label described in paragraph (a)(11)(iv) this section or, in the case of electronic labeling, if it cannot be viewed prior to authorization.

(vi) The radiofrequency devices must remain under legal ownership of the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker, and only transferring physical possession of the devices for pre-sale activity as defined in paragraph (a)(11) of this section is permitted prior to Grant of Certification under § 2.907. The device manufacturer, developer, importer or ultimate consignee, or their designated customs broker must have processes in place to retrieve the equipment in the event that the equipment is not successfully certified and must complete such retrieval immediately after a determination is made that certification cannot be successfully completed.

(vii) The device manufacturer, developer, importer or ultimate consignee, or their designated customs broker must maintain, for a period of sixty (60) months, records identifying the recipient of devices imported for pre-sale activities. Such records must identify the device name and product identifier, the quantity shipped, the date on which the device authorization was sought, the expected FCC ID number, and the identity of the recipient, including contact information. The device manufacturer, developer, importer or ultimate consignee, or their designated customs broker must provide records maintained under this provision upon the request of Commission personnel.

* * * * *

PART 95—PERSONAL RADIO SERVICES

■ 4. The authority citation for part 95 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307.

■ 5. Revise § 95.391 to read as follows:

§ 95.391 Manufacturing, importation, and sales of non-certified equipment prohibited.

No person shall manufacture, import, sell, or offer for sale non-certified equipment for the Personal Radio Services except as provided for in §§ 2.803(c)(2)(i) and 2.1204(a)(11) of this

chapter. *See* § 302(b) of the Communications Act (47 U.S.C. 302a(b)). *See also* part 2, subpart I (§ 2.801 *et seq.*) of this chapter for rules governing marketing of radiofrequency devices; part 2, subpart K (§ 2.1201 *et seq.*) of this chapter for rules governing import conditions.

[FR Doc. 2021–19385 Filed 9–17–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 5 and 97

[IB Docket No. 18–313, FCC 20–54; FR ID 48757]

Mitigation of Orbital Debris in the New Space Age

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collections associated with certain rules adopted in the Report and Order, *Mitigation of Orbital Debris in the New Space Age,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

DATES: The amendments to 47 CFR 5.64(b) and 97.207(g)(1), published at 85 FR 52422 on August 25, 2020, are effective October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Merissa Velez, International Bureau, Satellite Division, at (202) 418–0751. For information regarding the PRA information collection requirements contained in the PRA, contact Cathy Williams, Office of Managing Director, at (202) 418–2918 or *Cathy.Williams@fcc.gov*.

SUPPLEMENTARY INFORMATION: This document announces that OMB approved the information collection requirements in 47 CFR 5.64(b) and 97.207(g)(1), on July 21, 2021. These rules were modified in the Report and Order in IB Docket No. 18–313, FCC 20–54, *Mitigation of Orbital Debris in the New Space Age,* published at 85 FR 52422 on August 25, 2020. The Commission publishes this document as an announcement of the compliance date of the rules. The Report and Order also modified rules in part 25 and there is a separate PRA information collection review for the part 25 rules. Rule amendments adopted in the Report and Order which did not require OMB approval became effective on September 24, 2020.

If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams at *Cathy.Williams@fcc.gov* or Office of Managing Director, Federal Communications Commission, 45 L Street NE, Washington, DC 20554, regarding OMB Control Number 3060–1013. Please include the applicable OMB Control Number(s) in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on July 21, 2021, for the information collection requirements contained in 47 CFR 5.64(b) and 97.207(g)(1). Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number for the information collection requirements in these rules is 3060–1013.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1013.

OMB Approval Date: July 21, 2021.

OMB Expiration Date: July 31, 2024.

Title: Mitigation of Orbital Debris.

Form Number: N/A.

Respondents: Business or other for-profit, not-for-profit institutions.

Number of Respondents: 46 respondents; 46 responses.

Estimated Time per Response: 8 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 301, 303, 307, 308, 309, and 310.

Total Annual Burden: 368 hours.

Annual Cost Burden: $88,550.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: On April 24, 2020, the Commission released a Report and Order in IB Docket No. 18–313, FCC 20–54, *Mitigation of Orbital Debris in the New Space Age,* (Orbital Debris Report and Order). In this Orbital Debris Report and Order, the Commission updated its rules related to orbital debris mitigation, including application requirements. The new rules are designed to ensure that the Commission's actions concerning radio communications, including licensing U.S. spacecraft and granting access to the U.S. market for non-U.S. spacecraft, mitigate the growth of orbital debris, while at the same time not creating undue regulatory obstacles to new satellite ventures. The action will help to ensure that Commission decisions are consistent with the public interest in space remaining viable for future satellites and systems and the many services that those systems provide to the public. The rule revisions also provide additional detail to applicants on what information is expected under the Commission's rules, which can help to increase certainty in the application filing process. While this information collection represents an overall increase in the burden hours, the information collection serves the public interest by ensuring that the Commission and public have necessary information about satellite applicants' plans for mitigation of orbital debris.

Specifically, FCC 20–54 contains the new or modified information collection requirements listed below, applicable to applicants seeking experimental licenses for satellite operations under part 5 of the Commission's rules, as well as to license grantees under part 97 submitting notifications to the Commission prior to launch of a satellite amateur station:

(1) Existing disclosure requirements have been revised to include specific metrics in several areas, including: Probability that the space stations will become a source of debris by collision with small debris and meteoroids that would cause loss of control and prevent disposal; probability of collision between any non-geostationary orbit (NGSO) space station and other large objects; and casualty risk associated

with any individual spacecraft that will be disposed by atmospheric re-entry.

(2) Where relevant, the disclosures must include the following: Use of separate deployment devices, distinct from the space station launch vehicle, that may become a source of orbital debris; potential release of liquids that will persist in droplet form; and any planned proximity operations and debris generation that will or may result from the proposed operations, including any planned release of debris, the risk of accidental explosions, the risk of accidental collision, and measures taken to mitigate those risks.

(3) The existing disclosure requirement to analyze potential collision risk associated with space station(s) orbits has been modified to specify that the disclosure identify characteristics of the space station(s)' orbits that may present a collision risk, including any planned and/or operational space stations in those orbits, and indicate what steps, if any, have been taken to coordinate with the other spacecraft or system, or what other measures the operator plans to use to avoid collision.

(4) For NGSO space stations that will transit through the orbits used by any inhabitable spacecraft, including the International Space Station, the disclosure must include the design and operational strategies, if any, that will be used to minimize the risk of collision and avoid posing any operational constraints to the inhabitable spacecraft.

(5) The disclosure must include a certification that upon receipt of a space situational awareness conjunction warning, the operator will review and take all possible steps to assess the collision risk, and will mitigate the collision risk if necessary. As appropriate, steps to assess and mitigate the collision risk should include, but are not limited to: Contacting the operator of any active spacecraft involved in such a warning; sharing ephemeris data and other appropriate operational information with any such operator; and modifying space station attitude and/or operations.

(6) For NGSO space stations the disclosure must describe the extent of satellite maneuverability.

(7) The disclosure must address trackability of the space station(s). For NGSO space stations the disclosure must also include: (a) How the operator plans to identify the space station(s) following deployment and whether the space station tracking will be active or passive; (b) whether, prior to deployment the space station(s) will be registered with the 18th Space Control Squadron or successor entity; and (c) the extent to which the space station operator plans to share information regarding initial deployment, ephemeris, and/or planned maneuvers with the 18th Space Control Squadron or successor entity, other entities that engage in space situational awareness or space traffic management functions, and/or other operators.

(8) For NGSO space stations, additional disclosures must be provided regarding spacecraft disposal, including, for some space stations, a demonstration that the probability of success of the chosen disposal method is 0.9 or greater for any individual space station, and for multi-satellite systems, a demonstration including additional information regarding efforts to achieve a higher probability of success.

These information collection requirements are contained in 47 CFR 5.64 and 97.207.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–20193 Filed 9–17–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 18–314; FCC 20–159; FR ID 46198]

Further Streamlining FCC Rules Governing Satellite Services

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved new information collection requirements associated with a new rule adopted in *Further Streamlining FCC Rules Governing Satellite Services,* FCC 20–159, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of the new rule.

DATES: The addition of 47 CFR 25.136(h), published at 86 FR 11880 on March 1, 2021, is effective September 20, 2021.

FOR FURTHER INFORMATION CONTACT: Clay DeCell, *Clay.DeCell@fcc.gov,* 202–418–0803.

SUPPLEMENTARY INFORMATION: This document announces that OMB approved the information collection requirements in 47 CFR 25.136(h) on August 26, 2021. This rule was adopted in *Further Streamlining FCC Rules Governing Satellite Services,* FCC 20–159. The Commission publishes this document as an announcement of the effective date for this new rule. The other rule amendments adopted in *Further Streamlining FCC Rules Governing Satellite Services* did not require OMB approval and became effective on March 31, 2021. See 86 FR 11880 (Mar. 1, 2021).

If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 3.317, 45 L Street NE, Washington, DC 20554, regarding OMB Control Number 3060–1215. Please include the OMB Control Number in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the Commission is notifying the public that it received final OMB approval on August 26, 2021, for the information collection requirements contained in 47 CFR 25.136(h). Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number for the information collection requirements in 47 CFR 25.136(h) is 3060–1215. The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1215.

OMB Approval Date: August 26, 2021.

OMB Expiration Date: August 31, 2024.

Title: Use of Spectrum Bands Above 24 GHz for Mobile Radio Services.

Form Number: N/A.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local and tribal government.

Number of Respondents and Responses: 1,670 respondents; 1,670 responses.

Estimated Time per Response: .5–10 hours.

Frequency of Response: On occasion reporting requirement; third party disclosure requirement; upon commencement of service, or within 3 years of effective date of rules; and at end of license term, or 2024 for incumbent licensees.

Obligation to Respond: Statutory authority for this collection are contained in sections 1, 2, 3, 4, 5, 7, 10, 201, 225, 227, 301, 302, 302a, 303, 304, 307, 309, 310, 316, 319, 332, and 336 of the Communications Act of 1934, 47 U.S.C. 151, 152, 153, 154, 155, 157, 160, 201, 225, 227, 301, 302, 302a, 303, 304, 307, 309, 310, 316, 319, 332, 336, Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 1302.

Total Annual Burden: 790 hours.

Total Annual Cost: $581,250.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On November 19, 2020, the Commission released a Report and Order, FCC 20–159, in IB Docket No. 18–314, titled, ''Further Streamlining Part 25 Rules Governing Satellite Services.'' In this Report and Order, among other rule changes, the Commission adopted an optional, extended build-out period for earth station licensees. The optional build-out period increases the allowable time for an earth station to be brought into operation from within one year after licensing, to within: Up to five years and six months for earth stations operating with geostationary satellites; or, up to six years and six months for earth stations operating with non-geostationary satellites. As a companion provision to this new build-out period option, the Commission adopted a requirement for earth station licensees subject to 47 CFR 25.136 to re-coordinate with licensees of Upper Microwave Flexible Use Service (UMFUS) stations if the earth station is brought into operation later than one year after the date of the license grant. The earth station licensee must complete re-coordination within one year before its commencement of operation. The re-coordination should account for any demographic or geographic changes as well as changes to the earth station equipment or configuration. A re-coordination notice must also be filed with the Commission before commencement of earth station operations.

This information collection is used by UMFUS licensees to provide accurate information on the earth station operations notwithstanding the substantially longer earth station build-out period that was adopted. The collection also counterbalances the potential chilling of some UMFUS developments that might otherwise result from the extended earth station build-out periods, and thereby serves as an important check on potential warehousing. Without such information, the Commission would not be able to regulate the shared use of radiofrequencies among earth stations and UMFUS stations in the public interest, in accordance with the Communications Act of 1934, as amended.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–19393 Filed 9–17–21; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 100217097–1757–02; RTID 0648–XB419]

Reef Fish Fishery of the Gulf of Mexico; 2021 Commercial and Recreational Closure of Silk Snapper, Queen Snapper, Blackfin Snapper, and Wenchman

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure (AM) applicable to all harvest of species in the mid-water snapper stock complex, consisting of silk snapper, queen snapper, blackfin snapper, and wenchman in the Gulf of Mexico (Gulf) exclusive economic zone (EEZ). NMFS determined that combined commercial and recreational landings of the species in the mid-water snapper complex in the 2021 fishing year have exceeded the annual catch limit (ACL). Therefore, NMFS closes the Gulf EEZ to all harvest of species in the mid-water snapper complex on September 18, 2021, for the remainder of the 2021 fishing year. This closure is necessary to protect the species in the mid-water snapper complex.

DATES: The closure is effective at 12:01 a.m., local time, September 18, 2021, until January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Kelli O'Donnell, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *kelli.odonnell@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the Gulf reef fish fishery, which includes the mid-water snapper complex (silk snapper, queen snapper, blackfin snapper, and wenchman) under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council. The FMP is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. All weights described in this temporary rule apply as round weight.

The ACL for the mid-water snapper complex is 166,000 lb (75,296 kg) during the fishing year of January 1 through December 31. As specified in 50 CFR 622.41(i), if NMFS estimates that the sum of commercial and recreational landings (total landings) exceed the stock complex ACL, then during the following fishing year, if total landings again reach or are projected to reach the stock complex ACL, NMFS will close the commercial and recreational sectors for the remainder of that fishing year by filing a notification to that effect with the Office of the Federal Register.

In the 2020 fishing year, combined commercial and recreational landings of species in the mid-water snapper complex exceeded the stock ACL. As of September 7, 2021, available commercial and recreational landings data from the NMFS Southeast Fishery Science Center indicate that stock ACL for the mid-water snapper complex for the 2021 fishing year has been exceeded.

Accordingly, NMFS closes the Gulf EEZ to all harvest of species from the mid-water snapper complex from 12:01 a.m., local time, on September 18, 2021, through December 31, 2021, the end of the current fishing year. During the closure, the commercial sale or purchase of species from the mid-water snapper complex harvested from the Gulf EEZ is prohibited, and the recreational bag and possession limits are zero. Commercial and recreational harvest of species in the mid-water snapper complex will reopen on January 1, 2022.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 622.41(i), which was issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule implementing the stock complex ACL and the associated AM has already been subject to notice and public comment, and all that remains is to notify the public of the closure. Such procedures are also contrary to the public interest because of the need to immediately implement the closure to protect the mid-water snapper stock complex. The capacity of the fishing fleet allows for rapid harvest of the ACL and the ACL has already been met. Prior notice and opportunity for public comment would require time and could result in additional harvest.

For the aforementioned reasons, there is good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 15, 2021.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–20285 Filed 9–15–21; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 180720681–8999–02; RTID 0648–XB426]

Snapper-Grouper Fishery of the South Atlantic; 2021 Recreational Accountability Measure and Closure for South Atlantic Golden Tilefish

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) applicable to recreational harvest of golden tilefish in the exclusive economic zone (EEZ) of the South Atlantic for the 2021 fishing year through this temporary rule. NMFS estimates that recreational landings of golden tilefish in 2021 have exceeded the recreational annual catch limit (ACL). Therefore, NMFS closes the golden tilefish recreational sector in the South Atlantic EEZ on September 20, 2021. This closure is necessary to protect the golden tilefish resource.

DATES: This rule is effective 12:01 a.m., local time, September 20, 2021, until 12:01 a.m., local time, January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes golden tilefish and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

On January 4, 2019, NMFS implemented management measures for golden tilefish through a final rule for Amendment 28 to the Snapper-Grouper FMP (83 FR 233; December 4, 2018). That final rule set a recreational ACL of 2,316 fish (50 CFR 622.193(a)(2)(i)) and revised the recreational AM. The inseason recreational AM states that if recreational landings reach or are projected to reach the recreational ACL, then the recreational sector will be closed for the remainder of the fishing year (50 CFR 622.193(a)(2)(i)).

Landings data from the NMFS Southeast Fisheries Science Center indicate that the golden tilefish recreational ACL of 2,316 fish has been reached. Therefore, this temporary rule implements an AM to close the golden tilefish recreational sector of the snapper-grouper fishery for the remainder of the 2021 fishing year. As a result, the recreational sector for golden tilefish in the South Atlantic EEZ will be closed effective 12:01 a.m., local time September 20, 2021. The recreational sector for golden tilefish will open on January 1, 2022, the beginning of the 2022 fishing year and the recreational fishing season. During the closure, the bag and possession limits for golden tilefish in or from the South Atlantic EEZ are zero.

NMFS also closed the commercial sector for golden tilefish for the remainder of the 2021 fishing year (86 FR 29209; June 1, 2021). Therefore, as of the date of this recreational closure, all harvest and possession of golden tilefish in the South Atlantic EEZ is prohibited.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 622.193(a)(2)(i), which was issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), the NMFS Assistant Administrator (AA) finds good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule that established the recreational ACL and AM for golden tilefish has already been subject to notice and comment, and all that remains is to notify the public of the closure. Such procedures are contrary to the public interest because of the need to immediately implement this action to protect the golden tilefish stock. The recreational ACL has been reached and prior notice and opportunity for public comment would require time, potentially resulting in a harvest well in excess of the established ACL.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–20287 Filed 9–15–21; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 210513–0105; RTID 0648–XB421]

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Closed Area I Scallop Access Area to General Category Individual Fishing Quota Scallop Vessels

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the Closed Area I Scallop Access Area is closed to Limited Access General Category Individual Fishing Quota scallop vessels for the remainder of the 2021 fishing year. Regulations require this action once it is projected that 100 percent of trips allocated to the Limited Access General Category Individual Fishing Quota scallop vessels for the Closed Area I Scallop Access Area will be taken. This action is intended to prevent the number of trips in the Closed Area I Scallop Access Area from exceeding what is allowed under the Atlantic Sea Scallop Fishery Management Plan.

DATES: Effective 0001 hr local time, September 17, 2021, through March 31, 2022.

FOR FURTHER INFORMATION CONTACT: Louis Forristall, Fishery Management Specialist, (978) 281–9321.

SUPPLEMENTARY INFORMATION: Regulations governing fishing activity in the Sea Scallop Access Areas can be found in 50 CFR 648.59 and 648.60. These regulations authorize vessels issued a valid Limited Access General Category (LAGC) Individual Fishing Quota (IFQ) scallop permit to fish in the Closed Area I Scallop Access Area under specific conditions, including a total of 856 trips that may be taken during the 2021 fishing year. Section 648.59(g)(3)(iii) requires NMFS to close the Closed Area I Scallop Access Area to LAGC IFQ permitted vessels for the remainder of the fishing year once it determines that the allocated number of trips for the fishing year are projected to be taken.

Based on trip declarations by LAGC IFQ scallop vessels fishing in the Closed Area I Scallop Access Area, analysis of fishing effort, and other information, NMFS projects that 856 trips will be taken as of September 15, 2021. Therefore, in accordance with § 648.59(g)(3)(iii), NMFS is closing the Closed Area I Scallop Access Area to all LAGC IFQ scallop vessels as of September 17, 2021. No vessel issued an LAGC IFQ permit may fish for, possess, or land scallops in or from the Closed Area I Scallop Access Area after 0001 local time, September 17, 2021. Any LAGC IFQ vessel that has declared into the Closed Area I Access Area scallop fishery, complied with all trip notification and observer requirements, and crossed the Vessel Monitoring System demarcation line on the way to the area before 0001, September 17, 2021, may complete its trip without being subject to this closure. This closure is in effect for the remainder of the 2021 scallop fishing year, through March 31, 2022.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act. This action is required by 50 CFR part 648, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. The Closed Area I Scallop Access Area opened for the 2021 fishing year on April 1, 2021. The regulations at § 648.59(g)(3)(iii) require this closure to ensure that LAGC IFQ scallop vessels do not take more than their allocated number of trips in the area. The projected date on which the LAGC IFQ fleet will have taken all of its allocated trips in an Access Area becomes apparent only as trips into the area occur on a real-time basis and as activity trends begin to appear. As a result, NMFS can only make an accurate projection very close in time to when the fleet has taken all of its trips. To allow LAGC IFQ scallop vessels to continue to take trips in the Closed Area I Scallop Access Area during the period necessary to publish and receive comments on a proposed rule would likely result in the vessels taking much more than the allowed number of trips in the Closed Area I Scallop Access Area. Excessive trips and harvest from the Closed Area I Scallop Access Area would result in excessive fishing effort in the area, where effort controls are critical, thereby undermining conservation objectives of the Atlantic Sea Scallop Fishery Management Plan and requiring more restrictive future management measures. Also, the public had prior notice and full opportunity to comment on this closure process when it was enacted, as well as during the public comment period on the action to set specifications for the 2021 fishing year. For these same reasons, NMFS further finds, under 5 U.S.C 553(d)(3), good cause to waive the 30-day delayed effectiveness period.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 15, 2021.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–20288 Filed 9–15–21; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 86, No. 179
Monday, September 20, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0793; Project Identifier MCAI–2021–00372–E]

RIN 2120–AA64

Airworthiness Directives; Safran Helicopter Engines, S.A. (Type Certificate Previously Held by Turbomeca S.A.) Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2005–12–08, which applies to Safran Helicopter Engines, S.A. (Safran Helicopter Engines) Arrius 2B1, 2B1A, 2B1A–1, and 2B2 model turboshaft engines. AD 2005–12–08 requires replacing the software in the engine electronic control unit (EECU). Since the FAA issued AD 2005–12–08, the manufacturer determined that certain previously affected EECUs are not subject to the unsafe condition identified in AD 2005–12–08. This proposed AD would retain the requirements of AD 2005–12–08 for engines with a certain EECU part number (P/N) installed. This proposed AD would also prohibit installation of an affected EECU onto any engine. 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 November 4, 2021.

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

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

For service information identified in this NPRM, contact Safran Helicopter Engines, S.A., Avenue du 1er Mai, 40220 Tarnos, France; phone: +33 (0) 5 59 74 45 00. You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0793; 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 mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Wego Wang, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7134; fax: (781) 238–7199; email: *wego.wang@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–0793; Project Identifier MCAI–2021–00372–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Wego Wang, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2005–12–08, Amendment 39–14124 (70 FR 34334, June 14, 2005), (AD 2005–12–08), for all Turbomeca S.A. (Turbomeca) Arrius 2B1, 2B1A, 2B1A–1, and 2B2 model turboshaft engines. AD 2005–12–08 was prompted by a report of simultaneous loss of automatic control of both engines of an Airbus Helicopters Deutschland (formerly Eurocopter Deutschland) EC135 helicopter during flight. AD 2005–12–08 requires replacing the software in the EECU. The agency issued AD 2005–12–08 to prevent simultaneous loss of automatic control of both engines and subsequent loss of control of the helicopter.

Actions Since AD 2005–12–08 Was Issued

Since the FAA issued AD 2005–12–08, the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2021–0088, dated March 24, 2021.

EASA AD 2021–0088 was revised by EASA AD 2021–0088R1, dated July 26, 2021 (EASA AD 2021–0088R1) (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

An occurrence was reported of simultaneous loss of automatic control in flight of both ARRIUS 2B1 engines on an EC135 T1 helicopter. Loss of automatic control would result, for each engine, from a difference between the position datum of the fuel metering valve and its measured position.

This condition, if not corrected, could lead to increased work for flight crew during certain flight phases, possibly resulting in reduced control of the helicopter.

To address this potential unsafe condition, Turboméca developed mod TU80C, TU81C, TU82C and TU90C to improve the DECU software for ARRIUS 2B1 engines without overspeed option, ARRIUS 2B1 engines with overspeed option, ARRIUS 2B1A and ARRIUS 2B2 engines, and DGAC France issued AD F–2004–017 (later revised) to require engine modification.

Since that [DGAC France] AD was issued, it was determined that a DECU having a P/N which corresponds to Turboméca mod TU80C, TU81C, TU82C, TU90C or later software is not affected by the software modification requirement. DGAC France AD F–2004–017R1 did not specifically identify any affected DECU P/N(s).

For the reason described above, this [EASA] AD retains the requirements of DGAC France AD F–2004–017R1 (EASA approval 2004–1618), which is superseded, and limits the required actions to engines with an affected DECU P/N installed. This [EASA] AD also prohibits (re)installation of affected DECU on any engine.

This [EASA] AD is revised to provide clarification on affected and serviceable DECU.

You may obtain further information by examining the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0793.

In addition, Turbomeca issued Mandatory Service Bulletin (MSB) No. 319 73 2082, Version D, dated June 6, 2011. The manufacturer discovered an error in Version C of the MSB and determined that the requirement to replace the EECU or upgrade the EECU software should be applicable to only engines with a certain EECU P/N installed.

FAA's Determination

This product has been approved by EASA and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified the FAA of the unsafe condition described in the MCAI and service information. The FAA is issuing this NPRM because the agency evaluated all the relevant information provided by EASA and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Turbomeca Mandatory Service Bulletin (MSB) No. 319 73 2080, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2081, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2082, Update No. 1, dated February 13, 2004, Version C, dated July 31, 2008, and Version D, dated June 6, 2011; and Turbomeca MSB No. 319 73 2090, Original Issue, dated February 13, 2004. This service information specifies procedures for upgrading the EECU by either replacing the EECU or by uploading the software to the EECU. These documents are distinct since they apply to different engine models in different configurations. The Director of the Federal Register previously approved Turbomeca MSB No. 319 73 2080, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2081, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2082, Update No. 1, dated February 13, 2004; and Turbomeca MSB No. 319 73 2090, Original Issue, dated February 13, 2004 for incorporation by reference on June 29, 2005 (70 FR 34334, June 14, 2005). This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would retain all the requirements of AD 2005–12–08. This proposed AD would require replacement of the EECU or upgrade of the EECU software for engines with a certain EECU P/N installed. This proposed AD would also prohibit installation of an affected EECU onto any engine.

Differences Between the Proposed AD and MCAI or Service Information

EASA AD 2021–0088R1, dated July 26, 2021, uses the term digital engine control unit (DECU), whereas the Turbomeca MSBs and this proposed AD use EECU. These terms refer to the same part.

Turbomeca MSB No. 319 73 2080, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2081, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2082, Update No. 1, dated February 13, 2004, Version C, dated July 31, 2008, and Version D, dated June 6, 2011; and Turbomeca MSB No. 319 73 2090, Original Issue, dated February 13, 2004, instruct operators to notify Turbomeca that the EECUs have been replaced by returning the completed compliance certificate. This proposed AD would not mandate returning the completed compliance certificate to Turbomeca.

EASA AD 2021–0088R1 and the Turbomeca service information reference Arrius 2B1A_1 or Arrius 2B1A–1 model turboshaft engines, whereas this AD references Arrius 2B1A model turboshaft engines. Arrius 2B1A_1 model turboshaft engines are Arrius 2B1A model turboshaft engines with modification (mod) TU45C.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 221 engines installed on helicopters of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace the EECU	1 work-hour × $85 per hour = $85	$35,000	$35,085	$7,753,785
Upgrade the EECU software	2 work-hours × $85 per hour = $170	0	170	37,570

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 has 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 that the 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:

■ a. Removing Airworthiness Directive 2005–12–08, Amendment 39–14124 (70 FR 34334, June 14, 2005); and

■ b. Adding the following new airworthiness directive:

Safran Helicopter Engines, S.A. (Type Certificate previously held by Turbomeca S.A.): Docket No. FAA–2021–0793; Project Identifier MCAI–2021–00372–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 4, 2021.

(b) Affected ADs

This AD replaces AD 2005–12–08, Amendment 39–14124 (70 FR 34334, June 14, 2005) (AD 2005–12–08).

(c) Applicability

This AD applies to Safran Helicopter Engines, S.A. (Type Certificate previously held by Turbomeca S.A.) Arrius 2B1, Arrius 2B1A, (including those that embody modification (mod) TU45C, identified as Arrius 2B1A_1) and Arrius 2B2 model turboshaft engines with an installed engine electronic control unit (EECU) having part number (P/N) 70EMF01080 or 70EMF01090—for Arrius 2B1 model turboshaft engines without overspeed protection option (TU 19C); P/N 70EMF01100 or P/N 70EMF01120—for Arrius 2B1 model turboshaft engines with overspeed protection option (TU 67C or TU 23C); P/N 70EMH01000 or 70EMH01010—for Arrius 2B1A model turboshaft engines; or P/N 70EMM01000—for Arrius 2B2 model turboshaft engines.

Note 1 to paragraph (c): Turbomeca Mandatory Service Bulletin (MSB) No. 319 73 2082, Version D, dated June 6, 2011, references Arrius 2B1A_1 model turboshaft engines. Arrius 2B1A model turboshaft engines with mod TU 45C applied are identified as Arrius 2B1A_1 on the engine identification plate.

(d) Subject

Joint Aircraft System Component (JASC) Code 7600, Engine Controls.

(e) Unsafe Condition

This AD was prompted by a report of simultaneous loss of automatic control of both engines of an Airbus Helicopters Deutschland (formerly Eurocopter Deutschland) EC135 helicopter during flight. The FAA is issuing this AD to prevent simultaneous loss of automatic control of both engines. The unsafe condition, if not addressed, could result in failure of the engines and loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) For engines with an EECU having P/N 70EMF01090, 70EMF01100, 70EMF01120, 70EMH01010, or 70EMM01000, within 90 days after June 29, 2005 (the effective date of AD 2005–12–08), or before further flight, whichever occurs later, upload the EECU software on both engines of the helicopter simultaneously using paragraph 2, Instructions to be incorporated, of the applicable Turbomeca MSB listed in Table 1 to paragraph (g) of this AD, or replace the EECU with a part eligible for installation.

(2) For engines with an EECU having P/N 70EMF01080 or 70EMH01000, within 90 days after June 29, 2005 (the effective date of AD 2005–12–08), or before further flight, whichever occurs later, replace the affected EECU with a part eligible for installation.

Table 1 to paragraph (g) – Applicable MSBs

For—	Use—
Arrius 2B1 engines with EECUs that have incorporated Modification TU 19C	Turbomeca MSB No. 319 73 2080, Update No. 1, dated February 13, 2004
Arrius 2B1 engines with EECUs that have incorporated Modification TU 67C or TU 23C	Turbomeca MSB No. 319 73 2081, Update No. 1, dated February 13, 2004
Arrius 2B1A and 2B1A1_1 engines	Turbomeca MSB No. 319 73 2082, Update No. 1, dated February 13, 2004, Version C, dated July 31, 2008, or Version D, dated June 6, 2011
Arrius 2B2 engines	Turbomeca MSB No. 319 73 2090, Original Issue, dated February 13, 2004

(h) Installation Prohibition

After the effective date of this AD, do not install onto any engine any EECU having a P/N identified in paragraph (c) of this AD.

(i) Definition

For the purpose of this AD, a ''part eligible for installation'' is an EECU having a P/N that is not identified in paragraph (c) of this AD.

(j) No Reporting Requirements

The reporting requirements specified in Turbomeca MSB No. 319 73 2080, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2081, Update No. 1, dated February 13, 2004; Turbomeca MSB No. 319 73 2082, Update No. 1, dated February 13, 2004, Version C, dated July 31, 2008, and Version D, dated June 6, 2011; and Turbomeca MSB No. 319 73 2090, Original Issue, dated February 13, 2004, are not required by this AD.

(k) Alternative Methods of Compliance (AMOCs)

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

(l) Related Information

(1) For more information about this AD, contact Wego Wang, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7134; fax: (781) 238–7199; email: *wego.wang@faa.gov*.

(2) Refer to European Union Aviation Safety Agency (EASA) AD 2021–0088R1, dated July 26, 2021, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2021–0793.

(3) For service information identified in this AD, contact Safran Helicopter Engines, S.A., Avenue du 1er Mai, 40220 Tarnos, France; phone: +33 (0) 5 59 74 45 00. You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Issued on September 14, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–20230 Filed 9–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0783; Project Identifier 2019–SW–009–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 certain Bell Textron Canada Limited (type certificate previously held by Bell Helicopter Textron Canada Limited) Model 505 helicopters. This proposed AD was prompted by the determination that reducing the pressure altitude limitations for certain fuel types is necessary. This proposed AD would require revising the existing Rotorcraft Flight Manal (RFM) for your helicopter. 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 November 4, 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 NPRM, contact Bell Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J 1R4, Canada; telephone 1–450–437–2862 or 1–800–363–8023; fax 1–450–433–0272; email *productsupport@bellflight.com*; or at *https://www.bellflight.com/support/contact-support*. You may view this

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

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0783; 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: Rao Edupuganti, Aerospace Engineer, Dynamic Systems Section, Technical Innovation Policy Branch, Policy & Innovation Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@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–2021–0783; Project Identifier 2019–SW–009–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 Rao Edupuganti, Aerospace Engineer, Dynamic Systems Section, Technical Innovation Policy Branch, Policy & Innovation Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@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 for Canada, has issued Canadian AD CF–2019–08, dated March 5, 2019 (Canadian AD CF–2019–08), to correct an unsafe condition for Bell Helicopter Textron Canada Limited Model 505 helicopters serial numbers 65011 and subsequent. Transport Canada advises of the need to reduce the altitude limitations for Jet B and JP–4 wide-cut fuels following unsatisfactory performance of the engine at the original higher altitude limitations with these wide-cut fuels. This condition, if not addressed, could result in low fuel pressure, engine flame-out, or engine power interruption (a change in any engine performance parameter—including but not limited to gas generator speed, power turbine speed, main gas temperature, or output torque—outside its normal limits for the prevailing operating conditions).

Accordingly, Canadian AD CF–2019–08 requires revising the RFM to reflect the reduced altitude operating limitations for Jet B and JP–4 wide-cut fuels.

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 Under 1 CFR Part 51

The FAA reviewed Figure 1–6. Fuel Operating Envelope (Sheet 1 of 1), of Bell 505 Rotorcraft Flight Manual BHT–505–FM–1, Revision 3, dated July 25, 2018, which specifies limitations, normal and emergency procedures, performance data, weight and balance information, and provides a list of approved optional equipment supplements. This revision of the service information includes an updated figure of the fuel operating envelope showing the reduced pressure altitude limitations for Jet B and JP–4 fuels.

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

Proposed AD Requirements in This NPRM

This proposed AD would require revising the existing RFM for your helicopter by updating the fuel operating envelope figure to require reduced pressure altitude limitations for Jet B and JP–4 fuels. Incorporating the RFM revision may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a)(1) through (4) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439. This is an exception to our standard maintenance regulations.

Differences Between This Proposed AD and the Transport Canada AD

Canadian AD CF–2019–08 requires updating the RFM to Bell 505 RFM BHT–505–FM–1 Revision 3 or later revisions approved by Transport Canada, whereas this proposed AD would require revising the Limitations Section of the RFM for your helicopter by replacing the existing Figure 1–6. with Figure 1–6. Fuel Operating Envelope (Sheet 1 of 1) of Bell 505 RFM BHT–505–FM–1, Revision 3, dated July 25, 2018.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 73 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

Revising the existing RFM for your helicopter would take about 0.5 work-hour for an estimated cost of $43 per helicopter or $3,139 for the U.S. fleet.

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–2021–0783; Project Identifier 2019–SW–009–AD.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 4, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bell Helicopter Textron Canada Limited (type certificate previously held by Bell Helicopter Textron Canada Limited) Model 505 helicopters having serial number 65011 and subsequent, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 7300, Engine fuel and control.

(e) Unsafe Condition

This AD was prompted by the determination that reducing the pressure altitude limitations for certain fuel types is necessary. The FAA is issuing this AD to address unsatisfactory flight performance of the engine above pressure altitude limitations for Jet B and JP–4 fuels. The unsafe condition, if not addressed, could result in low fuel pressure, engine flame-out, or engine power interruption.

(f) Compliance

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

(g) Required Actions

Within 30 calendar days after the effective date of this AD, revise the Limitations Section of the existing Rotorcraft Flight Manual (RFM) for your helicopter by replacing Figure 1–6. with Figure 1–6. Fuel Operating Envelope (Sheet 1 of 1) of Bell 505 Rotorcraft Flight Manual BHT–505–FM–1, Revision 3, dated July 25, 2018 (BHT–505–FM–1 Revision 3). Using a different document with information identical to that in Figure 1–6. Fuel Operating Envelope (Sheet 1 of 1) of BHT–505–FM–1 Revision 3 is acceptable for compliance with the requirements of this AD. The action required by this paragraph may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a)(1) through (4) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

(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 Rao Edupuganti, Aerospace Engineer, Dynamic Systems Section, Technical Innovation Policy Branch, Policy & Innovation Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@faa.gov*.

(2) For service information identified in this AD, contact Bell Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J 1R4, Canada; telephone 1–450–437–2862 or 1–800–363–8023; fax 1–450–433–0272; email *productsupport@bellflight.com*; or at *https://www.bellflight.com/support/contact-support*. You may view 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–2019–08, dated March 5, 2019. You may view the Transport Canada AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2021–0783.

Issued on September 7, 2021.

Ross Landes,

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

[FR Doc. 2021–19964 Filed 9–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0364; Project Identifier MCAI–2019–00119–E]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG (Type Certificate Previously Held by Rolls-Royce plc) Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) that applied to all Rolls-Royce Deutschland Ltd & Co KG (RRD) Trent 1000–A2, Trent 1000–AE2, Trent 1000–C2, Trent 1000–CE2, Trent 1000–D2, Trent 1000–E2, Trent 1000–G2, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 model turbofan engines. This action revises the NPRM by requiring revision of the engine Time Limits Manual (TLM) life limits of certain critical rotating parts and direct accumulation counting (DAC) data files, 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. Since these actions would impose an additional burden over those in the NPRM, the agency is requesting comments on this SNPRM.

DATES: The FAA must receive comments on this SNPRM by November 4, 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 EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone: +49 221 8999 000; email: *ADs@easa.europa.eu.* You may find this material on the EASA website at *https://ad.easa.europa.eu.* For RRD service information identified in this SNPRM, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, DE24 8BJ, United Kingdom; phone: +44 (0)1332 242424; fax: +44 (0)1332 249936; website: *https://www.rolls-royce.com/contact-us.aspx.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759. The EASA material is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0364.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0364; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, this SNPRM, the EASA AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; fax: (781) 238–7199; email: *kevin.m.clark@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–0364; Project Identifier MCAI–2019–00119–E'' 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 again revise 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 proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this SNPRM 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 SNPRM, 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 SNPRM. Submissions containing CBI should be sent to Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD that would apply to all RRD Trent 1000–A2, Trent 1000–AE2, Trent 1000–C2, Trent 1000–CE2, Trent 1000–D2, Trent 1000–E2, Trent 1000–G2, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 model turbofan engines. The NPRM published in the **Federal Register** on April 10, 2020 (85 FR 20216). The NPRM was prompted by the manufacturer revising the engine TLM life limits of certain critical rotating parts and DAC data files. In the NPRM, the FAA proposed to require operators to revise the airworthiness limitation section (ALS) of their approved aircraft maintenance program (AMP) by incorporating the revised tasks of the applicable TLM for each affected model turbofan engine.

Actions Since the NPRM Was Issued

Since the FAA issued the NPRM, RRD has revised the tasks of the TLM for affected engines, updating the life limits of certain critical rotating parts and updating the DAC data files. RRD published Rolls-Royce Trent 1000 TLM T-Trent-10RRC, Chapters 05–10 and 05–20, Revision 20, both dated August 1, 2020.

Additionally, since the FAA issued the NPRM, EASA, which is the Technical Agent for the Member States of the European Union, superseded AD 2019–0058R1, dated April 2, 2019, with AD 2020–0241, dated November 5, 2020 (EASA AD 2020–0241), to require updates to the life limits and the DAC data files for affected engines.

Comments

The FAA received one comment on the NPRM from The Boeing Company (Boeing). The agency considered the comment received. Boeing supported the NPRM without change.

FAA's Determination

These engines have been approved by the aviation authority of another country and are 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 about the unsafe condition described in the EASA AD referenced in

this proposed AD. The FAA is issuing this SNPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design. Certain changes described above expand the scope of the NPRM. As a result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2020–0241. EASA AD 2020–0241 requires accomplishment of the actions specified in RRD's updated TLM for affected engines as specified in Rolls-Royce Trent 1000 TLM T-Trent-10RRC, Chapters 05–10 and 05–20, Revision 20, dated August 1, 2020. 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 **ADDRESSES**.

Proposed AD Requirements in This SNPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0241, 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, the FAA proposes to incorporate EASA AD 2020–0241 in the FAA final rule. This proposed AD would require compliance with EASA AD 2020–0241 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 EASA AD 2020–0241 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 EASA AD 2020–0241.

Service information specified in EASA AD 2020–0241 that is required for compliance with it will be available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0364 after the FAA final rule is published.

Differences Between This Proposed AD and the EASA AD

This AD does not mandate the ''Maintenance Tasks and Replacement of Critical Parts'' and ''Corrective Action(s)'' sections of EASA AD 2020–0241. Where EASA AD 2020–0241 requires compliance from its effective date, this proposed AD requires using the effective date of this AD. Where EASA AD 2020–0241 requires operators revising the approved AMP within 12 months from its effective date, this proposed AD requires revising the approved AMP within 90 days after the effective date of this AD. This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2020–0241.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 20 engines installed on airplanes of U.S. Registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the AMP	1 work-hour × $85 per hour = $85	$0	$85	$1,700

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) 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:

Rolls-Royce Deutschland Ltd & Co KG (Type Certificate previously held by Rolls-Royce

plc): Docket No. FAA–2020–0364; Project Identifier MCAI–2019–00119–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 4, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG (Type Certificate previously held by Rolls-Royce plc) (RRD) Trent 1000–A2, Trent 1000–AE2, Trent 1000–C2, Trent 1000–CE2, Trent 1000–D2, Trent 1000–E2, Trent 1000–G2, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 model turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the engine Time Limits Manual (TLM) life limits of certain critical rotating parts, updating direct accumulation counting (DAC) data files, and updating certain maintenance tasks. The FAA is issuing this AD to prevent the failure of critical rotating parts. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency AD 2020–0241, dated November 5, 2020 (EASA AD 2020–0241).

(h) Exceptions to EASA AD 2020–0241

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0241 are not required by this AD.

(2) Where EASA AD 2020–0241 requires compliance from its effective date, this AD requires using the effective date of this AD.

(3) Paragraph (3) of EASA AD 2020–0241 specifies revising the approved AMP within 12 months after its effective date, but this AD requires revising the existing approved AMP within 90 days after the effective date of this AD.

(4) This AD does not mandate compliance with the ''Remarks'' section of EASA AD 2020–0241.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2020–0241 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO 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 ECO Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *ANE-AD-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.

(k) Related Information

(1) For more information about EASA AD 2020–0241, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone: +49 221 8999 000; email: *ADs@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, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759. This material may be found in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0364.

(2) For more information about this AD, contact Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; fax: (781) 238–7199; email: *kevin.m.clark@faa.gov.*

(3) For RRD service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, DE24 8BJ, United Kingdom; phone: +44 (0)1332 242424; fax: +44 (0)1332 249936; website: *https://www.rolls-royce.com/contact-us.aspx.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Issued on September 14, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–20234 Filed 9–17–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 93

[Docket No. FAA–2020–0862]

COVID–19 Related Relief Concerning Operations at Chicago O'Hare International Airport, John F. Kennedy International Airport, Los Angeles International Airport, Newark Liberty International Airport, New York LaGuardia Airport, Ronald Reagan Washington National Airport, and San Francisco International Airport for the Winter 2021/2022 Scheduling Season

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

ACTION: Notice of proposed extension of a limited, conditional waiver of the minimum slot usage requirement for all international operations.

SUMMARY: The FAA proposes to extend through March 26, 2022, the Coronavirus (COVID–19)-related limited, conditional waiver of the minimum slot usage requirement at John F. Kennedy International Airport (JFK), New York LaGuardia Airport (LGA), and Ronald Reagan Washington National Airport (DCA) that the FAA has already made available through October 30, 2021, for all international operations. Similarly, the FAA proposes to extend through March 26, 2022, its COVID–19-related limited, conditional policy for prioritizing flights canceled at designated International Air Transport Association (IATA) Level 2 airports in the United States, for purposes of establishing a carrier's operational baseline in the next corresponding season, for all international operations. These IATA Level 2 airports include Chicago O'Hare International Airport (ORD), Newark Liberty International Airport (EWR), Los Angeles International Airport (LAX), and San Francisco International Airport (SFO). This relief would be limited to slots and approved operating times used by any carrier for international operations only, through March 26, 2022, and would be subject to the same terms and conditions, with minor modifications, that the FAA has already applied to the relief that remains available through October 30, 2021. This notice invites stakeholders to submit comments with detailed supporting information relevant to FAA making a final decision. The FAA anticipates subsequently providing notice of its final decision.

DATES: Submit comments on or before September 27, 2021.

ADDRESSES: Submit written views and supporting data by email to the Slot Administration Office at *9-FAA-Slot-Policy@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Al Meilus, Manager, Slot Administration, AJR–G, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–2822; email *Al.Meilus@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On March 16, 2020, the FAA granted a limited waiver of the minimum slot usage requirements [1] to carriers operating at all slot-controlled airports in the United States (DCA, JFK, and LGA) [2] and related relief to carriers operating at designated IATA Level 2 airports in the United States (EWR, LAX, ORD, SFO) due to the extraordinary impacts on the demand for air travel resulting from the COVID–19 pandemic.[3] Since the initial slot usage waiver and related relief was provided, the FAA has taken action to extend the relief provided on three occasions subject to certain substantive changes, including the addition of conditions, as the COVID–19 situation continued to evolve.[4] The most recent limited, conditional extension of COVID–19 related relief was issued by the FAA on January 13, 2021, and is due to expire on October 31, 2021.[5]

[1] The FAA has authority for developing ''plans and policy for the use of the navigable airspace'' and for assigning ''by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.'' 49 U.S.C. 40103(b)(1). The FAA manages slot usage requirements under the authority of 14 CFR 93.227 at DCA and under the authority of Orders at JFK and LGA. *See* Operating Limitations at John F. Kennedy International Airport, 85 FR 58258 (Sep. 18, 2020); Operating Limitations at New York LaGuardia Airport, 85 FR 58255 (Sep. 18, 2020).

[2] Although DCA and LGA are not designated as IATA Level 3 slot-controlled airports given that these airports primarily serve domestic destinations, the FAA limits operations at these airports via rules at DCA and an Order at LGA that are equivalent to IATA Level 3. *See* FN 1. The FAA reiterates that the relief provided in the March 16, 2020, notice (85 FR 15018), the April 17, 2020, notice (85 FR 21500), the October 7, 2020, notice (85 FR 63335), and this policy statement, extends to all allocated slots, including slots allocated by exemption.

[3] Notice of Limited Waiver of the Slot Usage Requirement, 85 FR 15,018 (Mar. 16, 2020).

[4] Notice of Extension of Limited Waiver of the Minimum Slot Usage Requirement, 85 FR 21,500 (Apr. 17, 2020); Extension of Limited Waiver of the Minimum Slot Usage Requirement, 85 FR 63,335 (Oct. 7, 2020); and FAA Policy Statement: Limited, Conditional Extension of COVID–19 Related Relief for the Summer 2021 Scheduling Season (Docket No. FAA–2020–0862–0302).

[5] FAA Policy Statement: Limited, Conditional Extension of COVID–19 Related Relief for the Summer 2021 Scheduling Season (Docket No. FAA–2020–0862–0302).

Current COVID–19 Situation

Since the FAA's January 13, 2021, policy statement granting a limited, conditional extension of COVID–19-related relief at slot-controlled airports and IATA Level 2 airports in the United States, COVID–19 has continued to cause disruption globally and the timeline for recovery from this global pandemic remains uncertain. The World Health Organization (WHO) reports COVID–19 cases in more than 200 countries, areas, and territories worldwide.[6] For the week ending September 12, 2021, the WHO reported nearly 4 million new COVID–19 cases and just over 62,000 new deaths, bringing the cumulative total to more than 224 million reported COVID–19 cases and more than 4.6 million deaths globally since the start of the COVID–19 pandemic.[7]

The WHO reports that it is monitoring multiple variants globally; currently the WHO has classified four different variants as ''variants of concern'' and five different variants as ''variants of interest.'' [8] The Center for Disease Control (CDC) is monitoring four variants of COVID–19 in the United States.[9] These variants include: The B.1.1.7 (Alpha), B.1.351 (Beta), P.1 (Gamma), and B.1.617.2 (Delta).[10] The CDC has stated that these variants of concern—including the current dominant Delta variant—spread more easily and quickly. However, the CDC reports that so far, studies suggest that the current Food and Drug Administration (FDA)-approved or authorized vaccines do work against the circulating variants.[11]

On January 21, 2021, President Biden announced the National Strategy for the COVID–19 Response and Pandemic Preparedness, a national strategy to beat the COVID–19 pandemic.[12] The strategy is a comprehensive plan that starts with restoring public trust and mounting an aggressive, safe, and effective vaccination campaign while continuing with the steps that stop the spread like expanded masking, testing, and social distancing. On September 9, 2021, President Biden announced a six-pronged approach to expand vaccinations, provide booster shots, keep schools safely open, increase testing and masking, protect the economic recovery, and improve care for those with COVID–19.[13]

Currently three COVID–19 vaccines have been authorized for emergency use or approved by the FDA.[14] As of September 13, 2021, 53.9% of Americans are fully vaccinated and 63.2% of Americans have received at least one dose.[15] Increased rates of vaccination in the U.S., along with other measures to stop the spread have resulted in an overall decline of the U.S. COVID–19 infection rate since the previous COVID–19 waiver proceeding. However, cases increased again following the U.S. reaching its lowest rates of infection experienced since the week of March 16, 2020 (79,358 confirmed new cases for the week of June 14 reflected the lowest rate of infection since the week of March, 16, 2020).[16] When the FAA extended COVID–19-related relief on January 13, 2021, the number of confirmed cases of COVID–19 in the U.S. for the week of January 11, 2021, based on WHO data, was 1,580,016.[17] For the week ending September 12, 2021, which is the most recent week for which data is available, the WHO reports 1,034,836 confirmed cases in the United States.[18]

The U.S. is attempting to distribute vaccines globally to help vaccination numbers improve.[19] On August 18, 2021, President Biden announced that in the months of June and July the United States had donated 100 million doses and that in the coming months of fall and early winter another 100 million boosters and 200 million

[6] *https://covid19.who.int/table.*

[7] COVID–19 weekly epidemiological update, September 14, 2021, available at: *https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports See also https://covid19.who.int/* for WHO COVID–19 Dashboard with the most current number of cases reported.

[8] *https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/.*

[9] Center for Disease Control (CDC), About Variants of the Virus that Causes COVID–19, available at: *https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html.*

[10] *Id.*

[11] *Id. See also https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html.*

[12] *https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf.*

[13] President Biden's COVID–19 Plan | The White House.

[14] *https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines.*

[15] CDC, COVID–19 Vaccinations in the United States, updated September 13, 2021, available at: *https://covid.cdc.gov/covid-data-tracker/#vaccinations.*

[16] *https://covid19.who.int/region/amro/country/us.*

[17] FAA Policy Statement: Limited, Conditional Extension of COVID–19 Related Relief for the Summer 2021 Scheduling Season. (Docket No. FAA–2020–0862–0302). *See also https://covid19.who.int/region/amro/country/us.*

[18] COVID–19 weekly epidemiological update, September 14, 2021, available at: *https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports. See also https://covid19.who.int/region/amro/country/us.*

[19] *https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joe-biden-on-global-vaccine-distribution/.*

additional doses will be donated to other countries.[20]

The President has placed a suspension and limitation on entry into the United States for non-U.S. citizens or permanent residents who have been present in, several foreign countries within the preceding 14 days.[21] International travel advisories issued by the U.S. Department of State's Global Health Advisory remain in effect worldwide, including designations ranging from Level 1—Exercise Normal Precautions to Level 4—Do Not Travel for more than 200 destinations.[22] A majority of countries are designated either Level 3 of Level 4—where COVID–19 numbers are classified as high and very high, respectively.[23] The U.S. Department of State advises that challenges to any international travel at this time may include mandatory quarantines, travel restrictions, and closed borders. The U.S. Department of State has noted further that foreign governments may implement restrictions with little notice, even in destinations that were previously low risk. Accordingly, the U.S. Department of State has warned Americans choosing to travel internationally that their trip may be disrupted severely and it may be difficult to arrange travel back to the United States. The CDC advises prospective domestic travelers to consider whether their destination has requirements or restrictions for travelers, and notes that State, local, and territorial governments may have travel restrictions in place, including testing requirements, stay-at-home orders, and quarantine requirements upon arrival.[24]

Standard Applicable to This Waiver Proceeding

The FAA reiterates the standards applicable to petitions for waivers of the minimum slot usage requirements in effect at DCA, JFK, and LGA, as discussed in the FAA's initial decision granting relief due to COVID–19 impacts.[25] At JFK and LGA, each slot must be used at least 80 percent of the time.[26] Slots not meeting the minimum usage requirements will be withdrawn. The FAA may waive the 80 percent usage requirement in the event of a highly unusual and unpredictable condition that is beyond the control of the slot-holding air carrier and which affects carrier operations for a period of five consecutive days or more.[27]

At DCA, any slot not used at least 80 percent of the time over a two-month period also will be recalled by the FAA.[28] The FAA may waive this minimum usage requirement in the event of a highly unusual and unpredictable condition that is beyond the control of the slot-holding carrier and which exists for a period of nine or more days.[29]

When making decisions concerning historical rights to allocated slots, including whether to grant a waiver of the usage requirement, the FAA seeks to ensure the efficient use of valuable aviation infrastructure while maximizing the benefits to airport users and the traveling public. This minimum usage requirement is expected to accommodate routine cancelations under all but the most unusual circumstances. Carriers proceed at risk if, at any time prior to a final decision, they make decisions in anticipation of the FAA granting a slot usage waiver.

Summary of Petitions From Stakeholders Concerning Continued COVID–19 Relief

The FAA has received nine petitions regarding COVID–19-related relief for the Winter 2021/2022 season to date. Five petitioners, including the International Air Transport Association (IATA), Avianca Airlines, All Nippon Airways (ANA), Lufthansa Group, and Airlines for America (A4A)[30] seek further relief through the end of the Winter 2021/2022 scheduling season due to ongoing COVID–19 impacts on demand for air travel. These petitioners emphasize the critical importance of an expedient decision to provide the industry with stability and certainty during the ongoing COVID–19 pandemic. Three petitioners, including JetBlue Airways (JetBlue), Southwest Airlines Co. (Southwest), and Airports Council International-North America (ACI–NA), oppose further extension of the limited, conditional relief FAA has made available through October 30, 2021. ACI–NA and JetBlue oppose any further relief due to COVID–19; however, JetBlue recognizes the potential need for relief for international operations and urges FAA to adopt a case-by-case approach to evaluating petitions for relief. Southwest specifically opposes any further relief at U.S. domestic airports, DCA and LGA. One petitioner submitted a petition marked privileged and confidential.

IATA, Avianca, ANA, and Lufthansa Group support continued relief for international operations at U.S. slot-controlled and IATA Level 2 airports and would prefer the FAA adopt the Worldwide Airport Slot Board's (WASB) slot relief package.[31] The FAA has previously described the provisions of the WASB slot relief package and explained how the provisions would be applied in the United States, if adopted, in a notice of proposed extension of a limited, conditional waiver of minimum slot usage requirement beyond March 27, 2021, which was published in the **Federal Register** on December 22, 2020 (85 FR 83672). The WASB slot relief package remains unchanged from the prior slot relief proceeding.

IATA believes ''the situation remains critically desperate and recovery slow'' highlighting the ''uncertainty around the need for booster vaccinations this fall, the impact of variants and government management of restrictions related to these outbreaks, lack of significant corporate demand until at least 2022, significant new outbreaks in Asia and Latin American and the related government retraction from reopening, as well as the disparity between countries approaches to managing the risk'' as justification for continued slot relief for international operations. IATA states that flexibility from continued slot usage relief ''enables airlines to focus flying where there is demand and not purely to satisfy slot use rules'' and that ''worsening the competitive position of U.S. aviation as it emerges

[20] *https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/18/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-2/.*

[21] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/proclamation-on-the-suspension-of-entry-as-immigrants-and-non-immigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease/.*

[22] *https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/.*

[23] *https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html#travel-4.*

[24] *https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html.*

[25] *See* 85 FR 15018 (Mar. 16, 2020).

[26] Operating Limitations at John F. Kennedy International Airport, 85 FR 58258 (Sep. 18, 2020); Operating Limitations at New York LaGuardia Airport, 85 FR 47065 at 58255 (Sep. 18, 2020).

[27] At JFK, historical rights to operating authorizations and withdrawal of those rights due to insufficient usage will be determined on a seasonal basis and in accordance with the schedule approved by the FAA prior to the commencement of the applicable season. *See* JFK Order, 85 FR at 58260. At LGA, any operating authorization not used at least 80 percent of the time over a two-month period will be withdrawn by the FAA. *See* LGA Order, 85 FR at 58257.

[28] *See* 14 CFR 93.227(a).

[29] *See* 14 CFR 93.227(j).

[30] All petitions and other submissions related to COVID–19 relief beyond the Summer 2021 season received by the FAA, with exception of one petition which was marked privileged and confidential, have been included in the docket for this proceeding. The FAA notes that two submissions were received from IATA, dated June 4 and June 25, 2021, respectively.

[31] A summary of the WASB proposal for Winter 2021/2022 was included in an annex to IATA's June 4, 2021 petition, which has been placed in the docket for this proceeding.

from the crisis only serves to jeopardize more jobs and further risks U.S. international connectivity.''

A4A supports a waiver of minimum slot usage requirements for international operations at U.S. slot-controlled airports and IATA Level 2 airports. A4A believes a waiver of minimum slot usage requirements for international operations is needed because ''international demand remains repressed and to ensure a level playing field.'' A4A states that international operations ''remain significantly deterred as a result of COVID–19 and direct government actions.'' Further A4A highlights that ''many countries have included reciprocity requirements previously and will likely wait until the U.S. acts before providing relief to ensure foreign carrier access to slots and gates in the U.S. when they resume operations.'' A4A asserts, ''without reciprocity U.S. carriers will lose slots in key international markets and be put at a significant competitive disadvantage relative to foreign competitors.''

JetBlue and ACI–NA oppose continued slot usage relief and support a return to usual 80/20 minimum slot usage requirements. ACI–NA believes that ''the U.S. is turning the corner in our battle against Coronavirus'' and that ''there are beginning to be opportunities for international travel.'' ACI–NA states that ending slot usage waivers ''will allow affected airports to begin piecing together their future air services portfolios that enable airports to drive sustainable economic growth for the communities they serve.'' Likewise, JetBlue believes that ''demand has returned and is growing and the U.S. airline industry will not be able to recover with full haste if competition-altering slot waivers continue without restriction.'' In addition, JetBlue believes that international flying levels may never return and broad waivers discourage the repurposing of slots previously used for international service. However, JetBlue states that it ''appreciates the complexities in international markets that were raised in the IATA letter'' and urges that ''DOT/FAA enable a case-by-case evaluation for limited exemptions based on extreme circumstances such as border closure or conditions of entry that represent de facto border closure.''

Southwest opposes continued slot usage relief at domestic-focused airports. Southwest specifically requests that the FAA ''reject any further requests for waivers of slot usage requirements for DCA and LGA, considering (a) the resurgence in the demand for domestic airline travel since March 2021, and (b) that DCA and LGA have perimeter restrictions that ensures the vast majority of flights from these airports are domestic.'' In addition, Southwest states, ''reopening these two predominately domestic airports would reflect the reality that domestic traffic is far more robust than international markets.'' Further, Southwest requests the FAA reduce barriers to competition at DCA and LGA and believes returning to normal slot usage requirements will ''clear the way for such competition to resume.''

Discussion of Proposal

Continued Relief for International Operations Through March 26, 2022

In consideration of the foregoing information, the petitions that the FAA has received, and the evolving and highly unpredictable situation globally with respect to ongoing impacts from COVID–19 at the current moment, the FAA proposes to extend, for all international operations, the current limited, conditional relief that FAA has already made available through October 30, 2021, through the end of the Winter 2021/2022 season on March 26, 2022.[32] This relief would be limited to slots and approved operating times used by carriers for international operations, through March 26, 2022, and would be subject to the same terms and conditions, with minor modifications, that the FAA has applied to the relief already made available through October 30, 2021, which the FAA reiterates in this notice. International operations, for purpose of this notice, are flights intended for operation between one of the U.S. slot-controlled or IATA Level 2 airports and any point in a foreign jurisdiction.

It is not the policy of the Department of Transportation (DOT) to use slot and Level 2 rules to reserve capacity for historic incumbent carriers until demand returns to predetermined levels. Instead, it is the policy of the Department to encourage high utilization of scarce public infrastructure. Under the established standard, slot usage waivers are generally used to address short-term, unpredictable shocks to demand or capacity that are beyond carriers' control. After 19 months of experience, the DOT believes it is becoming apparent that COVID–19 is causing structural and operational changes to the airline industry; the industry is adapting; and the issuance of waivers should not hinder that adaptation. As previously stated, at some point in time, repeated waivers to preserve pre-COVID slot holdings will impede the ability of airports and airlines to provide services that benefit the overall national economy and make appropriate use of scarce public assets. Therefore, the FAA emphasizes that operators should not assume further relief on the basis of COVID–19 will be forthcoming beyond the end of the Winter 2021/22 scheduling season.

IATA reports that international flights globally are operating around 88% below 2019 levels, with only slight recovery in international traffic forecast by the end of 2021 to about 66% below 2019 levels. As indicated by IATA, ''[t]he situation remains critically desperate and recovery slow with low advance bookings and many more last-minute bookings (and cancellations) on most routes projected for the foreseeable future. Uncertainty around the need for booster vaccinations this fall, the impact of variants and government management of restrictions related to these outbreaks, lack of significant corporate demand until at least 2022, significant new outbreaks in Asia and Latin America and the related government retraction from reopening, as well as the disparity between countries approaches to managing the risk justifies continued slot relief at this time. Without any stability and planning still at a 6–8 week horizon, airlines will continue to need maximum flexibility.''

FAA agrees with these petitioners and believes, based on global vaccination rates, changing infection rates and the threat of new virus strains, continued unpredictability of international travel restrictions, and the disparity between demand for domestic air travel and demand for international air travel, that extending the current limited, conditional waiver for international operations by all carriers, is reasonable. The FAA believes that extending the limited, conditional slot usage waiver, for international operations only, through the Winter 2021/2022 season would provide carriers with flexibility to operate in the unpredictable international market and would support long term viability of carrier operations at slot-controlled and IATA Level 2 airports in the United States.

The FAA recognizes that domestic carriers have a mix of both domestic and international operations and therefore the agency intends to make this relief available for international operations that would have been operated in the Winter 2021/2022 season, but for COVID–19 impacts. In other words, the FAA intends to provide this conditional relief to domestic carriers on a scale that

[32] The FAA notes that for purposes of the relief proposed in this proceeding, Canadian carriers would be treated as foreign carriers.

is comparable to each carrier's pre-COVID level of international service. The FAA would generally evaluate any request for relief from U.S. carriers for the Winter 2021/2022 scheduling season based on historical levels of operations to foreign points as demonstrated in published schedules. Domestic carriers seeking relief for a particular operation under the waiver will need to provide the FAA, if not readily apparent from FAA records and historic published schedule data, alternative supplemental information that predates this notice to demonstrate intent to use a slot or approved operating time for an international destination. The FAA would not accept evidence of intent to use a particular slot or approved operating time for an international flight during the Winter 2021/2022 season, if the information is dated after this notice is issued.

International operations eligible for a waiver under this proposal would be subject to all of the same conditions and policies, with minor modifications, described in FAA's January 13, 2021 policy statement, which remains in effect at slot-controlled and IATA Level 2 airports in the United States for the Summer 2021 season.[33] The FAA believes the conditions associated with the relief provided to date are generally comparable to the WASB package and remain necessary to strike a balance between competing interests of incumbent carriers and those carriers seeking new or increased access at these historically-constrained airports, as well as to ensure the relief is appropriately tailored to reduce the potential to suppress flight operations for which demand exists. The conditions for relief at slot-controlled airports, which the FAA would apply to the relief proposed in this notice, include:

(1) All slots not intended to be operated must be returned at least four weeks prior to the date of the FAA-approved operation to allow other carriers an opportunity to operate these slots on an *ad hoc* basis without historic precedence. Compliance with this condition is required for operations scheduled from October 31, 2021 through the duration of this relief; therefore, carriers should begin notifying the FAA of Winter returns by October 4, 2021. Slots operated as approved on a non-historic basis in Winter 2021/2022 will be given priority over new demands for the same timings in the next equivalent season (Winter 2022/23) for use on a non-historic basis, subject to capacity availability and consistent with established rules and policies in effect in the United States.[34] [35] Foreign carriers seeking priority under this provision will be required to represent that their home jurisdiction will provide reciprocal priority to U.S. carrier requests of this nature.

(2) The waiver does not apply to slots newly allocated for initial use during the Winter 2021/2022 season. New allocations meeting minimum usage requirements remain eligible for historic precedence. The waiver does not apply to historic in-kind slots within any 30-minute or 60-minute time period, as applicable, in which a carrier seeks and obtains a similar new allocation (*i.e.,* arrival or departure, air carrier or commuter, if applicable); and,

(3) the waiver does not apply to slots newly transferred on an uneven basis (*i.e.,* via one-way slot transaction/lease) since October 15, 2020, for the duration of the transfer.[36] Slots transferred prior to this date may benefit from the waiver if all other conditions are met. Slots granted historic precedence for subsequent seasons based on this relief are not eligible for transfer if the slot holder ceases all operations at the airport.

In addition, as proposed, an exception may be granted to these conditions based on any government restriction that prevents or severely restricts international travel to specific airports, destinations (including intermediate points) or countries for which the slot was held. This exception applies under extraordinary circumstances only in which a carrier is able to demonstrate that the ability to operate a particular flight or comply with the conditions of the proposed waiver is prevented or severely restricted due to an unpredictable official governmental action related to COVID–19. This proposed exception includes minor modifications compared to the exception currently in effect for the Summer 2021 season.[37] The FAA seeks to provide greater flexibility in allowing exceptions under certain circumstances based on issues that have arisen in the course of implementing the relief currently available. Official government actions that may qualify for this exception, include—

- Government travel restrictions based on nationality, closed borders, government advisories related to COVID–19 that warn against all but essential travel, or complete bans on flights from/to certain countries or geographic areas.
- Government restrictions related to COVID–19 on the maximum number of arriving or departing flights and/or the number of passengers on a specific flight or through a specific airport.
- Government restrictions on movement or quarantine/isolation measures within the country or region where the airport or destination (including intermediate points) is located.
- Government-imposed closure of businesses essential to support aviation activities (*e.g.,* closure of hotels, ground handling suppliers, etc.).
- Governmental restrictions on airline crew, including unreasonable entry requirements or unreasonable testing and/or quarantine measures.

This exception is being administered by the FAA in coordination with the Office of the Secretary of Transportation (OST). The extraordinary circumstances exception in this slot usage relief would only apply within the scope of the relief otherwise provided by the waiver; U.S. carriers should not expect to rely on the extraordinary circumstances exception for relief for domestic operations.

The conditions for COVID–19-related relief for prioritizing flights canceled at IATA Level 2 airports, for purposes of establishing a carrier's operational baseline in the next corresponding season, which the FAA would apply to the relief proposed in this notice include:

(1) All schedules as initially submitted by carriers and approved by

[33] FAA Policy Statement: Limited, Conditional Extension of COVID–19 Related Relief for the Summer 2021 Scheduling Season. (Docket No. FAA–2020–0862–0302).

[34] Consistent with the FAA's final policy statement issued January 13, 2021, this priority would apply to slot or schedule requests for Winter 2022/2023, which are comparable in timing, frequency, and duration to the non-historic ad hoc approvals made by the FAA for Winter 2021/2022. This priority does not affect the historic precedence or priority of slot holders and carriers with schedule approvals, respectively, which meet the conditions of the waiver during Winter 2021/2022 and seek to resume operating in Winter 2022/2023. The FAA may consider this priority in the event that slots with historic precedence become available for permanent allocation by the FAA.

[35] Although the FAA is proposing to extend the four-week rolling return policy consistent with the Summer 2021 waiver, any carrier returning full-season slots or schedule approvals at an airport outside the United States and associated with a route to the United States will generally be expected to similarly return the complementary full-season U.S. slot or schedule approval to the FAA for re-allocation on a non-historic or *ad hoc* basis.

[36] As previously explained, the FAA has determined not to revise this condition to include a buffer period for new transfers to be completed and still benefit from this waiver. Therefore, this policy will remain in effect continuously from the initial effective date of October 16, 2020.

[37] *See* FAA Policy Statement: Limited, Conditional Extension of COVID–19 Related Relief for the Summer 2021 Scheduling Season (Docket No. FAA–2020–0862–0302).

the FAA and not intended to be operated must be returned at least four weeks prior to the date of the FAA-approved operation to allow other carriers an opportunity to operate these times on an *ad hoc* basis without historic precedence. Schedules operated as approved on an *ad hoc* basis in Winter 2021/2022 will be given priority over new demands for the same timings in the next equivalent season (Winter 2022/2023) for use on an *ad hoc* basis, subject to capacity availability and consistent with established rules and policies in effect in the United States. Foreign carriers seeking priority under this provision would be required to represent that their home jurisdiction will provide reciprocal priority to U.S. carrier requests of this nature; and,

(2) The priority for FAA schedules approved for Winter 2021/2022 does not apply to net-newly approved operations for initial use during the Winter 2021/2022 season. New approved times will remain eligible for priority consideration in Winter 2022/2023 if actually operated in Winter 2021/2022 according to established processes.

Consistent with the proposal for slot-controlled airports, limited exceptions may be granted from either or both of these conditions at Level 2 airports under extraordinary circumstances due to any government restriction that prevents or severely restricts travel to specific airports, destinations (including intermediate points), or countries for which the slot was held, as discussed previously with respect to slot-controlled airports. If the exception is determined not to apply, carriers are expected to meet the conditions for relief or operate consistent with standard expectations for the Level 2 environment. The extraordinary circumstances exception in this slot usage relief would only apply within the scope of the relief otherwise provided by the waiver, carriers should not expect to rely on the extraordinary circumstances exception for relief related to domestic operations.

The FAA believes an extension of relief for all international operations, through March 26, 2022, is reasonable due to fluctuating travel restrictions and ongoing economic and health impacts of COVID–19 internationally. The proposed relief is expected to provide carriers with flexibility during this unprecedented situation and to support the long-term viability of international operations at slot-controlled and IATA Level 2 airports in the United States.[38] Continuing relief for this additional period is reasonable to mitigate the impacts on passenger demand for international air travel resulting from the spread of COVID–19 worldwide.

As of the date of issuance of this notice, U.S. domestic air travel demand and vaccination rates have reached a level that the FAA believes no longer necessarily justifies COVID–19-related slot usage relief domestically. However, COVID–19 continues to present a highly unusual and unpredictable condition for international operations that is beyond the control of carriers. Indeed, foreign carriers in many parts of the world are prevented from operating to the United States due to governmental restrictions resulting from COVID–19. The continuing impacts of COVID–19 on global aviation are dramatic and extraordinary, with an unprecedented decrease in passenger demand for international air travel globally. The ultimate duration and severity of COVID–19 impacts on passenger demand for international air travel remains unclear. Even after the pandemic is contained, impacts on passenger demand for international air travel are likely to continue for some time.

If the FAA extends relief for international operations through March 26, 2022, as proposed, the FAA expects that foreign slot coordinators will provide reciprocal relief to U.S. carriers. To the extent that U.S. carriers fly to a foreign carrier's home jurisdiction and that home jurisdiction does not offer reciprocal relief to U.S. carriers, the FAA may determine not to grant a waiver to that foreign carrier. A foreign carrier seeking a waiver may wish to ensure that the responsible authority of the foreign carrier's home jurisdiction submits a statement by email to *ScheduleFiling@dot.gov* confirming reciprocal treatment of the slot holdings of U.S. carriers.

Invitation for Comment and Submission of Supporting Information

The FAA seeks views and information regarding this proposal. Interested persons are invited to submit comments and supporting information to demonstrate why the FAA should or should not finalize this decision, and to submit any information relevant to making this decision. The FAA has received multiple formal petitions advocating on behalf of U.S. carriers that seek continued relief for international operations. However, the FAA has not received formal, individualized requests from U.S. carriers explaining the need for continued relief for international operations despite the early signs of recovery of air travel demand in the United States and certain parts of the world and the potential for U.S. carriers to utilize slots for operations on alternative routes—domestic or international. In particular, U.S. carriers are invited to provide individualized responses to the following—

- What is the basis with supporting rationale under which a U.S. carrier may necessitate continued relief for international operations in light of increasing demand for air travel domestically and for some international destinations? To what extent do carriers anticipate being unable to meet minimum slot usage requirements and/or operate consistent with approvals at Level 2 airports?
- What is the particularized relief requested for the Winter 2021/2022 season? In other words, each U.S. carrier seeking relief for international operations this Winter is invited to provide a detailed accounting of which operations in its portfolio have historically been used for international service versus domestic as well as any differences for the upcoming Winter 2021/2022 season, with an explanation regarding what extent (such, as percentage) of the carriers' international portfolio cannot be repurposed for alternate operations?
- What sources of information, other than historic published schedules, would U.S. carriers make available to FAA to demonstrate intent to use specific slots or approved timing for international operations versus domestic?
- To what extent have U.S. carriers relied upon the relief provided for the Summer 2021 season for international operations?

Information submitted to the FAA may be subject to disclosure under the Freedom of Information Act. The FAA recognizes that commenters may seek to submit business information that is both customarily and actually treated as confidential. Persons that submit such confidential business information should clearly mark the information as ''PROPIN''. The FAA will take the necessary steps to protect properly designated information to the extent allowable by law.

[38] The FAA is responsible to develop plans and policy for the use of navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. *See* 49 U.S.C. 40103(b)(1). The FAA manages slot usage requirements under the authority of 14 CFR 93.227 at DCA and under the authority of Orders at LGA and JFK. *See* Operating Limitations at John F. Kennedy International Airport, 85 FR 58258 (Sep. 18, 2020); Operating Limitations at New York LaGuardia Airport, 85 FR 58255 (Sep. 18, 2020).

After receiving and reviewing comments, the FAA anticipates subsequently providing notice of its final decision.

Issued in Washington, DC, on September 16, 2021.

Lorelei Dinges Peter,

Assistant Chief Counsel for Regulations.

Virginia T. Boyle,

Vice President, System Operations Services.

[FR Doc. 2021–20400 Filed 9–16–21; 4:15 pm]

BILLING CODE 4910–13–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 8, 64, 76

[GN Docket No. 17–142; DA 21–1114; FR ID 48290]

Improving Competitive Broadband Access to Multiple Tenant Environments

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Wireline Competition Bureau (WCB) refreshes the record in Improving Competitive Broadband Access to Multiple Tenant Environments Proceeding.

DATES: Comments are due on or before October 20, 2021, and reply comments are due on or before November 4, 2021.

ADDRESSES: You may submit comments, identified by GN Docket No. 17–142, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing ECFS: *https://www.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S-. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, 35 FCC Rcd 2788 (Mar. 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Government Affairs Bureau at (202) 418–0530.

Ex Parte Rules. This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. *See* 47 CFR 1.1200 *et seq.* Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) List all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenters written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b) of the Commission's rules. In proceedings governed by § 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml., .ppt, searchable .pdf). *See* 47 CFR 1.1206(b). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: Jesse Goodwin, Attorney Advisor, Competition Policy Division, Wireline Competition Bureau, at (202) 418–0958, or email: *Benjamin.Goodwin@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Public Notice, in GN Docket No. 17–142, DA 21–1114; released on September 7, 2021. The complete text of this document is available for download at *https://docs.fcc.gov/public/attachments/DA-21-1114A1.pdf.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

By this document, the Wireline Competition Bureau (Bureau) invites parties to update the record on issues raised in the 2019 Improving Competitive Broadband Access to Multiple Tenant Environments Notice of Proposed Rulemaking (*NPRM*), including but not limited to (1) revenue sharing agreements; (2) exclusive wiring arrangements, including sale-and-leaseback arrangements; and (3) exclusive marketing arrangements.

Americans living and working in multiple tenant environments (MTEs) face various obstacles to obtaining the benefits of competitive choice of fixed broadband, voice, and video services. Telecommunications carriers and multichannel video programming distributors (together, ''service providers'') need to access building conduits, install wiring to individual units or premises, and make repairs once wiring has been installed. Complicating these tasks is the fact that providing service to MTEs involves not just the service provider and the end-user tenant, but a third party: The premises owner or controlling party (MTE owner). As a result, deploying facilities-based fixed services to the millions of Americans living and working in MTEs can be uniquely challenging. The Commission has endeavored to increase competition among service providers and reduce potential barriers to broadband deployment in MTEs. Beginning in 2000, the Commission, through a series of orders, prohibited service providers from entering into contracts with MTE owners that give a service provider exclusive access to the building to offer its services. In the *NPRM,* the

Commission sought comment on a range of common practices in MTEs that could have the effect of dampening competition or deployment. We seek to refresh the record to better understand how the Commission can best ''facilitate enhanced deployment and greater consumer choice for Americans living and working in'' MTEs. (The Commission has defined MTEs as ''commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities.'')

Revenue Sharing Agreements. We seek to refresh the record on the impact revenue sharing agreements have on competition and deployment of facilities in MTEs. In the *NPRM,* the Commission explained that revenue sharing agreements are contracts between MTE owners and service providers where the owner ''receives consideration from the communications provider in return for giving the provider access to the building and its tenants.'' The Commission recognized that revenue sharing agreements can take various forms. For example, they can be simple one-time payments calculated on a per-unit basis (sometimes referred to as door fees); or they can be pro rata, calculated as a portion of revenue generated from tenants' subscription service fees. These pro rata agreements may also be graduated, where the building owner receives more revenue as the proportion of tenants in a building choose that service provider. And some revenue sharing agreements may be considered ''above cost''—that is, they may give MTE owners compensation beyond actual costs associated with the installation and maintenance of wiring. The Commission sought comment on the impact revenue sharing agreements have on competition and deployment, as well as whether they reduce incentives for building owners to grant access to competitive providers given that a lower number of subscribers for the incumbent provider means reduced income to the building owner. It also asked whether revenue sharing agreements were being used to circumvent Commission rules prohibiting exclusive access agreements, whether alone or in combination with other contractual provisions.

We seek to refresh the record on whether the Commission should restrict some or all of these types of revenue sharing agreements. Have there been changes over the last two years as to how frequently these agreements are used in MTEs? How do these agreements affect the ability of tenants to choose their service provider? How do they affect the prices that tenants ultimately pay for service? What are the effects of these agreements on competition among service providers? Do these agreements promote or inhibit entry by competitive providers? In what ways do revenue sharing agreements affect how service providers compete for customers? Do they encourage or discourage service providers to compete on the basis of price or service quality? Do service providers attempt to negotiate agreements that work to exclude competitors? If revenue sharing agreements function to prevent competing providers from deploying, does the MTE in effect become a locational monopoly? What legitimate reasons might a competitive provider and building owner have to enter into such agreements? For example, do these agreements affect competitive providers' ability to offer services in MTEs, such as by enabling providers to secure financing to deploy facilities? Do the drawbacks of such agreements outweigh any benefits? Should the Commission restrict the use of revenue sharing agreements? Alternatively, should the Commission require the disclosure of such agreements?

We seek comment on whether the Commission should address specific types of revenue sharing agreements. For example, should it restrict above-cost revenue sharing agreements? If so, how should the Commission define costs? How would any such restrictions impact tenants? How could the Commission best and most effectively monitor compliance? Additionally, we seek comment on whether the Commission should take action to address graduated revenue sharing agreements. To what extent do such agreements lead building owners to favor one provider over others and to exclude competitors? Similarly, we seek comment on revenue sharing agreements containing exclusivity provisions that may prevent building owners from offering equal terms to other providers. Do such provisions negatively affect competition and deployment in MTEs? Should the Commission restrict or prohibit such agreements, or require their disclosure? Are there any other provisions in such agreements that may serve to hinder competitive access?

Exclusive Wiring Arrangements. Second, we seek to refresh the record on the effect of exclusive wiring arrangements on competition and deployment of facilities in MTEs. In the *NPRM,* the Commission explained that under an exclusive wiring arrangement, service providers ''enter into agreements with MTE owners under which they obtain the exclusive right to use the wiring in the building.'' The Commission sought comment on whether it remained true that, as it had previously concluded in 2007, ''exclusive wiring arrangements do not preclude competitive providers' access to buildings.'' It also asked whether such arrangements differ in states and localities where mandatory access laws have been introduced.

We seek to refresh the record in light of possible developments since the *NPRM.* Should the Commission revisit its conclusion that exclusive wiring arrangements generally do not preclude access to new entrants, and thus do not violate its rules? What are the practical effects of exclusive wiring agreements in today's communications marketplace? Can exclusive wiring arrangements otherwise circumvent Commission rules? What anti-competitive effects or adverse impacts on deployment, if any, do exclusive wiring arrangements have? What benefits, if any, do exclusive wiring arrangements have, and do the benefits outweigh any drawbacks, particularly to tenants? Do exclusive wiring arrangements affect tenants' choice in providers? Do they inhibit entry by competing service providers? Do they encourage or discourage service providers to compete on the basis of price or service quality? Are there specific varieties of exclusive wiring arrangements, such as those containing provisions for exclusive use of MTE-owned wiring, that the Commission should study? What are the benefits and drawbacks of shared access to wiring and other facilities, in contrast to exclusive wiring arrangements? Does shared access promote competitive entry and tenant choice?

We seek to refresh the record on sale-and-leaseback arrangements, a subset of exclusive wiring arrangements. In the *NPRM,* the Commission explained that sale-and-leaseback arrangements ''occur when a service provider sells its wiring to the MTE owner and then leases back the wiring on an exclusive basis.'' The Commission has in place rules that facilitate competitive choice by making the previous provider's inside wiring available to MTE owners and tenants for other service providers to use after it has terminated service. Do sale-and-leaseback arrangements act as an end run around these rules by putting wiring ownership in the hands of the building owner, which is not subject to the Commission's rules? Regardless of whether they in effect act as a loophole, should the Commission prohibit such arrangements generally or in limited circumstances? The Commission also

sought comment on whether ''the policy considerations around sale-and-leaseback and other exclusive wiring arrangements differ.'' Are there reasons to distinguish sale-and-leaseback arrangements from other kinds of exclusive wiring arrangements?

Exclusive Marketing Arrangements. Third, we seek to refresh the record on exclusive marketing arrangements. In the *NPRM,* the Commission explained that an exclusive marketing arrangement is ''an arrangement, either written or in practice, between an MTE owner and service provider that gives the service provider, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to tenants of the MTE.''

The Commission asked whether specific circumstances might lead to such arrangements resulting in de facto exclusive access. For example, do these arrangements create confusion on the part of tenants or building owners as to whether only one provider can or does offer service to the building? We also seek to update the record on the Commission's question regarding ''what might be done to correct'' possible consumer confusion. Additionally, the Commission asked whether disclosure or disclaimer requirements would alleviate these problems, and when they might be warranted. Commenters have addressed the impact and costs of such requirements. We seek updated information on these issues, as well as on the benefits of exclusive marketing arrangements, particularly with respect to small competitive carriers. Do the benefits of such arrangements outweigh the costs? Do disclosure requirements affect tenant choice in providers, or the ability of competitors to deploy? And do they affect how service providers compete, such as in terms of price or service quality? What impact does this have on tenants? Have there been developments over the last few years that should impact the Commission's analysis on this issue?

Other Issues. In addition to refreshing the record on the issues outlined above, we also seek to refresh the record on other issues outlined in the *NPRM* and raised in the record. For example, in evaluating these issues, does the calculus differ based on the size of the MTE and, if so, should the Commission approach small MTEs differently than others for purposes of any rules it adopts? How should it define small MTEs for these purposes?

We also seek comment on whether there are other types of contractual provisions and non-contractual practices that affect competition, limit tenant choice, or lead to increased prices or decreased service quality. Are there benefits and drawbacks to shared access to facilities in MTEs, including telecom closets, conduit, and wiring? Can the sharing of facilities increase competition and tenant choice in MTEs? We also seek to refresh the record on mandatory access laws and other efforts to increase competitive access to MTEs and the infrastructure within them. What are the effects of these laws on competition, choice, and price in MTEs?

Finally, we seek to refresh the record on the Commission's jurisdiction and statutory authority to address the issues and practices raised above.

Federal Communications Commission.

Pamela Arluk,

Division Chief, Wireline Competition Bureau.

[FR Doc. 2021–20147 Filed 9–17–21; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 86, No. 179
Monday, September 20, 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.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 15, 2021.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by October 20, 2021 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal & Plant Health Inspection Service

Title: Gypsy Moth Identification Worksheet.

OMB Control Number: 0579–0104.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701–*et seq.*), the Secretary of Agriculture either independently or in cooperation with the States, is authorized to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pest new to the United States or not widely distributed throughout the United States. The Plant Protection and Quarantine (PPQ), a program within the Animal and Plant Health Inspection Service (APHIS), is responsible for implementing the intent of this Act, and does so through the enforcement of its Domestic Quarantine Regulations contained in Title 7 of the Code of Federal Regulations (CFR) Part 301. The European gypsy moth is one of the most destructive pests of fruit and ornamental trees as well as hardwood forests. The Asian gypsy moth is an exotic strain of gypsy moth that is closely related to the European variety already established in the United States. Due to significant behavioral differences, this strain is considered to pose an even greater threat to trees and forested areas. In order to determine the presence and extent of a European gypsy moth or an Asian gypsy moth infestation, APHIS sets traps in high-risk areas to collect specimens.

Need and Use of the Information: APHIS will collect information from the Specimens for Determination, PPQ Form 391, to identify and track specific specimens that are sent to the Otis Development Center for identification tests based on DNA analysis. This information collected is vital to APHIS' ability to monitor, detect, and eradicate gypsy moth infestations and the worksheet is completed only when traps are found to contain specimens. Information on the worksheet includes the name of the submitter, the submitter's agency, the date collected, the trap number, the trap's location (including the nearest port of entry), the number of specimens in the trap, and the date the specimen was sent to the laboratory. APHIS will also use the Gypsy Moth Checklist and Record Your Self-Inspection, PPQ Form 377 or PPQ Form 377A to collect information on required inspection of outdoor household articles that are to be moved from a gypsy moth quarantined area to a non-quarantined area to ensure that they are free of all life stages of gypsy moth.

Description of Respondents: Individuals or households; State, Local or Tribal Government; and Businesses.

Number of Respondents: 2,500,100.

Frequency of Responses: Recordkeeping; Reporting; On occasion.

Total Burden Hours: 2,711,543.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2021–20236 Filed 9–17–21; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2021–0050]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Pale Cyst Nematode

AGENCY: Animal and Plant Health Inspection Service, Agriculture (USDA).

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the regulations for the interstate movement of regulated articles to prevent the spread of pale cyst nematode to noninfested areas of the United States.

DATES: We will consider all comments that we receive on or before November 19, 2021.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2021–0050 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2021–0050, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *www.regulations.gov* or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the interstate movement of regulated articles to prevent the spread of pale cyst nematode, contact Ms. Lynn Evans-Goldner, National Policy Manager, PPQ, APHIS, 4700 River Road, Unit 137, Riverdale, MD 20737; (301) 851–2286. For more detailed information on the information collection reporting process, contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2483; *joseph.moxey@usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Pale Cyst Nematode.

OMB Control Number: 0579–0322.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: The Plant Protection Act (7 U.S.C 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States.

In accordance with the regulations in ''Subpart S-Pale Cyst Nematode'' (7 CFR 301.86 through 301.86–9), the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture restricts the interstate movement of certain articles to help prevent the spread of pale cyst nematode, a major pest of potato crops in cool-temperature areas, via potatoes, soil, and other host material to noninfested areas of the United States. The regulations involve information collection activities such as certificates, permits, appeals, compliance agreements, self-certifications, packing facility process approvals, and labeling.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.28 hours per response.

Respondents: U.S. potato producers, packers, processors, and handlers.

Estimated annual number of respondents: 212.

Estimated annual number of responses per respondent: 8.

Estimated annual number of responses: 1,747.

Estimated total annual burden on respondents: 484 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 14th day of September 2021.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2021–20197 Filed 9–17–21; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Nutrition and Foods for Special Dietary Uses

AGENCY: U.S. Codex Office, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The U.S Codex Office is sponsoring a public meeting on October 19, 2021. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 42nd Session of the Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) of the Codex Alimentarius Commission, which will take place virtually November 19–25, 2021, with report adoption on December 1, 2021. The U.S. Manager for Codex Alimentarius and the Acting Deputy Under Secretary for Trade and Foreign Agricultural Affairs recognize the importance of providing interested parties the opportunity to obtain background information on the 42nd Session of the CCNFSDU and to address items on the agenda.

DATES: The public meeting is scheduled for October 19, 2021, from 2:00–4:00PM EDT.

ADDRESSES: The public meeting will take place via Video Teleconference only. Documents related to the 42nd Session of the CCNFSDU are accessible via the internet at the following address: *http://www.fao.org/fao-who-codexalimentarius/meetings/detail/en/?meeting=CCNFSDU&session=42.* Dr. Douglas Balentine, U.S. Delegate to the 42nd Session of the CCNFSDU, invites U.S. interested parties to submit their comments electronically to the following email address: *douglas.balentine@fda.hhs.gov.*

Registration: Attendees must register to attend the public meeting by emailing *uscodex@usda.gov* by October 15, 2021. Early registration is encouraged.

For Further Information about the 42nd Session of the CCNFSDU, contact U.S. Delegate, Dr. Douglas Balentine, *douglas.balentine@fda.hhs.gov* or (240) 402–2373.

For Further Information about the public meeting Contact: U.S. Codex Office, 1400 Independence Avenue SW, Room 4861, South Agriculture Building, Washington, DC 20250. Phone (202) 720–7760, Fax: (202) 720–3157, Email: *uscodex@usda.gov*

SUPPLEMENTARY INFORMATION:

Background

Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO)and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure fair practices in the food trade.

The Terms of Reference of the Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) are:

(a) To study specific nutritional problems assigned to it by the Commission and advise the Commission on general nutrition issues;

(b) to draft general provisions, as appropriate, concerning the nutritional aspects of all foods;

(c) to develop standards, guidelines or related texts for foods for special dietary uses, in cooperation with other committees where necessary; and,

(d) to consider, amend if necessary, and endorse provisions on nutritional aspects proposed for inclusion Codex standards, guidelines and related texts.

The CCNFSDU is hosted by Germany. The United States attends the CCNFSDU as a member country of Codex.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 42nd Session of the CCNFSDU will be discussed during the public meeting:

- Adoption of the Agenda
- Matters Referred to the Committee by the Codex Alimentarius Commission and/or Other Subsidiary Bodies
- Matters of Interest Arising from FAO and WHO
- Review of the Standard for Follow-up Formula (CXS 156–1987)
- Draft Guideline for Ready-to-use Therapeutic Foods
- General Principles for the establishment of nutrient reference values-requirements (NRVs-R) for persons aged 6–36 months
- Other Business and Future Work
- Date and Place of the Next Session

Public Meeting

At the October 19, 2021, public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Dr. Douglas Balentine, U.S. Delegate for the 42nd Session of the CCNFSDU (see **ADDRESSES**). Written comments should state that they relate to activities of the 42nd Session of the CCNFSDU.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the U.S. Codex Office will announce this **Federal Register** publication on-line through the USDA web page located at: *http://www.usda.gov/*codex, a link that also offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscription themselves and have the option to password protect their accounts.

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How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *https://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative. Send your completed complaint form or letter to USDA by mail, fax, or email.

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410.

Fax: (202) 690–7442, Email: *program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington DC, on September 14, 2021.

Mary Frances Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2021–20225 Filed 9–17–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Services Surveys: BE–30, Quarterly Survey of Ocean Freight Revenues and Foreign Expenses of U.S. Carriers, and the BE–37, Quarterly Survey of U.S. Airline Operators' Foreign Revenues and Expenses

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before November 19, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Christopher Stein, Chief, Services Surveys Branch, Bureau of Economic Analysis, by email to *christopher.stein@bea.gov* or *PRAcomments@doc.gov.* Please reference OMB Control Number 0608–0011 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Christopher Stein, Chief, Services Surveys Branch, Bureau of Economic Analysis, 301–278–9189, or via email to *christopher.stein@bea.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Quarterly Survey of Ocean Freight Revenues and Foreign Expenses of U.S. Carriers (BE–30) collects data from U.S. ocean freight carriers (owners and operators) that engaged in the international transportation of freight, cargo, and/or passengers between U.S. and foreign ports or between foreign ports, if total covered revenues or total covered expenses were $500,000 or more in the previous year or are expected to be $500,000 or more during the current year.

The Quarterly Survey of U.S. Airline Operators' Foreign Revenues and Expenses (BE–37) collects data from U.S. airline operators engaged in the international transportation of passengers or of U.S. export freight, or the transportation of freight or passengers between two foreign points, if total covered revenues or total covered expenses were $500,000 or more in the previous year or are expected to be $500,000 or more during the current year.

The data are needed to monitor trade in transport services, to analyze the impact of U.S. trade on the U.S. and foreign economies, to compile and improve the U.S. economic accounts, to support U.S. commercial policy on trade in transport services, to conduct trade promotion, and to improve the ability of U.S. businesses to identify and evaluate market opportunities. The data are used in estimating the transport services component of the U.S. international transactions accounts (ITAs) and national income and product accounts (NIPAs).

The Bureau of Economic Analysis (BEA) is proposing modifications to the information collected on the BE–37 survey, and a change to the BE–30 and BE–37 surveys' due dates, beginning with the reporting period for first quarter 2022. The proposed modifications to the BE–37 survey would eliminate the collection of certain items not currently needed to estimate international transactions in air transportation services, and introduce new items that will increase the quality and usefulness of BEA's statistics on trade in transport services. BEA proposes the following changes to the BE–37 survey:

BEA proposes to eliminate the collection of several items on the BE–37 survey: (1) Total revenue from transporting passengers originating from, or destined to, points outside the United States; (2) total revenue from transporting passengers to and/or from the United States, (3) interline settlement receipts from foreign airline operators; and (4) interline settlement payments to foreign airline operators. BEA proposes to eliminate these items because the information collected is not currently used to estimate international transactions in air transportation services and is not expected to be needed in the future.

BEA proposes to collect country detail for BE–37 survey item 1, revenue from carriage of export freight and express originating from the United States to points outside the United States, and item 2, revenue from carriage of freight and express originating from, and destined to, points outside the United States. Currently, only global totals are collected for these items. Requiring airlines to report these two items by country will improve the quality of the geographic statistics BEA disseminates.

BEA proposes to add U.S. airliners' in-flight sales revenue (total and by region) and expand the information collected on number of passengers to include the region, on the BE–37 survey. In-flight sales are revenues of the airline or a vendor for the purposes of consumption on the aircraft (food, drinks, Wi-Fi, pillows, etc.). The data will be used to close a gap in the ancillary fees component of air passenger transport. Collecting this information by region will allow BEA to produce more detailed statistics on trade in transport services because large differences exist across regions in per-passenger ancillary fee revenue, mostly corresponding to length of flight. BEA proposes to collect this item and number of passengers by region according to the three regional designations outlined by the U.S. Department of Transportation in 14 CFR 241.21(g)—Atlantic Ocean, Pacific Ocean, and Latin America. These designations group Canada within the domestic category. Although revenue and expenses for Canada must be included in all other items on this survey, Canada will be excluded from the item on in-flight sales revenue and number of passengers.

Additionally, BEA proposes to collect two additional airline identification elements on the BE–37 survey: the U.S. airline's International Air Transport Association (IATA) and International Civil Aviation Organization (ICAO) codes. These elements will enable BEA to match information reported on the BE–37 with supplemental information received from other government agencies and increase the quality and accuracy of BEA's statistics on trade in services.

BEA also proposes to change the due dates of the BE–30 and BE–37 surveys to 30 days after the close of each quarter from 45 days. Shortening the reporting timeline will allow BEA to produce more accurate and complete trade in transport services statistics in preliminary estimates of the ITAs, which is critical information for policymakers' timely decisions on international trade policy. The earlier due date will allow BEA to use more reported data for preliminary statistics, improving the accuracy of both the aggregates and the country detail, reducing revisions in subsequent statistical releases.

BEA estimates there will be a one hour increase in the average burden for completing the BE–37 survey with data, from 4 to 5 hours pers response, primarily as a result of the requirement to report country detail for revenue from the carriage of freight and express. There will be no change in the average number of burden hours per response for the BE–30 survey, currently estimated to be 4 hours. The language in the instructions and definitions will be reviewed and adjusted as necessary to clarify survey requirements.

II. Method of Collection

BEA contacts potential respondents by mail at the end of each quarter. Respondents would be required to file the completed BE–30 and BE–37 forms within 30 days after the end of each quarter.

BE–30 reports would be required from each U.S. ocean freight carrier (owners and operators) that engaged in the international transportation of freight, cargo, and/or passengers between U.S. and foreign ports or between foreign ports, whose total covered revenues or total covered expenses were $500,000 or more in the previous year or are expected to be $500,000 or more during the current year.

BE–37 reports would be required from each from U.S. airline operator engaged in the international transportation of passengers or of U.S. export freight, or the transportation of freight or passengers between two foreign points, whose total covered revenues or total covered expenses were $500,000 or more in the previous year or are expected to be $500,000 or more during the current year.

Entities required to report on the BE–30 and BE–37 surveys will be contacted individually by BEA. Entities not contacted by BEA have no reporting responsibilities.

BEA offers its electronic filing option, the eFile system, for use in reporting on Forms BE–30 and BE–37. For more information about eFile, go to *www.bea.gov/efile.* In addition, BEA posts all its survey forms and reporting instructions on its website, *www.bea.gov/ssb.* These may be downloaded, completed, printed, and submitted via fax or mail.

III. Data

OMB Control Number: 0608–0011.

Form Number(s): BE–30 and BE–37.

Type of Review: Regular submission.

Affected Public: U.S. ocean carriers and U.S. airline operators.

Estimated Number of BE–30 Respondents: 200 annually (50 filed each quarter; 48 reporting mandatory data, and 2 that would file exemption claims or voluntary responses).

Estimated Number of BE–37 Respondents: 120 annually (30 filed each quarter; 28 reporting mandatory data, and 2 that would file an exemption claim or voluntary response).

Estimated Time per Response: For the BE–30, 4 hours is the average for those reporting data and one hour is the average for those filing an exemption claim. For the BE–37, 5 hours is the average for those reporting data and one hour is the average for those filing an

exemption claim. For the BE–30 and BE–37 surveys, hours may vary considerably among respondents because of differences in company size and complexity.

Estimated Total Annual Burden Hours: 1,344 (776 for the BE–30; 568 for the BE–37).

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Mandatory.

Legal Authority: International Investment and Trade in Services Survey Act (Pub. L. 94–472, 22 U.S.C. 3101–3108, as amended).

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–20282 Filed 9–17–21; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–63–2021]

Foreign-Trade Zone 15—Kansas City, Missouri; Application for Reorganization and Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Greater Kansas City Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 15, requesting authority to reorganize the zone to expand its service area and include a new magnet site under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on September 14, 2021.

FTZ 15 was approved by the FTZ Board on March 13, 1973 (Board Order 93, 38 FR 8622, April 4, 1973), reorganized under the ASF on May 16, 2014 (Board Order 1938, 79 FR 30079, May 27, 2014), and expanded under the ASF on October 25, 2018 (Board Order 2069, 83 FR 54711–54712, October 31, 2018). The zone currently has a service area that includes Andrew, Bates, Buchanan, Caldwell, Carroll, Cass, Chariton, Clay, Clinton, Cooper, Daviess, DeKalb, Henry, Howard, Jackson, Johnson, Lafayette, Livingston, Pettis, Platte, Ray and Saline Counties, Missouri.

The applicant is now requesting authority to expand the service area of the zone to include Holt County, as described in the application. If approved, the grantee would be able to serve sites throughout the expanded service area based on companies' needs for FTZ designation. The application indicates that the proposed expanded service area is adjacent to the Kansas City Customs and Border Protection Port of Entry.

The applicant is also requesting to expand its zone to include an additional magnet site: Proposed Site 24 (31.85 acres)—Iowa Tribe of Kansas and Nebraska Distribution Center, 27598 Highway F, Holt County.

In accordance with the FTZ Board's regulations, Camille Evans of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is November 19, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to December 6, 2021.

A copy of the application will be available for public inspection in the ''Online FTZ Information Section'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.* For further information, contact Camille Evans at *Camille.Evans@trade.gov.*

Dated: September 15, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–20269 Filed 9–17–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 210910–0181]

RIN 0694–XC077

Notice of Request for Public Comments on Risks in the Information Communications Technology Supply Chain

AGENCY: Bureau of Industry and Security, Office of Technology Evaluation, U.S. Department of Commerce.

ACTION: Notice of request for public comments.

SUMMARY: On February 24, 2021, President Biden issued Executive Order 14017 (E.O. 14017) on ''America's Supply Chains,'' which directs several federal agency actions to secure and strengthen America's supply chains. One of these directions is for the Secretary of Commerce and the Secretary of Homeland Security, in consultation with the heads of appropriate agencies, to submit, within one year of the date of E.O. 14017, a report on supply chains for critical sectors and subsectors of the information and communications technology (ICT) industrial base (as determined by the Secretary of Commerce and the Secretary of

Homeland Security), including the industrial base for the development of ICT software, data, and associated services. This notice requests comments and information from the public to assist the Secretary of Commerce and the Secretary of Homeland Security in preparing the report required by E.O. 14017.

DATES: The due date for filing comments is November 4, 2021.

ADDRESSES: *Submissions:* All written comments in response to this notice must be addressed to ''Information and Communications Technology Supply Chain'' and filed through the Federal eRulemaking Portal: *https://www.regulations.gov.* To submit comments via *https://www.regulations.gov,* enter docket number BIS–2021–0021 on the home page and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find the reference to this notice and click on the link entitled ''Comment Now!'' (For further information on using *https://www.regulations.gov,* please consult the resources provided on the website by clicking on ''How to Use This Site.'')

FOR FURTHER INFORMATION CONTACT: Maura Weber, Defense Industrial Base Division, Office of Technology Evaluation, Bureau of Industry and Security, at 202–704–8388, *Maura.Weber@bis.doc.gov,* or *ICTstudy@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2021, President Biden issued Executive Order 14017, ''America's Supply Chains'' (86 FR 11849) (E.O. 14017). E.O. 14017 focuses on the need for resilient, diverse, and secure supply chains to ensure U.S. economic prosperity and national security. Such supply chains are needed to address conditions that can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services. E.O. 14017 directs that within one year of the date of the order, the Secretary of Commerce and the Secretary of Homeland Security, in consultation with the heads of appropriate agencies, shall submit a report to the President, through the Assistant to the President for National Security Affairs (APNSA) and the Assistant to the President for Economic Policy (APEP), on supply chains for critical sectors and subsectors of the information and communications technology (ICT) industrial base (as determined by the Secretary of Commerce and the Secretary of Homeland Security). For the purposes of this report, the scope of the ICT industrial base shall consist of hardware that enables terrestrial distribution, broadcast/wireless transport, satellite support, data storage to include data center and cloud technologies, and end user devices including home devices such as routers, antennae, and receivers, and mobile devices; ''critical'' software (as defined by the National Institute of Standards and Technology in relation to Executive Order 14028); and services that have direct dependencies on one or more of the enabling hardware. In developing this report, the Secretary of Commerce and the Secretary of Homeland Security will consult with the heads of appropriate agencies and will be advised by all relevant bureaus and components of the Department of Commerce and the Department of Homeland Security. This notice requests comments and information from the public to assist the Secretary of Commerce and the Secretary of Homeland Security in preparing the report required by E.O. 14017.

Written Comments

The Department of Commerce and the Department of Homeland Security are particularly interested in comments and information directed to the policy objectives listed in E.O. 14017 as they affect the U.S. ICT supply chains, as defined in the previous section, including, but not limited to, the following elements:

(i) ''Critical goods and materials,'' as defined in section 6(b) of E.O. 14017, underlying the supply chain in question. Under section 6(b) of E.O. 14017, ''critical goods and materials'' means goods and raw materials currently defined under statute or regulation as ''critical'' materials, technologies, or infrastructure;

(ii) ''other essential goods and materials,'' as defined in section 6(d) of E.O. 14017, underlying the supply chain in question, including digital products. Under section 6(d) of E.O. 14017, ''other essential goods and materials'' means those that are essential to national and economic security, emergency preparedness, or to advance the policy set forth in section 1 of E.O. 14017, but not included within the definition of ''critical goods and materials''; [1]

(iii) manufacturing, or other capabilities necessary to produce or supply the materials and services identified in paragraphs (i) and (ii) above, including emerging capabilities;

(iv) defense, intelligence, cyber, homeland security, health, climate, environmental, natural, market, economic, geopolitical, human-rights or forced-labor risks, or other contingencies that may disrupt, strain, compromise, or eliminate the supply chain—including risks posed by supply chains' reliance on digital products that may be vulnerable to failures or exploitation, and risks resulting from the elimination of, or failure to develop domestically the capabilities identified in paragraph (iii) above—and that are sufficiently likely to arise so as to require reasonable preparation for their occurrence;

(v) resilience and capacity of American manufacturing supply chains, including ICT design, manufacturing, and distribution, and the industrial base—whether civilian or defense—of the United States to support national and economic security, information security, emergency preparedness, and the policy identified in section 1 of E.O. 14017, in the event any of the contingencies identified in paragraph (iv) above occurs, including an assessment of:

(A) manufacturing or other needed capacities of the United States related to ICT design and manufacturing of products and services, including the ability to modernize to meet future needs;

(B) gaps in domestic design and manufacturing capabilities, including nonexistent, extinct, threatened, or single-point-of failure capabilities;

(C) information and cybersecurity practices and standards of the ICT sector with specific regard to the risks identified in paragraph (iv) above. The Department of Commerce and the Department of Homeland Security are specifically interested in comments related to validation standards of component and software integrity, standards and practices ensuring the availability and integrity of software delivery and maintenance, and security controls during the manufacturing phase of ICT hardware and components;

(D) supply chains with a single point of failure, single or dual suppliers, single region suppliers, highly connected markets or shared suppliers, or limited resilience, especially for subcontractors, as defined by section 44.101 of title 48, Code of Federal Regulations (Federal Acquisition Regulation);

(E) location of key design, manufacturing, software development, integration, and production assets, with any significant risks identified in paragraph (iv) above posed by the

[1] The Department of Commerce and the Department of Homeland Security are also interested in essential goods and materials essential to incident response and recovery.

assets' physical location or the distribution of these facilities;

(F) exclusive or dominant supply of ''critical goods and materials,'' and ''other essential goods and materials,'' as identified in paragraphs (i) and (ii) above, by or through nations that are or are likely to become, unfriendly or unstable;

(G) availability of substitutes or alternative sources for ''critical goods and materials,'' and ''other essential goods and materials,'' as identified in paragraphs (i) and (ii) above.

(H) relevant workforce skills, best practices, and identified gaps in the availability and/or adequacy of domestic education and training resources necessary to fulfill future workforce needs;

(I) need for research and development capacity to sustain leadership in the development of services or ''critical goods and materials,'' and ''other essential goods and materials,'' as identified in paragraphs (i) and (ii) above;

(J) role of transportation and transmission systems in supporting existing supply chains and risks associated with those systems; and

(K) risks posed by climate change to the availability, production, transportation, or transmission of ''critical goods and materials'' and ''other essential goods and materials,'' as identified in paragraphs (i) and (ii) above;

(vi) allied and partner actions, including whether or not the United States' allies and partners have also identified and prioritized the services or ''critical goods materials'' and ''other essential goods and materials'' identified in paragraphs (i) and (ii) above, and possible avenues for international engagement;

(vii) primary causes of risks for any aspect of the ICT industrial base and supply chains assessed as vulnerable pursuant to paragraph (v) above;

(viii) prioritization of the ''critical goods and materials'' and ''other essential goods and materials,'' including digital products, identified in paragraphs (i) and (ii) above for the purpose of identifying options and policy recommendations. The prioritization shall be based on statutory or regulatory requirements; importance to national security, emergency preparedness, and the policy set forth in section 1 of E.O. 14017;

(ix) specific policy recommendations important for ensuring a resilient supply chain for the ICT industrial base. Such recommendations may include, but are not limited to, sustainably reshoring supply chains and developing or strengthening domestic design, components, and supplies; cooperating with allies and partners to identify alternative supply chains; building redundancy into domestic supply chains; ensuring and enlarging stockpiles; developing workforce capabilities; enhancing access to financing; expanding research and development to broaden supply chains; addressing risks due to vulnerabilities in digital products relied on by supply chains; addressing risks posed by climate change; strengthening supply chain security; and any other recommendations;

(x) any executive, legislative, regulatory, and policy changes and any other actions to strengthen the capabilities identified in paragraph (iii) above, and to prevent, avoid, or prepare for any of the contingencies identified in paragraph (iv) above; and

(xi) suggestions for improving the Government-wide effort to strengthen supply chains, including suggestions for coordinating actions with ongoing efforts that could be considered duplicative of the work of E.O. 14017 or with existing Government mechanisms that could be used to implement E.O. 14017 in a more effective manner.

The Department of Commerce and the Department of Homeland Security encourage commenters, when addressing the elements above, to structure their comments using the specific text as identifiers for the areas of inquiry to which their comments respond. This will assist in more easily reviewing and summarizing the comments received in response to these specific comment areas. For example, a commenter submitting comments responsive to *paragraph (i) above,* would use that exact text—*The ''critical goods and materials,'' as defined in section 6(b) of E.O. 14017, underlying the supply chain in question*—as a heading in the public comment followed by the commenter's specific comments in this area.

Requirements for Written Comments

The *https://www.regulations.gov* website allows users to provide comments by filling in a ''Type Comment'' field, or by attaching a document using an ''Upload File'' field. The Department of Commerce prefers that comments be provided in an attached document. The Department of Commerce prefers submissions in Microsoft Word (.doc files) or Adobe Acrobat (.pdf files). If the submission is in an application format other than Microsoft Word or Adobe Acrobat, please indicate the name of the application in the ''Type Comment'' field. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter within the comments. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file, so that the submission consists of one file instead of multiple files. Comments (both public comments and non-confidential versions of comments containing business confidential information) will be placed in the docket and open to public inspection. Comments may be viewed on *https://www.regulations.gov* by entering docket number BIS–2021–0021 in the search field on the home page.

All filers should name their files using the name of the person or entity submitting the comments. Anonymous comments are also accepted. Communications from agencies of the United States Government will not be made available for public inspection.

Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. The non-confidential version of the submission will be placed in the public file on *https://www.regulations.gov.* For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC''. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The non-confidential version must be clearly marked ''PUBLIC''. The file name of the non-confidential version should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. If a public hearing is held in support of this assessment, a separate **Federal Register** notice will be published providing the date and information about the hearing.

The Bureau of Industry and Security does not maintain a separate public inspection facility. Requesters should first view the Bureau's web page, which can be found at *https://efoia.bis.doc.gov/* (see ''Electronic FOIA'' heading). If requesters cannot access the website, they may call 202–482–0795 for assistance. The records related to this assessment are made accessible in accordance with the regulations published in part 4 of title 15 of the

Code of Federal Regulations (15 CFR 4.1 through 4.11).

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2021–20229 Filed 9–17–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Surveys for User Satisfaction, Impact and Needs

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on July 6, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: International Trade Administration, U.S. Commercial Service, Commerce.

Title: Domestic and International Client Export Services and Customized Forms.

OMB Control Number: 0625–0275.

Form Number(s): None.

Type of Request: Renewal submission (extension of a current information collection).

Number of Respondents: 50,000.

Average Hours per Response: .5 (30 minutes).

Burden Hours: 33,333 (annual).

Needs and Uses: The International Trade Administration provides a multitude of international trade related programs to help U.S. businesses. These programs include information products, services, and trade events. To accomplish its mission effectively, ITA needs ongoing feedback on its programs. This information collection item allows ITA to solicit clients' opinions about the use of ITA products, services, and trade events. To promote optimal use and provide focused and effective improvements to ITA programs, we are requesting approval for this clearance package; including: use of Comment Cards (*i.e.* transactional-based surveys) to collect feedback immediately after ITA assistance is provided to clients; use of annual surveys (*i.e.,* relationship-based surveys) to gauge overall satisfaction, impact and needs for clients with ITA assistance provided over a period time; use of multiple data collection methods (*i.e.,* web-enabled surveys sent via email, telephone interviews, automated telephone surveys, and in-person surveys via mobile devices/laptops/tablets at trade events/shows) to enable clients to conveniently respond to requests for feedback; and a forecast of burden hours. Without this information, ITA is unable to systematically determine the actual and relative levels of performance for its programs and products/services and to provide clear, actionable insights for managerial intervention. This information will be used for program evaluation and improvement, strategic planning, allocation of resources and stakeholder reporting.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

Legal Authority: Public Law 15 U.S.C. *et seq.* and 15 U.S.C. 171 *et seq.*

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0625–0275.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–20232 Filed 9–17–21; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

Civil Nuclear Trade Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed topics for a meeting of the Civil Nuclear Trade Advisory Committee (CINTAC).

DATES: The meeting is scheduled for Thursday, September 30, 2021, from 9:00 a.m. to 4:00 p.m. Eastern Daylight Time (EDT). The deadline for members of the public to register to participate, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5:00 p.m. EDT on Friday, September 24, 2021.

ADDRESSES: The meeting will be held virtually via Microsoft Teams. Requests to register to participate (including to speak or for auxiliary aids) and any written comments should be submitted via email to Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, at *jonathan.chesebro@trade.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration (Phone: 202–482–1297; email: *jonathan.chesebro@trade.gov*).

SUPPLEMENTARY INFORMATION:

Background: The CINTAC was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App.), in response to an identified need for consensus advice from U.S. industry to the U.S. Government regarding the development and administration of programs to expand United States exports of civil nuclear goods and services in accordance with applicable U.S. laws and regulations, including advice on how U.S. civil nuclear goods and services export policies, programs, and activities will affect the U.S. civil nuclear industry's competitiveness and ability to participate in the international market.

The Department of Commerce renewed the CINTAC charter on August 5, 2020. This meeting is being convened under the seventh charter of the CINTAC.

On September 30, 2021, the CINTAC will hold the third meeting of its current charter term. The Committee, with officials from the U.S. Department of Commerce and other agencies, will discuss major issues affecting the competitiveness of the U.S. civil nuclear energy industry and discuss proposed recommendations and potential priorities for future subcommittee work.

An agenda will be made available by September 24, 2021 upon request to Mr. Jonathan Chesebro.

Members of the public wishing to attend the public session of the meeting must notify Mr. Chesebro at the contact information above by 5:00 p.m. EDT on Friday, September 24, 2021 in order to pre-register to participate. Please specify any requests for reasonable accommodation at least five business days in advance of the meeting. Last minute requests will be accepted but may not be possible to fill. A limited amount of time will be available for brief oral comments from members of the public attending the meeting. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of 30 minutes. Individuals wishing to reserve speaking time during the meeting must contact Mr. Chesebro and submit a brief statement of the general nature of the comments and the name and address of the proposed participant by 5:00 p.m. EDT on Friday, September 24, 2021. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers.

Any member of the public may submit written comments concerning the CINTAC's affairs at any time before or after the meeting. Comments may be submitted to Mr. Jonathan Chesebro at *Jonathan.chesebro@trade.gov.* For consideration during the meeting, and to ensure transmission to the Committee prior to the meeting, comments must be received no later than 5:00 p.m. EDT on Friday, September 24, 2021. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of CINTAC meeting minutes will be available within 90 days of the meeting.

Dated: September 10, 2021.

Man Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2021–20267 Filed 9–17–21; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of National Estuarine Research Reserve; Public Meeting; Request for Comments

AGENCY: Office for Coastal Management (OCM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meeting and opportunity to comment.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA), Office for Coastal Management will hold a public meeting to solicit comments on the performance evaluation of the Chesapeake Bay, Virginia National Estuarine Research Reserve.

DATES: NOAA will consider all written comments received by Friday, October 29, 2021. A virtual public meeting will be held on Wednesday, October 20, 2021 at 12 p.m. ET.

ADDRESSES: You may submit written comments on the national estuarine research reserve NOAA intends to evaluate by emailing Carrie Hall, Evaluator, NOAA Office for Coastal management at *Carrie.Hall@noaa.gov.* Timely comments received by the Office for Coastal Management are considered part of the public record and may be publicly accessible. Any personal information (*e.g.,* name, address) submitted voluntarily by the sender may also be publicly accessible. NOAA will accept anonymous comments. You may also provide public comments during the virtual public meeting. To participate in the virtual public meeting, registration is required by Tuesday, October 19, 2021, at 5 p.m. ET.

Registration: To register, visit *https://forms.gle/24YYpd9AkG82ciSN7.* If you have difficulty registering, contact Carrie Hall by email at *Carrie.Hall@noaa.gov.* You may participate online or by phone. If you would like to provide comment during the public meeting, please select ''yes'' during the online registration. The line-up of speakers will be based on the date and time of registration. Once you register, you will receive a confirmation of your registration. One hour prior to the start of the meeting on October 20, 2021, you will be emailed a link to the public meeting and information about participating.

FOR FURTHER INFORMATION CONTACT: Carrie Hall Evaluator, NOAA Office for Coastal Management by email at *Carrie.Hall@noaa.gov* or 240–530–0730. Copies of the previous evaluation findings, reserve management plan, and reserve site profile may be viewed and downloaded on the internet at *http://coast.noaa.gov/czm/evaluations.* A copy of the evaluation notification letter and most recent progress report may be obtained upon request by contacting Carrie Hall.

SUPPLEMENTARY INFORMATION: Section 312 of the Coastal Zone Management Act (CZMA) requires NOAA to conduct periodic evaluations of federally approved national estuarine research reserves. The process includes one or more public meetings, consideration of written public comments, and consultations with interested Federal, state, and local agencies and members of the public. During the evaluation, NOAA will consider the extent to which the state of California has met the national objectives, adhered to the reserve's management plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance under the CZMA. When the evaluation is completed, NOAA's Office for Coastal Management will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings.

Authority: 16 U.S.C. 1458

Keelin Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2021–20256 Filed 9–17–21; 8:45 am]

BILLING CODE 3510–JE–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m. EDT, Thursday, September 30, 2021.

PLACE: Virtual meeting.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.cftc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: September 16, 2021.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2021–20417 Filed 9–16–21; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 1:30 p.m. EDT, Monday, September 27, 2021.

PLACE: Virtual meeting.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.cftc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: September 16, 2021.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2021–20416 Filed 9–16–21; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2021–HQ–0007]

Proposed Collection; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Air Force announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 19, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Ms. Angela Duncan at the Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100 or call 571–372–7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Air Force Family Integrated Results & Statistical Tracking (AFFIRST) Automated System; OMB Control Number 0701–0070.

Needs and Uses: The information collection requirement is necessary to record demographic information on Airman & Family Readiness Center (A&FRC) customers, results of the customer's visits, determine customer needs, service plan, referrals, workshop attendance and other related A&FRC activities and services accessed by the customer. Data is used to determine the effectiveness of A&FRC activities and services (results management) as well as collect and provide return on investment data to leadership. Information is compiled for statistical reporting to bases, major commands, Headquarters United States Air Force, Department of Defense and Congress.

Affected Public: Individuals or households.

Annual Burden Hours: 9,375 hours.

Number of Respondents: 37,500.

Responses per Respondent: 1.

Annual Responses: 37,500.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

Dated: September 13, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20200 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Intent To Prepare a Supplemental Environmental Impact Statement for Updates to the Implementation of Howard A. Hanson Dam Downstream Fish Passage, Washington

AGENCY: U.S. Army Corps of Engineers, Department of the Army, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (USACE), Seattle District, is announcing its intent to prepare a supplemental environmental impact statement (SEIS) in compliance with the National Environmental Policy Act for the express purpose of addressing updates to the implementation of Howard A. Hanson Dam (HAHD) downstream fish passage to be instituted as part of the Additional Water Storage Project on the Green River in King County, Washington. The SEIS will supplement the *HAHD Additional Water Storage Project Final Feasibility Report and Final EIS* (August 1998) prepared by USACE.

ADDRESSES: USACE Seattle District, CENWS–PMP–E, P.O. Box 3755, Seattle, WA, 98124–3755.

FOR FURTHER INFORMATION CONTACT: Ms. Nancy Gleason, Environmental Coordinator, 206–764–6577 or Ms. Katherine LaPonte, Project Manager, 206–351–6077; email to *HAHD-fishpassage@usace.army.mil;* or mail to USACE Seattle District, CENWS–PMP–E, P.O. Box 3755, Seattle, WA 98124–3755.

SUPPLEMENTARY INFORMATION: The USACE, Seattle District, will prepare an SEIS in accordance with 33 CFR 230.13(b) for proposed modifications to the recommended alternative for the downstream fish passage component of the previously authorized HAHD Additional Water Storage Project in King County, Washington. The scope of this SEIS will not extend to other elements of the project related to water supply or ecosystem restoration, as those components were not materially altered from the description evaluated in the 1998 EIS and have already been implemented. The purpose of the fish passage component of the larger

Additional Water Storage Project remains the same as the original EIS: To successfully pass migrating juvenile fish downstream.

The 1998 EIS evaluated a fish passage facility generally consisting of a floating fish collector. In their 2019 Biological Opinion (BiOp) for HAHD operations and maintenance, the National Marine Fisheries Service (NMFS) established survival criteria and transport pipe exit release location criteria that must be met by any fish passage facility for the project. In order to meet these criteria, the USACE has redesigned the downstream fish passage component of the project. In this SEIS, the USACE will evaluate implementation of downstream fish passage via a fixed multiport collection structure that would allow fish collection from a set of five intake ports at multiple elevations as the reservoir water level changes. Once collected through the multiport structure, fish would be transported downstream using one or more steep bypass pipes. The SEIS will evaluate and provide supplemental analysis, as applicable, on any impacts generated by the modification of the downstream fish passage component of the recommended alternative to the quality of the human environment not identified and evaluated in the August 1998 Final EIS. Evaluation may extend, for example, to potential changes in the study area to aquatic habitat, different species listed under the Endangered Species Act (ESA) in the study area, potential changes to the geological analysis associated with the construction of a fish passage facility, potential impacts to natural resources during construction, including elevated noise and disturbance to fish and wildlife at HAHD from rock blasting and operation of construction equipment, potential effects to cultural and historical resources, and temporary effects to water quality and aquatic habitat from construction.

As identified in the original EIS, USACE continues to propose monitoring to determine whether the facility provides safe downstream passage for fish. Once operational, the fish passage facility is expected to have significant benefits to ESA-listed salmonids thereby benefiting the ecosystem of the entire Green River watershed, as well as increasing a primary food source for the endangered Southern Resident killer whales. The anticipated authorizations required prior to construction are expected to include a BiOp from the U.S. Fish and Wildlife Service, a Clean Water Act Section 401 Water Quality Certification, concurrence from the Washington Department of Ecology on a Coastal Zone Management Act Consistency Determination, and consultation under Section 106 of the National Historic Preservation Act.

The SEIS will follow the same process and format as the original EIS (*i.e.,* draft, final, updated record of decision (ROD)), except that scoping is not required. The original EIS and other project documents are available online at *https://www.nws.usace.army.mil/Missions/Environmental/Environmental-Documents/.*

The draft SEIS will be made available for public and agency review and comment, which is expected to occur in October 2021. After public review of the draft SEIS and evaluation of the comments received, USACE will promulgate a final SEIS; this is expected to occur in 2022.

Comments or questions concerning this proposed action can be directed to the USACE contacts listed above.

Geoffrey Van Epps,

Colonel, U.S. Army, Division Commander.

[FR Doc. 2021–20240 Filed 9–17–21; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0099]

Proposed Collection; Comment Request

AGENCY: Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Logistics Agency (DLA) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 19, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Logistics Agency, Office of Small Business Programs, ATTN: Sherry Savage, 8725 John J. Kingman Road, Fort Belvoir, VA 22060 or call (571) 767–1656.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Procurement Technical Assistance Center Cooperative Agreement Performance Report; DLA Form 1806; OMB Control Number 0704–0320.

Needs and Uses: This information collection by the Defense Logistics Agency (DLA) gathers data to be used in measuring, on a quarterly basis, cooperative agreement recipients' performance against goals and objectives established by awards. The Department of Defense (DoD) Procurement Technical Assistance (PTA) Cooperative Agreement Program was established by Congress in 1985 to assist state and local governments, tribal organizations, tribal economic enterprises, and other non-profit entities in establishing or maintaining PTA activities to help business firms market their goods and services to the DoD, other federal agencies, and state and local governments. Administrative requirements for the program are established by the DoD Grant and Agreement Regulations (DoDGARS).

Affected Public: State, Local, or Tribal Government; Not-for-Profit Institutions.

Annual Burden Hours: 1,900.

Number of Respondents: 95.

Responses per Respondent: 4.

Annual Responses: 380.

Average Burden per Response: 5 hours.

Frequency: Quarterly.

Dated: September 13, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20201 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0045]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 20, 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: Angela Duncan, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Defense Travel System; OMB Control Number 0704–0577.

Type of Request: Extension.

Number of Respondents: 1,500.

Responses per Respondent: 1.

Annual Responses: 1,500.

Average Burden per Response: 10 minutes.

Annual Burden Hours: 250.

Needs and Uses: The Defense Travel System (DTS) is the enterprise standard for requesting, authorizing, reserving, and requesting payment for travel within the Department of Defense. Information is collected for the purpose of official travel. The information is used to satisfy reporting requirements and detect fraud and abuse.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: September 13, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20191 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee (DoDWC); Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of closed Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the DoDWC will take place.

DATES: Tuesday, September 21, 2021 from 10:00 a.m. to 11:00 a.m. and will be closed to the public.

ADDRESSES: The closed meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Mr. Karl Fendt, (571) 372–1618 (voice), *karl.h.fendt.civ@mail.mil.* (email), 4800 Mark Center Drive, Suite 05G21, Alexandria, Virginia 22350 (mailing address).

SUPPLEMENTARY INFORMATION: Meeting Announcement: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer for the DoDWC, the DoDWC was unable to provide public notification required by 41 CFR 102–3.450(a) concerning its September 21, 2021 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix), the Government in the Sunshine Act (5 U.S.C. 552b), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of this meeting is to provide independent advice and recommendations on matters relating to the conduct of wage surveys and the establishment of wage schedules for all appropriated fund and non-appropriated fund areas of blue-collar employees within the DoD.

Agenda

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous agenda.

2. Wage Schedule (Wage Change) for the Washington, District of Columbia wage area (AC–124).

3. Wage Schedule (Wage Change) for the Prince William, Virginia wage area (AC–126).

4. Wage Schedule (Wage Change) for the Charles-St. Mary's, Maryland wage area (AC–128).

5. Wage Schedule (Wage Change) for the Anne Arundel, Maryland wage area (AC–147).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

6. Wage Schedule (Full Scale) for the Utah wage area (AC–139).

7. Wage Schedule (Full Scale) for the Spokane, Washington wage area (AC–145).

8. Wage Schedule (Wage Change) for the Charleston, South Carolina wage area (AC–119).

9. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b(c)(4), the Department of Defense has determined that the meeting shall be closed to the public. The Under Secretary of Defense for Personnel and Readiness, in consultation with the Department of Defense Office of General Counsel, has

determined in writing that this meeting may disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Written Statements: Pursuant to section 10(a)(3) of the Federal Advisory Committee Act and 41 CFR 102–3.140, interested persons may submit written statements to the Designated Federal Officer for the DoDWC at any time. Written statements should be submitted to the Designated Federal Officer at the email or mailing address listed above in the **FOR FURTHER INFORMATION CONTACT**. If statements pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five (5) business days prior to the meeting in question. Written statements received after this date may not be provided to or considered by the DoDWC until its next meeting. The Designated Federal Officer will review all timely submitted written statements and provide copies to all the committee members before the meeting that is the subject of this notice.

Dated: September 14, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20204 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0098]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 19, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Human Resources Activity, 4800 Mark Center Drive, Suite 08F05 Alexandria, VA 22350, LaTarsha Yeargins, 571–372–2089.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Non-combatant Tracking System (NTS) & Evacuation Tracking and Accountability System (ETAS); OMB Control Number 0704–NCTS.

Needs and Uses: This information collection is needed to collect the required evacuee information necessary to document the movement of an evacuee from a foreign country to an announced safe haven and to assist the evacuee in meeting their needs. In addition, this information collection is needed to ensure that Federal and State agencies receive proper reimbursement for costs incurred during these very expensive operations. The primary purpose of this information collection is personnel accountability of evacuees who have been repatriated through designated processing sites. By identifying what services have been provided to respective evacuees during initial processing and where they have gone, Federal agencies may ensure that their personnel receive safe haven entitlements and notification of change in status.

Affected Public: Individuals or households.

Annual Burden Hours: 4,167 hours.

Number of Respondents: 50,000.

Responses per Respondent: 1.

Annual Responses: 50,000.

Average Burden per Response: 5 minutes.

Frequency: On occasion.

Dated: September 13, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20198 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2021–OS–0069]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 20, 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: Angela Duncan, 571–372–7574, orm*whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Application for Surrogate Association for DoD Self-Service (DS) Logon; DD Form 3005; OMB Control Number 0704–0559.

Type of Request: Regular.

Number of Respondents: 5,000.

Responses per Respondent: 1.

Annual Responses: 5,000.

Average Burden per Response: 6 minutes.

Annual Burden Hours: 500 hours.

Needs and Uses: This information collection is needed to obtain the necessary data to establish eligibility for

a DS Logon credential and enrollment in DEERS. This information shall be used to establish an individual's eligibility for DEERS enrollment and DS Logon credential issuance as a surrogate. Information is collected via the DD Form 3005, ''Application for Surrogate Association for DoD Self-Service (DS) Logon,'' and used to establish a record in DEERS and issue a DS Logon credential in accordance with DoDM 1341.02, Volume 1. The information that is collected may be released to Federal and State agencies and private entities, on matters relating to utilization review, professional quality assurance, program integrity, civil and criminal litigation, and access to Federal government facilities, computer systems, networks, and controlled areas.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: September 13, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–20190 Filed 9–17–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Project To Support America's Families and Educators (Project SAFE) Grant Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2021 and FY 2022 for Project SAFE under the School Safety National Activities authority of the Elementary and Secondary Education Act (ESEA), Assistance Listing Number 84.184N. The Project SAFE grant program is intended to improve students' safety and well-being by providing resources to local educational agencies (LEAs) that adopt and implement strategies to prevent the spread of the Novel Coronavirus Disease 2019 (COVID–19) consistent with guidance from the Centers for Disease Control and Prevention (CDC) and that are financially penalized for doing so by their State educational agency (SEA) or other State entity.

DATES:

Applications Available: September 20, 2021.

Deadline for Transmittal of Applications: Applications will be reviewed and approved on a rolling, expedited basis contingent on the availability of funding.

ADDRESSES: To submit an application, please email the completed and signed application, along with required attachments, to *ProjectSAFE@ed.gov.* The application template may be found at the following link: *https://oese.ed.gov/offices/office-of-formula-grants/safe-supportive-schools/the-project-to-support-americas-families-and-educators-project-safe/.*

FOR FURTHER INFORMATION CONTACT: Amy Banks, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E257, Washington, DC 20202–6244. Phone: 202–453–6704. Email: *ProjectSAFE@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 Project SAFE grant program provides grants to eligible LEAs to improve student safety and well-being by advancing strategies consistent with CDC guidance to reduce transmission of COVID–19 in schools.

Background: Since March 2020, the Nation's students have experienced massive interruptions to in-person instruction as a result of the COVID–19 pandemic. The pandemic has negatively impacted many students' social, emotional, and mental well-being and academic achievement, and exacerbated pre-existing racial, socioeconomic, and other educational inequities.[1] The Administration is committed to taking all necessary steps to support LEAs in providing every student the opportunity to safely learn in-person full-time during the 2021–2022 school year.

CDC guidance makes clear that K–12 schools can safely operate in-person by implementing layered prevention strategies (using multiple strategies together consistently).[2] Studies show that schools that consistently implemented layered prevention strategies had levels of transmission lower than or similar to the rates in the communities in which they are located.[3] Science-based strategies recommended by the CDC for preventing the spread of COVID–19 include promoting vaccination for staff and eligible students, universal and correct indoor masking, implementing screening testing, using contact tracing in combination with isolation and quarantine, improving ventilation, and maintaining physical distance to the maximum extent possible.

To support LEAs in adopting and implementing strategies to sustain safe in-person instruction, the American Rescue Plan Act of 2021 (ARP Act) requires each LEA that receives Elementary and Secondary School Emergency Relief (ARP ESSER) funds to adopt a plan for the safe return to in-person instruction and continuity of services.[4] Under the Department's interim final requirements for the ARP ESSER funds, the LEA must describe in its plan how it will maintain the health and safety of students, educators, and other staff and the extent to which it has adopted policies on CDC safety recommendations.[5]

In addition, the ARP Act is clear that it is within the LEA's discretion [6] to use

[1] See: *https://www.cdc.gov/mmwr/volumes/70/wr/mm7011a1.htm* and *https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf.*

[2] See: *https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html.*

[3] Ibid.

[4] Section 2001(i) of the ARP Act.

[5] See: 86 FR 21195 (April 22, 2021), available at *https://www.federalregister.gov/documents/2021/04/22/2021-08359/american-rescue-plan-act-elementary-and-secondary-school-emergency-relief-fund.*

[6] Section 18003(d) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116–136 (March 27, 2020), and section 313(d) of the Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act, 2021, Public Law 116–260 (December 27, 2020), and section 2001(e)(2) of the ARP Act permit an LEA to use

ARP ESSER funds (as well as ESSER funds granted through prior Federal pandemic relief funding) to implement policies in line with guidance from the CDC that support the reopening and operation of school facilities to effectively maintain health and safety.[7] As noted, multiple studies have shown that transmission rates within school settings, when multiple prevention strategies are in place, are typically lower than or similar to community transmission levels.[8] The Administration fully supports and encourages all school districts to adopt CDC-recommended prevention strategies in order to prevent transmission of COVID–19 in schools.

However, some States have taken steps that restrict an LEA's implementation of local health and safety policies aligned with CDC guidance, including the withholding of critical resources needed to support their implementation. For example, some States have prohibited or otherwise blocked LEAs from adopting universal masking strategies. The Department has issued letters of concern to these States [9] because trying to prevent school districts from adopting these policies puts the health and safety of students and school staff at greater risk and threatens the ability of school districts to safely sustain in-person instruction. Additionally, for example, some States have gone so far as to withhold resources from or impose financial penalties on LEAs that are following CDC guidance.

On August 18, 2021, President Biden issued the ''Memorandum on Ensuring a Safe Return to In-Person School for the Nation's Children.'' The Presidential Memorandum directs the Department ''to assess all available tools in taking action, as appropriate and consistent with applicable law, to ensure that:

(i) Governors and other officials are taking all appropriate steps to prepare for a safe return to school for our Nation's children, including not standing in the way of local leaders making such preparations; and

(ii) Governors and other officials are giving students the opportunity to participate and remain in safe full-time, in-person learning without compromising their health or the health of their families or communities.''

The Presidential Memorandum further notes that: ''some State officials have even threatened to impose personal financial consequences on school officials who are working tirelessly to put student health and safety first and to comply with their legal obligations to their communities to further the essential goal of a safe, in-person education for all students. Our priority must be the safety of students, families, educators, and staff in our school communities. Nothing should interfere with this goal.'' [10]

Consequently, in cases where LEAs incur financial penalties related to the implementation of science-based strategies recommended by the CDC to prevent the spread of COVID–19 in schools and support sustained, full-time in-person learning, it is appropriate for the Department to provide grant assistance to help offset the impact of such financial penalties and support activities to improve student safety and well-being by advancing strategies consistent with CDC guidance to reduce transmission of COVID–19 in schools.

Priority: This notice contains one absolute priority. We are establishing this priority for the FY 2021 and FY 2022 Project SAFE grant program in accordance with section 437(d) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d).

Absolute Priority: For FY 2021 and FY 2022, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we will consider only applications that meet the absolute priority.

This priority is:

Supporting LEAs' and local education leaders' efforts to improve student safety and well-being in LEAs that have been financially penalized by their SEA or other State entity for adopting and implementing strategies consistent with CDC guidance to prevent the spread of COVID–19.

Under this absolute priority, the Department awards funds to support activities to improve student safety and well-being by advancing strategies consistent with CDC guidance to reduce transmission of COVID–19 in schools by addressing the harmful impact of disruptive State penalties imposed on the LEA for implementing strategies consistent with CDC guidance. These activities could include, for example, activities to facilitate the continued implementation of strategies aligned with CDC guidance, despite the State-imposed penalty, and/or to maintain LEA and school stability, such as by enabling the LEA to maintain activities and/or staffing levels or compensation that would otherwise be negatively impacted or reduced due to financial penalties levied on the LEA for implementing strategies aligned with CDC guidance, including but not limited to a reduction in salaries for the superintendent or school board members.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under title IV, part F, subpart 3 of the Elementary and Secondary Education Act (ESEA) (20 U.S.C. 7281) and therefore qualifies for this exemption. Section 437(d)(2) of GEPA allows the Secretary to exempt from rulemaking requirements regulations for which he determines that the requirements of this subsection will cause extreme hardship to the intended beneficiaries of the program affected by such regulations. The Secretary determined notice and comment rulemaking would cause extreme hardship by dangerously delaying critical health and safety measures for students, educators, and staff. Therefore this competition qualifies for this exemption as well. In order to ensure timely grant awards, the Secretary has decided to forgo public comment on the priorities and requirements under section 437(d) of GEPA. These priorities and requirements will apply to this FY 2021/2022 grant competition and any subsequent year in which we make awards under this competition.

Program Authority: Section 4631(a)(1)(B) of the ESEA (20 U.S.C. 7281(a)(1)(B)).

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

ESSER funds for a broad range of allowable activities. Each section authorizes an LEA to use ESSER funds ''for any of the following'' activities. Accordingly, neither an SEA nor a State legislature has the authority to limit an LEA's use of ESSER formula funds. See Question A–6 in the Department's FAQ guidance: *https://oese.ed.gov/files/2021/05/ESSER.GEER_.FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf.*

[7] Section 2001(e)(2)(Q) of the ARP Act.

[8] See: *https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html.*

[9] The letters are available to the public at *https://oese.ed.gov/offices/american-rescue-plan/american-rescue-plan-elementary-and-secondary-school-emergency-relief.*

[10] See: *https://www.federalregister.gov/documents/2021/08/23/2021-18223/ensuring-a-safe-return-to-in-person-school-for-the-nations-children.*

parts 75, 77, 79, 81, 82, 84, 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.

Note: The open licensing requirement in 2 CFR 3474.20 does not apply to this program.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $3,200,000.

Estimated Range of Awards: $50,000 to $350,000.

Estimated Average Size of Awards: $250,000.

Maximum Award: The total amount of Project SAFE funds an LEA requests must not exceed the amount of the financial penalty for adopting and implementing CDC guidance that the LEA incurred or will incur during the project period. The Department may fund awards in whole, or in part, consistent with this notice, and may establish a maximum grant award level through a notice in the **Federal Register** in order to serve as many eligible applicants as possible.

Estimated Number of Awards: 13.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 12 months. The Department may structure an LEA's award based on the timing of any anticipated future financial penalty.

III. Eligibility Information

1. *Eligible Applicants:* An LEA that—

a. Has adopted a policy to implement and is implementing one or more of the strategies recommended in the CDC's Guidance for COVID–19 Prevention in K–12 Schools, as may be updated.[11] The most recent guidance incorporates the following strategies:

(i) Promoting vaccination;

(ii) Consistent and correct mask use;

(iii) Physical distancing;

(iv) Screening testing to promptly identify cases, clusters, and outbreaks;

(v) Ventilation;

(vi) Handwashing and respiratory etiquette;

(vii) Staying home when sick and getting tested;

(viii) Contact tracing, in combination with isolation and quarantine; and

(ix) Cleaning and disinfection.

b. Has incurred or will incur a financial penalty imposed by its SEA or other State entity, such as a reduction in funding, including but not limited to reduction in salaries for school board members or superintendents, due to implementation of one or more strategies described in paragraph (a); and

c. To protect the safety and well-being of students, has continued at the time of application to implement such strategy or strategies for which the penalty was imposed and commits to maintain such strategy or strategies to the extent consistent with CDC guidance for the 2021–2022 school year.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *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 activities described in its application.

IV. Application and Submission Information

1. *Application:* Applicants are required to certify in their application that they meet the eligibility requirements. In addition to this certification, applicants must include with their application an electronic copy of—

a. The enacted LEA policy that demonstrates that the LEA has adopted one or more strategies as recommended in the CDC's Guidance for COVID–19 Prevention in K–12 Schools available at *https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html,* as listed in the eligibility requirements;

b. The SEA or other State entity notification of a financial penalty levied due to the LEA's adoption of such strategy or strategies, which includes the amount and duration of such penalty (to the extent available); and

c. An assurance from the LEA superintendent or authorized representative that the LEA leadership will continue implementing the prevention strategy or strategies to the extent consistent with CDC guidance for the duration of the 2021–2022 school year.

The application must also describe the amount of the financial penalty specified in the notification from the SEA or other State entity that has already been levied at the time of the application and the anticipated amount of any future financial penalty that will be levied during the 12-month period beginning on the date of application.

2. *Budget:* Applicants are required to include a budget that includes the total amount requested and the proposed use of grant funds consistent with the absolute priority. The total amount requested must not exceed the amount of the financial penalty the LEA already incurred at the time of application and will incur within the 12-month period following the date of application.

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make awards on an expedited basis.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

V. Application Review Information

1. *Review:* Program staff will screen all applications to eliminate any applications that do not meet the eligibility requirements or are incomplete and review applicant budgets to ensure they meet the absolute priority and that costs are allowable. Applications will be accepted on a rolling basis and approved as they are reviewed and determined by program staff to meet all requirements. If it becomes necessary to prioritize applications due to limited availability of funds, the Department may consider additional factors including whether an LEA has Federal pandemic recovery funds available to meet the purposes of the grant.

2. *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

[11] See: *https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html.*

or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *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.

4. *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.

5. *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. *Termination of Award:* An LEA that receives a Project SAFE grant must notify the Department if its financial penalty is terminated, whether by the SEA, another State entity, or a judicial proceeding. The Department may discontinue an award and terminate the grant (*i.e.,* prevent future grantee draw downs) if the LEA is no longer subject to a financial penalty required for eligibility.

2. *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.

3. *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.

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. For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measure:* For purposes of the Government Performance and Results Act of 1993 and for Department reporting under 34 CFR 75.110, the Department has established the following performance measure for this program: The percentage of LEAs receiving Project SAFE grants that report that they are continuing to protect students' safety and well-being by implementing specific COVID–19 prevention strategies aligned with the most recent CDC guidance. The Department's target for grantees meeting this measure is 100 percent.

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 requester 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.

Ian Rosenblum,

Deputy Assistant Secretary for Policy and Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Elementary and Secondary Education.

[FR Doc. 2021–20394 Filed 9–17–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2021–SCC–0078]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Statewide Longitudinal Data System (SLDS) Survey 2021–2023

AGENCY: Institute of Educational Science (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before October 20, 2021.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox. Comments may also be sent to *ICDocketmgr@ed.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Statewide Longitudinal Data System (SLDS) Survey 2021–2023.

OMB Control Number: 1850–0933.

Type of Review: A revision of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 112.

Total Estimated Number of Annual Burden Hours: 140.

Abstract: The National Center for Education Statistics (NCES), of the Institute of Education Sciences (IES), within the U.S. Department of Education, is requesting clearance to continue the Statewide Longitudinal Data System (SLDS) Survey collection, which is intended to provide insight on State and U.S. territory SLDS capacity for automated linking of K–12, teacher, postsecondary, workforce, career and technical education (CTE), adult education, and early childhood data. The SLDS Survey will continue to be collected annually from State Education Agencies (SEAs), and will help inform NCES ongoing evaluation and targeted technical assistance efforts to enhance the quality of the SLDS Program's support to States regarding systems development, enhancement, and use. The request to conduct all activities related to SLDS 2020–22, including materials and procedures, was approved by OMB in May 2020 (OMB #1859–0933v.8), with a nonsubstantive change request (OMB #1859–0933v.9) approved in August 2020. The SLDS 2020–22 package included a new data collection tool, a Google Form developed for an electronic data collection. That tool was not as successful in the 2020 data collection as NCES would like (see section A.3 for a richer discussion of this). This new request is to conduct all activities related to SLDS 2021–23. It submits enhancements to the OMB-approved Survey, intended to bring consistency to questions across sectors, provide greater definition and clarity to terminology and questions used within the SLDS Survey, and address pandemic-related response across states. In addition, this request submits screenshots of the new Qualtrics information collection tool that will replace the Google Form introduced for SLDS 2020 and which will be used in the 2021 SLDS Data Collection (for proposed changes, see Appendix E) and is planned for use in subsequent collections. Finally, this request submits screenshots of the updated webinar, as the SLDS Program proposes the option to host one or two SLDS Survey webinars to familiarize respondents with the collection tool and completion process. All proposed changes are captured within these documents, including accompanying appendices.

Dated: September 14, 2021.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–20209 Filed 9–17–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP21–1108–000.

Applicants: Cove Point LNG, LP.

Description: § 4(d) Rate Filing: Cove Point—Interim PVIC Adjustment Filing to be effective 10/1/2021.

Filed Date: 9/13/21.

Accession Number: 20210913–5113.

Comment Date: 5 p.m. ET 9/27/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–20249 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD21–8–000]

Technical Conference on Reassessment of the Electric Quarterly Report Requirements; Supplemental Notice of Technical Conference

On August 12, 2021, the Federal Energy Regulatory Commission (Commission) issued a notice that its staff will hold a technical conference related to the reassessment of the Electric Quarterly Report (EQR) requirements on October 14, 2021. The technical conference will take place from 10:00 a.m. to 12:30 p.m. Eastern Time. All interested persons are invited to participate. Access to the meeting will be available via WebEx.

Commission staff is hereby supplementing the August 12, 2021 notice with the agenda, including sample discussion topics. During the conference, Commission staff, EQR filers, and EQR users will discuss potential changes to the current EQR data fields. This technical conference is the third in a series of conferences related to the reassessment of the EQR requirements.

Information for the technical conference, including a link to the webcast, will be posted prior to the event on the meeting event page on the Commission's website, available at: *https://www.ferc.gov/news-events/events/technical-conference-reassessment-electric-quarterly-report-requirements-0.* The presentation slides will be posted to the website prior to the conference. Any interested person that wishes to participate in the conference is required to register through the WebEx link.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–1659 (TTY).

For more information about the technical conference, please contact Jeff Sanders of the Commission's Office of Enforcement at (202) 502–6455, or send an email to *EQR@ferc.gov.*

Dated: September 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20270 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6115–016]

Pyrites Hydro, LLC; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 6115–016.

c. *Date Filed:* August 31, 2021.

d. *Applicant:* Pyrites Hydro, LLC.

e. *Name of Project:* Pyrites Hydroelectric Project (Pyrites Project).

f. *Location:* The existing project is located on the Grass River near the Town of Canton, St. Lawrence County, New York. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825 (r).

h. *Applicant Contact:* Mr. Kevin M. Webb, Hydro Licensing Manager, Pyrites Hydro, LLC, 670 N. Commercial Street, Suite 204, Manchester, NH 03101, (978) 935–6039; email—*kwebb@centralriverspower.com.*

i. *FERC Contact:* Christopher Millard at (202) 502–8256; or email at *christopher.millard@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* October 30, 2021.[1]

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Pyrites Hydroelectric Project (P–6115–016).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The existing Pyrites Project consists of: (1) A 170-foot-long and 12-foot-high concrete Ambursen overflow spillway with 1.5-foot-high flashboards, a 115-foot-long concrete auxiliary spillway, and a 208-foot-long non-overflow dam, which includes a 50-foot-wide intake structure; (2) a 6-foot-diameter, 700-foot-long steel penstock running from the intake structure to an upper powerhouse and a 10-foot-diameter, 2,160-foot-long penstock running from the intake structure to a lower powerhouse; (3) a 21-foot by 31-foot upper powerhouse located 700 feet downstream of the intake structure containing one 1.2-megawatt (MW) turbine/generator unit operating under a rated head of 76 feet and a 50-foot by 53-foot lower powerhouse located 1,200 feet downstream of the tailrace containing two 3.5-MW turbine/generator units operating under a rated head of 111 feet; (4) a 50-foot by 97-foot 115/4.16/2.3-kilovolt (kV) switchyard and substation for use by both powerhouses; (5) a 470-foot-long 2.3-kV transmission line connecting the upper powerhouse to the

[1] The Commission's Rules of Practice and Procedure provide that if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is closed for business, the filing deadline does not end until the close of business on the next business day. 18 CFR 385.2007(a)(2) (2020). Because the 60-day filing deadline falls on a Saturday (*i.e.,* October 30, 2021), the filing deadline is extended until the close of business on Monday, November 1, 2021.

switchyard; (6) a 1,150-foot-long 4.16 kV transmission line connecting the lower powerhouse to the switchyard; and (7) appurtenant facilities.

The Pyrites Project is operated in a run-of-river mode with an average annual generation of 27,865 megawatt-hours.

o. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* license application) via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document (P–6115). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19) issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Issue Deficiency Letter (if necessary).	October 2021.
Request Additional Information.	October 2021.
Issue Acceptance Letter	January 2022.
Issue Scoping Document 1 for comments.	February 2022.
Issue Scoping Document 2.	May 2022.
Issue Notice of Ready for Environmental Analysis.	May 2022.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: September 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20272 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3102–000]

Jason and Carol Victoria Presley; Notice of Authorization for Continued Project Operation

On September 12, 2017, Jason and Carol Victoria Presley, licensees for the High Shoals Hydroelectric Project No. 3102, filed a Notice of Intent to File Subsequent License Application for the project, and on November 1, 2017, they filed a Preliminary Application Document. On August 27, 2019, they filed a Notice of Intent to Surrender the project followed by an application for Surrender of License on November 7, 2019. The High Shoals Hydroelectric Project is located on the Apalachee River in Walton, Morgan, and Oconee Counties, Georgia.

The license for Project No. 3102 was issued for a period ending August 31, 2021. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3102 is issued to Jason and Carol Victoria Presley for a period effective September 1, 2021 through August 31, 2022 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2022, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Jason and Carol Victoria Presley are authorized to continue operation of the High Shoals Hydroelectric Project, until such time as the Commission takes final action on the application for Surrender of License.

Dated: September 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20275 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3509–042]

Little Falls Hydroelectric Associates, LP; Notice of Application Tendered for Filing With The Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 3509–042.

c. *Date Filed:* August 31, 2021.

d. *Applicant:* Little Falls Hydroelectric Associates, LP.

e. *Name of Project:* Little Falls Hydroelectric Project (Little Falls Project).

f. *Location:* The existing project is located on the Mohawk River, in the City of Little Falls, Herkimer County, New York. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825 (r).

h. *Applicant Contact:* David H. Fox, Director, Licensing and Compliance, Little Falls Hydroelectric Associates, LP, Eagle Creek Renewable Energy, 7315 Wisconsin Avenue, Suite 1100W, Bethesda, MD 20814, email—*david.fox@eaglecreekre.com;* Jody J. Smet, Vice President, Regulatory Affairs, Little Falls Hydroelectric Associates, LP, Eagle Creek Renewable Energy, 7315 Wisconsin Avenue, Suite 1100W, Bethesda, MD 20814, email—*jody.smet@eaglecreekre.com.*

i. *FERC Contact:* Monir Chowdhury at (202) 502–6736 or email at *monir.chowdhury@ferc.gov*.

j. This application is not ready for environmental analysis at this time.

k. *Project Description:* The Little Falls Project consists of: (1) Two state-owned dams (*i.e.,* North State Dam and South State Dam) joined by an island, and equipped with 1-foot-high flashboards and flow control gates, with a total length of 594 feet and a height of about 6.25 feet; (2) a reservoir with a storage capacity of 800 acre-feet at a normal surface elevation of 363.8 feet; [1] (3) a 45-foot-wide, 300-foot-long navigation lock (Lock 17); (4) a 55-foot-wide, 73-foot-long concrete intake structure with two roller head gates to control flow through the intake; (5) two 14-foot-diameter, 90-foot-long steel penstocks; (6) a 65-foot-wide by 99-foot-long concrete powerhouse containing two-turbine-generator units each with a capacity of 6.8 megawatts; (7) two sets of 4.16-kilovolt (kV), 60-foot-long generator leads that run from the powerhouse to a switchyard containing a 4.16/46-kV transformer; (8) a 46-kV, 50-foot-long transmission line from the switchyard to a nearby interconnection point that connects the project with the National Grid; and (9) appurtenant facilities.

There are several structures inside the project boundary that are not considered part of the project: A flood gate structure owned by the New York State Canal Corporation to protect the canal during periods of high headwater; the Middle Dam, with sixty percent of the dam currently breached, located in the bypassed reach of the Mohawk River, and built as part of a hydropower plant that was decommissioned in 1962; and the Gilbert Dam located also in the bypassed reach approximately 700 feet upstream of the powerhouse to measure flow through the Mohawk River and to assure minimum flow conditions are met in the river.

l. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested individuals an opportunity to view and/or print the contents of this document and the full license application via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. At this time, the Commission has suspended access to the Commission's Public Access Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

m. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural schedule:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue Deficiency Letter (if necessary).	September 2021.
Request Additional Information.	October 2021.
Notice of Acceptance/Notice of Ready for Environmental Analysis.	February 2022.

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: September 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20271 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

[1] All elevations refer to Barge Canal Datum which is 0.8 foot higher than elevations in National Geodetic Vertical Datum of 1929.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC21–133–000.

Applicants: Maverick Solar 6, LLC, Maverick Solar 7, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Maverick Solar 6, LLC, et al.

Filed Date: 9/13/21.

Accession Number: 20210913–5247.

Comment Date: 5 pm ET 10/4/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–2424–001.

Applicants: Generation Bridge M&M Holdings, LLC.

Description: Tariff Amendment: Amendment to Market-Based Rate Application and Response to Deficiency Letter to be effective 7/15/2021.

Filed Date: 9/14/21.

Accession Number: 20210914–5161.

Comment Date: 5 pm ET 10/5/21.

Docket Numbers: ER21–2884–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2021–09–14_SA 3438 Entergy Arkansas-Long Lake Solar 1st Rev GIA (J663 J834) to be effective 9/8/2021.

Filed Date: 9/14/21.

Accession Number: 20210914–5116.

Comment Date: 5 pm ET 10/5/21.

Docket Numbers: ER21–2885–000.

Applicants: Arizona Public Service Company.

Description: § 205(d) Rate Filing: Service Agreement No. 300 to be effective 11/14/2021.

Filed Date: 9/14/21.

Accession Number: 20210914–5118.

Comment Date: 5 pm ET 10/5/21.

Docket Numbers: ER21–2886–000.

Applicants: Old Middleboro Road Solar, LLC.

Description: Baseline eTariff Filing: Old Middleboro Road Solar, LLC MBR Application Filing to be effective 10/1/2021.

Filed Date: 9/14/21.

Accession Number: 20210914–5140.

Comment Date: 5 pm ET 10/5/21.

Docket Numbers: ER21–2887–000.

Applicants: Leicester Street Solar, LLC.

Description: Baseline eTariff Filing: Leicester Street Solar LLC MBR Application Filing to be effective 10/1/2021.

Filed Date: 9/14/21.

Accession Number: 20210914–5141.

Comment Date: 5 pm ET 10/5/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–20252 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF21–10–000]

Western Area Power Administration; Notice of Filing

Take notice that on September 9, 2021, Western Area Power Administration submitted tariff filing: RMR–WAPA–196–Errata Filing, to be effective 10/1/2021.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 12, 2021.

Dated: September 14, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–20253 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3777–000]

Town of Rollinsford, New Hampshire; Notice of Authorization for Continued Project Operation

On August 29, 2019, the Town of Rollinsford, New Hampshire, licensee for the Rollinsford Hydroelectric Project No. 3777, filed an Application for a Subsequent License pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. The Rollinsford Hydroelectric Project is located on the Salmon Falls River in Strafford County, New Hampshire and York County, Maine.

The license for Project No. 3777 was issued for a period ending August 31, 2021. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3777 is issued to the Town of Rollinsford, New Hampshire for a period effective September 1, 2021 through August 31, 2022 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2022, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the Town of Rollinsford, New Hampshire is authorized to continue operation of the Rollinsford Hydroelectric Project, until such time as the Commission acts on its application for a subsequent license.

Dated: September 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20274 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3820–000]

Aclara Meters, LLC; Notice of Authorization for Continued Project Operation

On March 29, 2019, Aclara Meters, LLC, licensee for the Somersworth Hydroelectric Project No. 3820, filed an application for Surrender of License. The Somersworth Hydroelectric Project is located on the Salmon Falls River in Strafford County, New Hampshire, and York County, Maine.

The license for Project No. 3820 was issued for a period ending August 31, 2021. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA,

then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3820 is issued to Aclara Meters, LLC for a period effective September 1, 2021 through August 31, 2022 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2022, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Aclara Meters, LLC is authorized to continue operation of the Somersworth Hydroelectric Project, until such time as the Commission takes final action on the application for Surrender of License.

Dated: September 14, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–20273 Filed 9–17–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

2025 Resource Pool—Loveland Area Projects, Allocation Procedures and Call for Applications

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of allocation procedures and call for 2025 Resource Pool applications.

SUMMARY: Western Area Power Administration (WAPA), a Federal Power Marketing Administration of the Department of Energy (DOE), is publishing this notice of allocation procedures and call for applications from new preference entities interested in an allocation of Federal firm power. WAPA's Rocky Mountain Region (RMR) published its Loveland Area Projects (LAP)—2025 Power Marketing Initiative (2025 PMI) in the **Federal Register** on December 30, 2013, to be effective January 29, 2014. The 2025 PMI established the criteria for allocating firm power from the LAP beginning October 1, 2024, through September 30, 2054. The 2025 PMI established three resource pools of up to one percent each of the marketable resource under contract at the time of each reallocation to be available for eligible new preference entities. Reallocations will occur at the beginning of the October 1, 2024, contract term and again every 10 years thereafter on October 1, 2034, and October 1, 2044. Therefore, WAPA is issuing a call for applications for the 2025 Resource Pool. New preference entities interested in applying for an allocation of firm power from LAP must submit a written application using the Applicant Profile Data (APD) form and satisfy the General Eligibility Criteria, General Allocation Criteria, and General Contract Principles described in this notice.

DATES: WAPA must receive a completed and signed application using the APD form by 4:00 p.m., MST, on November 15, 2021. WAPA will accept applications by email or delivered by U.S. mail. Applications sent by U.S. mail will be accepted if postmarked at least three days before November 15, 2021, and received no later than November 18, 2021. WAPA reserves the right to not consider an application received after the prescribed date and time.

A single virtual public information forum (not to exceed three hours) addressing the allocation procedures, call for applications, and APD form will be held on Wednesday,

October 6, 2021, at 1 p.m., MDT. The public information forum can be accessed 15 minutes in advance of the start time for the public information forum by copying and pasting the following link into your browser: *https://doe.webex.com/doe/j.php?MTID=m40e148a1ad3464d2f53ea61f8608c48e.*

ADDRESSES: If submitting a paper application, please print a completed and signed APD form and mail it to Barton V. Barnhart, Regional Manager, Rocky Mountain Region, Western Area Power Administration, 5555 East Crossroads Boulevard, Loveland, CO 80538–8986. If submitting an electronic application, please email a completed and signed APD form to Parker Wicks, Contracts and Energy Services Manager, Rocky Mountain Region, Western Area Power Administration, at *pwicks@wapa.gov.* A completed and signed APD form must be received by WAPA within the time required in the **DATES** section.

FOR FURTHER INFORMATION CONTACT: Parker Wicks, Contracts and Energy Services Manager, Rocky Mountain Region, Western Area Power Administration, (970) 461–7202, email *pwicks@wapa.gov.*

SUPPLEMENTARY INFORMATION: The 2025 PMI, as published in the **Federal Register** December 30, 2013 (78 FR 79444), extends the current marketing plan, with amendments to key marketing plan principles, and provides the basis for marketing the LAP long-term firm hydroelectric resource beginning October 1, 2024, through September 30, 2054. As part of the 2025 PMI, WAPA will provide for three resource pools of up to one percent of the marketable resource under contract. Service under the first of these pools begins on October 1, 2024, and again every 10 years thereafter (October 1, 2034, and October 1, 2044), until the conclusion of the marketing plan on September 30, 2054. Each reallocation will be placed in a resource pool from which power allocations to eligible new preference entities will be made. This notice sets forth the following procedures for determining these allocations: (1) The amount of pool resources; (2) general eligibility criteria; (3) general allocation criteria, *i.e.,* how WAPA plans to allocate pool resources to eligible new preference entities as provided for in the Program and the 2025 PMI; (4) general contract principles under which WAPA will sell the allocated power; and (5) applications for firm power, *i.e.,* APD application information required from each applicant. After evaluating applications, if WAPA determines there is one or more eligible applicants, WAPA will publish a Notice of Proposed Allocations in the **Federal Register**. The public will have an opportunity to comment on the Proposed Allocations. After reviewing the comments, WAPA will publish a Notice of Final Allocations in the **Federal Register**. If there are no qualified applicants under the 2025 Resource Pool, WAPA will publish a notice in the **Federal Register** to conclude the 2025 Resource Pool.

I. Amount of Pool Resources

WAPA will allocate up to one percent of the LAP long-term firm hydroelectric resource under contract as of October 1,

2024, to be available for eligible new preference entities, as firm power. ''Firm power'' means firm capacity and associated energy allocated by WAPA that is subject to the terms and conditions specified in WAPA's long-term LAP firm electric service contract. The amount of the resource that will become available October 1, 2024, is approximately 6.9 MW for the summer season and 6.1 MW for the winter season.

II. General Eligibility Criteria

WAPA will apply the following general eligibility criteria to applicants seeking an allocation of firm power under the 2025 Resource Pool:

A. All qualified applicants must be preference entities as defined by Section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)), as amended and supplemented.

B. All qualified applicants must be located within the currently established LAP marketing area. (*See* Section III.C. for a description of the LAP marketing area.)

C. All qualified applicants must not have a current LAP firm electric service contract or be a member of a parent entity who has a LAP firm electric service contract with WAPA.

D. All qualified utility and non-utility applicants must be able to use the firm power directly or be able to sell it directly to retail customers.

E. All qualified utility applicants who are municipalities, cooperatives, public utility districts, or public power districts must attain utility status by October 1, 2021. ''Utility status'' means the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase firm power from WAPA on a wholesale basis.

F. A qualified Native American applicant must be an Indian Tribe as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304(e)), as amended and supplemented.

III. General Allocation Criteria

WAPA will apply the following general allocation criteria to applicants seeking an allocation of firm power under the 2025 Resource Pool:

A. Allocations of firm power will be made in amounts solely determined by WAPA in exercising its discretion as permitted under Reclamation Law.

B. An allottee will have the right to purchase firm power only after executing a LAP firm electric service contract between WAPA and the allottee and satisfying all conditions for firm electric service delivery in that contract.

C. Firm power allocated under these procedures will be available only to new, qualified applicants residing within LAP's current marketing area. The LAP current marketing area includes parts of Colorado, Kansas, Nebraska, and Wyoming. LAP's marketing area is specifically defined as the portion of Colorado east of the Continental Divide, Mountain Parks Electric, Inc.'s service territory in Colorado west of the Continental Divide, the portion of Kansas located in the Missouri River Basin, the portion of Kansas west of the eastern borders of the counties intersected by the 100th Meridian, the portion of Nebraska west of the 101st Meridian, and the portion of Wyoming east of the Continental Divide.

D. An allocation of firm power made to an Indian Tribe will be based on actual load, or estimated load as developed by the Indian Tribe, in calendar year 2020. WAPA will evaluate and may adjust inconsistent estimates during the allocation process. WAPA is willing to assist Indian Tribes in developing load estimating methods.

E. Allocations made to eligible utility and non-utility applicants will be based on actual calendar year 2020 loads. WAPA will apply the 2025 PMI criteria to these loads, except as stated herein.

F. Firm capacity and energy will be based upon each applicant's calendar year 2020 load factor.

G. Any long-term LAP firm electric service contract offered by WAPA to an eligible applicant is expected to be executed by the applicant no later than September 30, 2022, unless otherwise agreed to in writing by WAPA.

H. The 2025 Resource Pool will be dissolved after September 30, 2022, the closing date for executing firm electric service contracts. Firm power, not under contract or a written contract execution extension, will be used as WAPA determines.

I. The minimum allocation shall be 100 kilowatts (kW).

J. The maximum allocation shall be 5,000 kW. Qualified Native American applicants are not subject to this limitation.

K. Contract rates of delivery shall be subject to adjustment in the future as provided in the 2025 PMI and the firm electric service contract between WAPA and the allottee.

L. If WAPA encounters obstacles to delivering firm electric service to an Indian Tribe, it retains the right to provide the economic benefit of the resource directly to the Indian Tribe.

IV. General Contract Principles

WAPA will apply the following general contract principles to all allottees receiving an allocation of firm power under the 2025 Resource Pool:

A. WAPA, at its discretion and sole determination, reserves the right to adjust the contract rate of delivery on a five years advance written notice in response to changes in hydrology and river operations. Any such adjustments shall take place only after a public process.

B. Each allottee is ultimately responsible for making its own third-party delivery arrangements. WAPA may assist allottees in making third-party transmission arrangements for delivery of firm power.

C. Contracts entered under the 2025 Resource Pool allocation procedures shall provide for WAPA to furnish firm electric service effective October 1, 2024, through September 30, 2054.

D. Contracts entered under the 2025 Resource Pool shall incorporate WAPA's standard provisions for power sales contracts, integrated resource planning, and the General Power Contract Provisions.

V. Applications for Firm Power

Through this notice, WAPA formally requests applications from new qualified preference entities interested in purchasing firm power beginning October 1, 2024, through September 30, 2054. All applicants must submit applications using the APD form. Completed applications for an allocation of firm power under the 2025 Resource Pool must be submitted in writing either via regular postal delivery to the Regional Manager, Rocky Mountain Region, or electronically via email to the Contracts and Energy Services Manager. The APD form must be received by WAPA's Rocky Mountain Region in accordance with the requirements listed herein. WAPA will not consider applications submitted before publication of this notice or after the deadline specified in the **DATES** section. Applications are available either upon request or in fillable Word and PDF versions at *https://www.wapa.gov/regions/RM/PowerMarketing/Pages/2025-Loveland-Area-Projects-Resource-Pool.aspx.*

A. Applicant Profile Data Form

APD form content and format are outlined below. To be considered, each applicant must submit its completed and signed APD form to WAPA's Rocky Mountain Region no later than 4:00 p.m., MST, on November 15, 2021. See the **DATES** and **ADDRESSES** sections listed

previously for specific information on submission and deadline requirements. Each applicant must provide all requested information or the most reasonable available estimate and note any requested information that is not applicable or not available. WAPA is not responsible for errors in data, missing data, or missing pages.

B. Confidential Business Information

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked ''CONFIDENTIAL'' including all the information believed to be confidential, and one copy of the document marked ''NON-CONFIDENTIAL'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination. The information collected under this process will not be part of a system of records covered by the Privacy Act and may be subject to disclosure under the Freedom of Information Act (FOIA). If you are submitting any confidential business information, and believe this information is exempt from disclosure under FOIA Exemption 4 (5 U.S.C. 552(b)(4)), please mark such information before submitting your application.

BILLING CODE 6450–01–P

APPLICANT PROFILE DATA

All items of information in the Applicant Profile Data (APD) should be answered as if prepared by the entity/organization seeking the allocation of Federal power from Western Area Power Administration (WAPA). The APD shall consist of the following:

1. Applicant Information. Please provide the following:

a. Applicant's (entity/organization requesting an allocation) name and address:

Applicant's Name:	
Address:	
City:	
State:	
Zip:	

b. Person(s) representing the applicant:

Contact Person (Name & Title):	
Address:	
City:	
State:	
Zip:	
Telephone:	
Fax:	
Email Address:	

c. Type of entity/organization:

☐ Federal Agency Irrigation
☐ District
☐ Municipality
☐ Native American Tribe Public Utility
☐ District Rural Electric Cooperative State
☐ Agency
☐ Other, please specify:

d. Parent entity/organization of the applicant, if any:

e. Name of the applicant's member organizations, if any:

(Separated by commas)

f. Applicable law under which the applicant was established:

g. Applicant's geographic service area (if available, please submit a map of the service area and indicate the date prepared):

h. **Describe whether the applicant owns and operates its own electric utility system.**

i. **Provide the date the applicant attained utility status, if applicable. 10 C.F.R. Part 905.35 defines utility status to mean "that the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase power from WAPA on a wholesale basis for resale to retail consumers."**

j. **Describe the entity/organization that will interact with WAPA on contract and billing matters (include contact person, email and telephone number).**

2. **Service Requested:**
   a. **Provide the amount of power the applicant is requesting to be served by WAPA.**
3. **Applicant's Loads:**
   a. **Utility and non-utility applicants:**
      (i) **If applicable, provide the number and type of customers served (e.g., residential, commercial, industrial, military base, agricultural):**

Customer Type and Number						
	Residential	Commercial	Industrial	Military	Ag.	Other
Number of customers						
If not applicable, explain why:						

      (ii) **Provide the actual monthly maximum demand (kilowatts) and energy use (kilowatt-hours) for each calendar month experienced in calendar year 2020:**

Calendar Year 2020						
	January	February	March	April	May	June
Demand (kilowatts)						
Energy (kilowatt-hours)						
	July	August	September	October	November	December
Demand (kilowatts)						
Energy (kilowatt-hours)						

      (iii) **Provide the annual load factor for calendar year 2020:**

Calendar Year 2020 Annual Load Factor

      (iv) **Provide the monthly load factors for calendar year 2020:**

Calendar Year 2020 Monthly Load Factor						
	January	February	March	April	May	June
Load Factor						
	July	August	September	October	November	December
Load Factor						

(v) Identify any factors or conditions in the next 5 years which may significantly change peak demands, load duration, or profile curves.

b. Native American Tribe applicants only:

(i) Indicate the utility or utilities currently serving your loads:

(ii) If applicable, provide the number and type of customers served (e.g., residential, commercial, industrial, military base, agricultural):

Customer Type and Number						
	Residential	Commercial	Industrial	Military	Ag.	Other
Number of customers						
If not applicable, explain why:						

(iii) Provide the actual monthly maximum demand (kilowatts) and energy use (kilowatt-hours) experienced in calendar year 2020. If the actual demand and energy data are not available or are difficult to obtain provide the estimated monthly demand:

Calendar Year 2020						
	January	February	March	April	May	June
Demand (kilowatts)						
Energy (kilowatt-hours)						
	July	August	September	October	November	December
Demand (kilowatts)						
Energy (kilowatt-hours)						

(iv) If the demand and energy data in 3.b.(iii) above is estimated, provide a description of the method and basis for this estimation in the space provided below:

(v) Provide the actual annual load factors for calendar year 2020. If the actual load factors are not available, provide the estimated load factors:

Calendar Year 2020 Annual Load Factor

(vi) **Provide the actual monthly load factors for calendar year 2020. If the actual load factors are not available, provide the estimated load factors.**

Calendar Year 2020 Monthly Load Factor						
	January	February	March	April	May	June
Load Factor						
	July	August	September	October	November	December
Load Factor						

(vii) **If the load factor data in 3.b.(v-vi) is estimated, provide a description of the method and basis for this estimation in the space provided below:**

(viii) **Identify any factors or conditions in the next 5 years which may significantly change peak demands, load duration, or profile curves:**

4. **Applicant's Resources. Please provide the following information:**
   a. **A list of current power supplies if applicable, including the applicant's own generation, as well as, purchases from others. For each supply, provide the resource name, capacity supplied, and the resource's location.**
   Power supplies (resource name, capacity & location):
   b. **For each power supplier, provide a description and status of the power supply contract (including the termination date):**
   c. **For each power supplier, provide the type of power:**
   ☐ **Power supply is on a firm basis.**
   ☐ **Power supply is not on a firm basis. Please explain:**

5. **Transmission:**
   a. **Points of delivery. Provide the requested point(s) of delivery on WAPA's transmission system (or a third party's transmission system), the voltage of service required, and the capacity desired, if applicable.**
   b. **Transmission arrangements. Describe the transmission arrangements necessary to deliver firm power to the requested points of delivery. Include a brief description of the applicant's transmission and distribution system including major interconnections. Provide a single-line drawing of applicant's system, if one is available.**
   c. **Provide a brief explanation of the applicant's ability to receive and use, or receive and distribute Federal power as of [date].**

6. **Other Information. The applicant may provide any other information pertinent to receiving an allocation.**

7. **Signature:** WAPA requires the signature and title of an appropriate official who is able to attest to the validity of the APD and who is authorized to submit the request for an allocation.

By signing below, I certify the information I have provided is true and correct to the best of my information, knowledge and belief.

Signature _____ Title_____

Org. Code_____

Applications may be submitted by U.S. mail to the address below or electronically to pwicks@wapa.gov with an electronic signature. If submitting this application electronically and an electronic signature is not available, please fax, upload or otherwise transmit this page with a signature to (970) 461-7213, or mail it to Rocky Mountain Region, Western Area Power Administration, Attention J6200, 5555 East Crossroads Boulevard, Loveland, CO 80538-8986.

RECORDKEEPING REQUIREMENTS: If WAPA accepts your application and you receive an allocation of Federal power you must keep all records associated with your APD for a period of 3 years after you sign your contract for Federal power. If you do not receive an allocation of Federal power, there is no recordkeeping requirement.

WAPA has obtained an OMB Clearance Number 1910-5136 for the collection of the above information.

The data are being collected to enable WAPA to properly perform its function of marketing limited amounts of Federal hydropower. The data you supply will be used by WAPA to evaluate who will receive an allocation of Federal power.

Public reporting burden for this collection of information is estimated to average 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Ronald J. Klinefelter, Paperwork Reduction Act Comments, Western Area Power Administration, P.O. Box 281213, 12155 W. Alameda Parkway, Lakewood, CO 80228; and to the Office of Management and Budget (OMB), OIRA, Washington, DC 20503.

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

Submission of this data is voluntary, however if an entity seeks an allocation of Federal power, the applicant must submit an APD.

BILLING CODE 6450–01–C

C. WAPA's Consideration of Applications

1. Upon receipt, WAPA will review the APD form and verify that each applicant meets the general eligibility criteria set forth in Section II above.

a. WAPA will request, in writing, additional information from any applicant whose APD form is deficient. The applicant shall have 15 calendar days from the date on WAPA's request letter to provide, in writing, the requested information. If the requested information is not provided within that time period, the application will not be considered.

b. If WAPA determines that an applicant does not meet the general eligibility criteria, WAPA will send a letter explaining why the applicant did not qualify.

c. If an applicant meets the general eligibility criteria, WAPA will determine the amount of firm power to be allocated under the general allocation criteria set forth in Section III above. WAPA will send for the applicant's review a draft firm electric service contract, which contains the terms and conditions of the offer and the amount of firm power allocated to the applicant.

2. WAPA reserves the right to determine the amount of firm power to allocate to an applicant, as justified by an applicant's APD form.

VI. Regulatory Procedure Requirements

A. Review Under the National Environmental Policy Act (NEPA)

WAPA has determined this action fits within the following categorical exclusion listed in appendix B to subpart D of 10 CFR part 1021.B4.1 (Contracts, policies, and marketing and allocation plans for electric power). Categorically excluded projects and activities do not require preparation of either an environmental impact statement or an environmental assessment.[1] Specifically, WAPA has determined this rulemaking is consistent with activities identified in part B4, Categorical Exclusions Applicable to Specific Agency Actions (see 10 CFR part 1021, appendix B to subpart D, part B4). A copy of the categorical exclusion determination is available on WAPA–RMR's website at: *https://www.wapa.gov/regions/RM/environment/Pages/CX2021.aspx.* Look for the file entitled ''2021–091 LAP 2025 Resource Pool CX.''

B. Review Under Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), WAPA has received approval from the Office of Management and Budget for the collection of customer information in this rule, under OMB control number 1910–5136.

C. Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Signing Authority

This document of the Department of Energy was signed on September 10, 2021, by Tracey A. LeBeau, Administrator, Western Area Power Administration, pursuant to delegated authority from the Secretary of Energy. That document, with the original signature and date, is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 15, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–20242 Filed 9–17–21; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of Intent To Terminate Receiverships

Notice is hereby given that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institutions listed below, intends to terminate its receivership for said institutions.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIPS

Fund	Receivership name	City	State	Date of appointment of receiver
10061	BankUnited, FSB	Coral Gables	FL	05/21/2009
10109	Bradford Bank	Baltimore	MD	08/28/2009
10110	Affinity Bank	Ventura	CA	08/28/2009
10116	Vantus Bank	Sioux City	IA	09/04/2009
10126	San Joaquin Bank	Bakersfield	CA	10/16/2009
10128	First Dupage Bank	Westmont	IL	10/23/2009
10143	Prosperan Bank	Oakdale	MN	11/06/2009
10148	Century Bank, FSB	Sarasota	FL	11/13/2009
10149	Orion Bank	Naples	FL	11/13/2009
10156	Greater Atlantic Bank	Reston	VA	12/04/2009
10163	New South Federal Savings Bank	Irondale	AL	12/18/2009
10168	Horizon Bank	Bellingham	WA	01/08/2010
10423	Tennessee Commerce Bank	Franklin	TN	01/27/2012
10531	The Enloe State Bank	Cooper	TX	05/31/2019

The liquidation of the assets for each receivership has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

[1] The determination was done in compliance with NEPA (42 U.S.C. 4321–4347); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

Based upon the foregoing, the Receiver has determined that the continued existence of the receiverships will serve no useful purpose. Consequently, notice is given that the receiverships shall be terminated, to be effective no sooner than thirty days after the date of this notice. If any person wishes to comment concerning the termination of any of the receiverships, such comment must be made in writing, identify the receivership to which the comment pertains, and be sent within thirty days of the date of this notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34.6, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of the above-mentioned receiverships will be considered which are not sent within this time frame.

(Authority: 12 U.S.C. 1819)

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 14, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–20223 Filed 9–17–21; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0611]

Questions and Answers on Biosimilar Development and the Biologics Price Competition and Innovation Act of 2009; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a revised final guidance for industry entitled ''Questions and Answers on Biosimilar Development and the BPCI Act.'' The question and answer (Q&A) format is intended to inform prospective applicants and facilitate the development of proposed biosimilars and proposed interchangeable biosimilars, and also describes FDA's interpretation of certain statutory requirements added by the Biologics Price Competition and Innovation Act of 2009 (BPCI Act). This guidance document revises the final guidance document entitled ''Questions and Answers on Biosimilar Development and the BPCI Act'' issued December 12, 2018.

DATES: The announcement of the guidance is published in the **Federal Register** on September 20, 2021.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2011–D–0611 for ''Questions and Answers on Biosimilar Development and the BPCI Act.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002, or the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sandra Benton, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 1132, Silver Spring, MD 20993, 301–796–1042, *Sandra.Benton@fda.hhs.gov* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911, *Stephen.Ripley@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a revised final guidance for industry entitled ''Questions and Answers on Biosimilar Development and the BPCI Act.'' The Q&A format is intended to inform prospective applicants and facilitate the development of proposed biosimilars and proposed interchangeable biosimilars, and also describe FDA's interpretation of certain statutory requirements added by the BPCI Act.

The BPCI Act created an abbreviated licensure pathway in section 351(k) of the PHS Act (42 U.S.C. 262(k)) for biological products shown to be biosimilar to, or interchangeable with, an FDA-licensed biological reference product (see sections 7001 through 7003 of the Patient Protection and Affordable Care Act (Pub. L. 111–148)). FDA believes that guidance for industry that provides answers to commonly asked questions regarding FDA's interpretation of the BPCI Act will enhance transparency and facilitate the development and approval of biosimilar and interchangeable products. FDA intends to update this guidance to include additional Q&As as appropriate.

FDA issues biosimilar Q&A guidances that contain Q&As about biosimilar and interchangeable products. This final guidance document contains all Q&As that are in final form. The November 2020 draft guidance entitled ''Biosimilarity and Interchangeability: Additional Draft Q&As on Biosimilar Development and the BPCI Act'' (Additional Draft Q&A Guidance) and the draft guidance entitled ''New and Revised Draft Q&As on Biosimilar Development and the BPCI Act (Revision 3)'' (New and Revised Draft Q&A Guidance) contain draft Q&As. After FDA has considered any comments on the Q&As contained in the draft guidances, received during the relevant comment period and, as appropriate, incorporated suggested changes to the Q&A, individual Q&As will be moved to the final guidance document. This final guidance document contains Q&As that have been through the public comment process and reflects FDA's current thinking on the topics described.

This guidance document revises the final guidance document entitled ''Questions and Answers on Biosimilar Development and the BPCI Act'' to clarify and update certain Q&As and add additional Q&As. For certain Q&As, FDA updated the Q&A by referring the reader to a separate guidance document that provides additional information on the topic. In addition, a Q&A may be withdrawn and removed from the Q&A guidance documents if, for instance, the issue addressed in the Q&A has been addressed in a separate FDA guidance document.

FDA has maintained the original numbering of the Q&As used in the December 2018 final guidance, ''Questions and Answers on Biosimilar Development and the BPCI Act,'' the December 2018 draft guidance, ''New and Revised Draft Q&As on Biosimilar Development and the BPCI Act (Revision 2),'' and the Additional Draft Q&A Guidance.

TABLE 1—STATUS OF DRAFT GUIDANCE Q&AS AND FINAL GUIDANCE Q&AS

Q&A category	Q&A No.	Previous guidance location	Current guidance location
Part I. Biosimilarity or Interchangeability.	Q.I.1	Final	Final.
	Q.I.2	Final	Final.
	Q.I.3	Final	Final.
	Q.I.4	Final	Final.
	Q.I.5	Final	Final.
	Q.I.6	Final	Final.
	Q.I.7	Final	Final.
	Q.I.8	Final	Final.
	Q.I.9	Final	Final.
	Q.I.10	Final	Final.
	Q.I.11	Withdrawn	Withdrawn.
	Q.I.12	Draft	Draft.*
	Q.I.13	Final	Final.
	Q.I.14	Final	Final.
	Q.I.15	Final	Final.
	Q.I.16	Draft	Final.
	Q.I.17	Final	Final.
	Q.I.18	Final	Final.
	Q.I.19	Final	Final.
	Q.I.20	Draft	Final.
	Q.I.21	Draft	Final.
	Q.I.22	Draft	Final.
	Q.I.23	Draft	Withdrawn.
	Q.I.24	Draft	Final.
	Q.I.25		Draft.
	Q.I.26		Draft.
	Q.I.27		Draft.
	Q.I.28		Draft.
Part II. Provisions Related to Requirements to Submit a Biologics License Application (BLA) for a ''Biological Product''.	Q.II.1	Draft	Withdrawn.
	Q.II.2	Final	Final.

TABLE 1—STATUS OF DRAFT GUIDANCE Q&AS AND FINAL GUIDANCE Q&AS—Continued

Q&A category	Q&A No.	Previous guidance location	Current guidance location
Part III. Exclusivity	Q.II.3	Final	Final.
	Q.III.1	Final	Final.
	Q.III.2	Final	Final.

*The draft Q&A continues to be available in the New and Revised Draft Q&A Guidance (Revision 3). All other draft Q&As are available in the Additional Draft Q&A Guidance.

This guidance finalizes all but three of the Q&As that were included in the draft guidance ''New and Revised Draft Q&As on Biosimilar Development and the BPCI Act (Revision 2)'' issued on December 12, 2018. FDA considered comments it received regarding these Q&As, and made changes to the Q&As, as appropriate; for example, providing additional and clearer information in Q.I.16 and providing additional information about text in the labeling for a biosimilar in Q.I.22. FDA also made certain clarifying and editorial changes to update previously finalized Q&As. Editorial changes were made primarily for clarification.

FDA has retained Q.I.12 in draft and transferred it to ''New and Revised Draft Q&As on Biosimilar Development and the BPCI Act (Revision 3).'' This draft Q&A addresses how an applicant can demonstrate that its proposed injectable biosimilar product or proposed injectable interchangeable product has the same ''strength'' as the reference product. FDA withdrew Q.I.23, which addressed a process for obtaining certain letters related to reference product access for testing for products with risk evaluation and mitigation strategy with elements to assure safe use. In light of the enactment of the Further Consolidated Appropriations Act, 2020 (FCA Act) (Pub. L. 116–94), which includes provisions related to this topic (see Division N, section 610, of the FCA Act (21 U.S.C. 355–2)), FDA intends to issue guidance describing how the existing process for obtaining these letters is being aligned with the framework set forth in the new law. FDA also withdrew Q.II.1, which addressed the definition of ''protein.'' For information on the definition of ''protein'' in section 351(i)(1) of the PHS Act, see the final rule entitled ''Definition of the Term 'Biological Product' '' (85 FR 10057, February 21, 2020; 21 CFR 600.3(h)(6)).

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Questions and Answers on Biosimilar Development and the BPCI Act.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 for submission of an investigational new drug application have been approved under OMB control number 0910–0014. The collections of information in 21 CFR part 314.50 for submission of a new drug application have been approved under OMB control number 0910–0001. The collections of information in section 351(a) of the PHS Act and 21 CFR part 601 for submission of a biologics license application (BLA) have been approved under OMB control number 0910–0338. The collections of information in section 351(k) of the PHS Act and 21 CFR part 601 for submission of a BLA have been approved under OMB control number 0910–0719.

III. Electronic Access

Persons with access to the internet may obtain the final guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances,* or *https://www.regulations.gov.*

Dated: September 14, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–20255 Filed 9–17–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Council on Migrant Health

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Secretary's National Advisory Council on Migrant Health (NACMH or Council) has scheduled a public meeting. Information about NACMH and the agenda for this meeting can be found on the NACMH website at: *https://bphc.hrsa.gov/qualityimprovement/strategicpartnerships/nacmh.*

DATES: November 2–5, 2021; 12:30 p.m.–4:30 p.m. Eastern Time each day.

ADDRESSES: This meeting will be held by webinar. Instructions for joining the meeting will be posted on the NACMH website 30 business days before the meeting date. For meeting information updates, go to the NACMH website at: *https://bphc.hrsa.gov/qualityimprovement/strategicpartnerships/nacmh.*

FOR FURTHER INFORMATION CONTACT: Esther Paul, NACMH Designated Federal Officer, Strategic Initiatives and Planning Division, Office of Policy and Program Development, Bureau of Primary Health Care, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; 301–594–4300; or *epaul@hrsa.gov.*

SUPPLEMENTARY INFORMATION: NACMH is a non-discretionary advisory body mandated by the Public Health Service Act, Title 42 U.S.C. 218, to advise, consult with, and make recommendations to the Secretary of the Department of Health and Human Services and the Administrator of HRSA regarding the organization, operation, selection, and funding of migrant health centers and other entities funded under section 330(g) of the Public Health

Service Act (42 U.S.C. 254b). NACMH meets twice each calendar year, or at the discretion of the Designated Federal Officer in consultation with the NACMH Chair.

Agenda items and meeting times are subject to change as priority dictate. The agenda items for the meeting may include topics and issues related to migratory and seasonal agricultural worker health. Refer to the NACMH website listed above for any updated information concerning the meeting. Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting. Oral comments will be honored in the order requested and may be limited as time allows. Requests to submit a written statement or make oral comments to the NACMH should be sent to Esther Paul using the contact information above at least 5 business days before the meeting.

Individuals who plan to participate and need special assistance or another reasonable accommodation should notify Esther Paul at the address and phone number listed above at least 10 business days before the meeting. Registration is required to participate in the meeting prior to entry. Registration and meeting attendance instructions will be posted on the NACMH website 30 business days before the meeting date.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–20231 Filed 9–17–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place, NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, Maryland 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with the United States Court of Federal Claims and to serve a copy of the petition to the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on August 1, 2021, through August 31, 2021. This list provides the name of petitioner, city and state of vaccination (if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the Table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the United States Court of Federal Claims at the address listed above (under the heading ''For Further Information Contact''), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, Maryland 20857. The Court's caption (Petitioner's Name v. Secretary of HHS) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Diana Espinosa,

Acting Administrator.

List of Petitions Filed

1. Hussam Ismael, Orlando, Florida, Court of Federal Claims No: 21–1642V
2. Nicholas D. Goettl, Cincinnati, Ohio, Court of Federal Claims No: 21–1644V
3. Robert Anderson, Vestavia Hills, Alabama, Court of Federal Claims No: 21–1645V

4. Savanna Starkey on behalf of The Estate of R. S., Deceased, Brandenburg, Kentucky, Court of Federal Claims No: 21–1646V
5. Joseph Delory, West Des Moines, Iowa, Court of Federal Claims No: 21–1648V
6. David Vazquez-Gonzalez, San Juan, Puerto Rico, Court of Federal Claims No: 21–1649V
7. Emyli Ferguson and Jeremy Ferguson on behalf of J. F., Glendale, Arizona, Court of Federal Claims No: 21–1650V
8. Jeffrey Sears and Brittney Sears on behalf of G. S., Roseville, New York, Court of Federal Claims No: 21–1651V
9. Jennifer L. Portock, Virginia Beach, Virginia, Court of Federal Claims No: 21–1653V
10. Weldon Wilson, Scottsdale, Arizona, Court of Federal Claims No: 21–1655V
11. Barbie Willett, Tyler, Texas, Court of Federal Claims No: 21–1656V
12. Deborah Beckwith, Louisville, Kentucky, Court of Federal Claims No: 21–1660V
13. Anthony Flores, Lovington, New Mexico, Court of Federal Claims No: 21–1661V
14. Louis Post, Poughkeepsie, New York, Court of Federal Claims No: 21–1662V
15. Chris Van Hulse, Jr., Phoenix, Arizona, Court of Federal Claims No: 21–1663V
16. Michelle Azzopardi, Dearborn, Michigan, Court of Federal Claims No: 21–1668V
17. Deborah Loring, Keene, New Hampshire, Court of Federal Claims No: 21–1670V
18. John Mohnal, Philadelphia, Pennsylvania, Court of Federal Claims No: 21–1671V
19. Steven Brooks, Oshkosh, Wisconsin, Court of Federal Claims No: 21–1672V
20. Sheila Cullen, Washington, District of Columbia, Court of Federal Claims No: 21–1673V
21. Melanie Worsley, Topeka, Kansas, Court of Federal Claims No: 21–1674V
22. Elizabeth Sears, Lawrenceville, New Jersey, Court of Federal Claims No: 21–1677V
23. Amy Gray, Boise, Idaho, Court of Federal Claims No: 21–1678V
24. Darlene E. Milne, Bellevue, Washington, Court of Federal Claims No: 21–1679V
25. Krista Elvin O'Brien and Robert O'Brien on behalf of M. O., Phoenix, Arizona, Court of Federal Claims No: 21–1680V
26. Alyssa Huber, Columbia, Tennessee, Court of Federal Claims No: 21–1681V
27. Ileana Matta on behalf of I. R., Boston, Massachusetts, Court of Federal Claims No: 21–1682V
28. Cori Rivas, Peoria, Illinois, Court of Federal Claims No: 21–1683V
29. Chelsea Pomponio, Lancaster, Pennsylvania, Court of Federal Claims No: 21–1687V
30. Keith Tillman, Salt Lake City, Utah, Court of Federal Claims No: 21–1688V
31. Kyle Pappas, Indianapolis, Indiana, Court of Federal Claims No: 21–1690V
32. Gregory Petraco, Port Jefferson Station, New York, Court of Federal Claims No: 21–1691V
33. Karrolee Tomchak, Santa Monica, California, Court of Federal Claims No: 21–1696V
34. Robert M. Claypool, Lancaster, Ohio, Court of Federal Claims No: 21–1697V
35. E. R. Hightower-Newell on behalf of R. B. Newell, North Las Vegas, Nevada, Court of Federal Claims No: 21–1698V
36. Ryan Sughrue, West Windsor, New Jersey, Court of Federal Claims No: 21–1699V
37. Arturo Vasquez, II, Phoenix, Arizona, Court of Federal Claims No: 21–1700V
38. Michelle Johnson, Springdale, Ohio, Court of Federal Claims No: 21–1707V
39. Rhonda Bryan, Tomball, Texas, Court of Federal Claims No: 21–1708V
40. Pamela Lewis-Nunez, Redondo Beach, California, Court of Federal Claims No: 21–1709V
41. Nancy Olivo, Glendale, New York, Court of Federal Claims No: 21–1710V
42. Christopher Hudson, Rockledge, Florida, Court of Federal Claims No: 21–1711V
43. Melissa B. Shine, Morehead City, North Carolina, Court of Federal Claims No: 21–1717V
44. Richard J. Tumas, Charlotte, North Carolina, Court of Federal Claims No: 21–1718V
45. Yvette Moyler, Columbus, Ohio, Court of Federal Claims No: 21–1720V
46. Michael Ritchey and Monica Ritchey on behalf of G. R., Little Rock, Arkansas, Court of Federal Claims No: 21–1724V
47. Nadine Robbins, Hyde Park, New York, Court of Federal Claims No: 21–1726V
48. Rivka Iliovits and Mordechie Iliovits on behalf of L. I., Staten Island, New York, Court of Federal Claims No: 21–1727V
49. Stephanie Felix and Ashton Felix on behalf of E. A. F., Bonita, California, Court of Federal Claims No: 21–1728V
50. Jill Shanti Zinzi, Phoenix, Arizona, Court of Federal Claims No: 21–1729V
51. Rebekah Schaffer, Cheyenne, Wyoming, Court of Federal Claims No: 21–1731V
52. Lori Wilson on behalf of A. W., Phoenix, Arizona, Court of Federal Claims No: 21–1732V
53. Katherine Miller, Huntingtown, Maryland, Court of Federal Claims No: 21–1733V
54. Paige Graves on behalf of D. G., Bartonville, Texas, Court of Federal Claims No: 21–1734V
55. Paloma Flood, Oviedo, Florida, Court of Federal Claims No: 21–1738V
56. David D. Bronson, Rancho Santa Margarita, California, Court of Federal Claims No: 21–1741V
57. Robert Zampitella, Philadelphia, Pennsylvania, Court of Federal Claims No: 21–1743V
58. Aina Rizvi, Phoenix, Arizona, Court of Federal Claims No: 21–1744V
59. Claire Panella, Stuart, Florida, Court of Federal Claims No: 21–1748V
60. Deborah Hammond, East Norriton, Pennsylvania, Court of Federal Claims No: 21–1749V
61. Monique Coombes, Boise, Idaho, Court of Federal Claims No: 21–1750V
62. Dr. Michelle Perez, Stratford, Connecticut, Court of Federal Claims No: 21–1753V
63. Matthew Rivera, Pembroke Pines, Florida, Court of Federal Claims No: 21–1754V
64. Wendy Miller, Torrington, Connecticut, Court of Federal Claims No: 21–1756V
65. Nancy Sorge, Monroe, Connecticut, Court of Federal Claims No: 21–1759V
66. Monica Godoy, Seattle, Washington, Court of Federal Claims No: 21–1760V
67. Christy Bright, Houston, Texas, Court of Federal Claims No: 21–1761V
68. Barton Bond, Fayetteville, Georgia, Court of Federal Claims No: 21–1764V
69. Mary Jo Drcar, Mentor, Ohio, Court of Federal Claims No: 21–1766V
70. Justin Boggs, Wellesley Hills, Massachusetts, Court of Federal Claims No: 21–1767V
71. Robert Schenck, Spring Hill, Florida, Court of Federal Claims No: 21–1768V
72. Amarah Elzabad, Boston, Massachusetts, Court of Federal Claims No: 21–1771V
73. Silvia Bavli, Phoenix, Arizona, Court of Federal Claims No: 21–1772V
74. Felicia R. Williams, St. Louis, Missouri, Court of Federal Claims No: 21–1774V
75. Fazal Siddiqui, Chicago, Illinois, Court of Federal Claims No: 21–1776V
76. Tommy E. Martin, Mt. Holly, North Carolina, Court of Federal Claims No: 21–1777V
77. Lynn Peterson, Waukesha, Wisconsin, Court of Federal Claims No: 21–1778V
78. Bailey Thomas on behalf of A. B., Englewood, New Jersey, Court of Federal Claims No: 21–1780V
79. Anita Richardson, Pensacola, Florida, Court of Federal Claims No: 21–1781V
80. Leah Gonzalez-Guzman, White Plains, New York, Court of Federal Claims No: 21–1782V

[FR Doc. 2021–20233 Filed 9–17–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Ya Wang, M.D., Ph.D. (Respondent), retired Professor and Director, Division of Experimental Radiation Oncology, Department of Radiation Oncology, Winship Cancer Institute, Emory University (EU). Respondent engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Cancer Institute (NCI), National Institutes of Health (NIH), grants P30 CA138292 and R01 CA186129 and National Institute of General Medical Sciences (NIGMS), NIH, grant R01 GM080771. The administrative actions, including debarment for a period of four (4) years, were implemented beginning on August 4, 2021, and are detailed below.

FOR FURTHER INFORMATION CONTACT: Wanda K. Jones, Dr. P.H., Acting Director, Office of Research Integrity,

1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Ya Wang, M.D., Ph.D., Emory University: Based on the report of an inquiry conducted by EU and analysis conducted by ORI in its oversight review, ORI found that Dr. Ya Wang, retired Professor and Director, Division of Experimental Radiation Oncology, Department of Radiation Oncology, Winship Cancer Institute, EU, engaged in research misconduct in research supported by PHS funds, specifically NCI, NIH, grants P30 CA138292 and R01 CA186129 and NIGMS, NIH, grant R01 GM080771.

Respondent neither admits nor denies ORI's findings of research misconduct. The settlement is not an admission of liability on the part of the Respondent. The parties entered into a Voluntary Exclusion Agreement to conclude this matter without further expenditure of time, finances, or other resources.

ORI found that Respondent engaged in research misconduct by knowingly, intentionally, and/or recklessly falsifying data that were included in the following one (1) PHS grant application and six (6) published papers:

• R21 HL154577–01, ''GPRC5A Inhibits Error-Prone Repair to Maintain Lung Genomic Integrity,'' submitted to the National Heart, Lung, and Blood Institute (NHLBI), NIH, on December 13, 2019.

• miR–21-Mediated Radioresistance Occurs via Promoting Repair of DNA Double Strand Breaks. *J Biol Chem.* 2017 Feb 24;292(8):3531–40; doi: 10.1074/jbc.M116.772392 (hereafter referred to as ''*J Biol Chem.* 2017''). Retraction in: *J Biol Chem.* 2020 May 1;295(18):6250; doi: 10.1074/jbc.W120.013725.

• Distinct Roles of Ape1 Protein, an Enzyme Involved in DNA Repair, in High or Low Linear Energy Transfer Ionizing Radiation-Induced Cell Killing. *J Biol Chem.* 2014 Oct 31; 289(44):30635–44; doi: 10.1074/jbc.M114.604959 (hereafter referred to as ''*J Biol Chem.* 2014''). Retraction in: *J Biol Chem.* 2020 May 1;295(18):6249; doi: 10.1074/jbc.W120.013724.

• OCT4 as a Target of miR–34a Stimulates p63 but Inhibits p53 to Promote Human Cell Transformation. *Cell Death Dis.* 2014 Jan 23;5(1):e1024; doi: 10.1038/cddis.2013.563 (hereafter referred to as ''*Cell Death Dis.* 2014'').

• MicroRNA–21 Modulates the Levels of Reactive Oxygen Species by Targeting SOD3 and TNFα. *Cancer Res.* 2012 Sep 15;72(18):4707–13; doi: 10.1158/0008–5472.CAN–12–0639 (hereafter referred to as ''*Cancer Res.* 2012a'').

• RNAi-Mediated Targeting of Noncoding and Coding Sequences in DNA Repair Gene Messages Efficiently Radiosensitizes Human Tumor Cells. *Cancer Res.* 2012 Mar 1; 72(5):1221–8; doi: 10.1158/0008–5472.CAN–11–2785 (hereafter referred to as ''*Cancer Res.* 2012b'').

• Over-Expression of miR–100 is Responsible for the Low-Expression of ATM in the Human Glioma Cell Line: M059J. *DNA Repair (Amst).* 2010 Nov 10;9(11):1170–5; doi: 10.1016/j.dnarep.2010.08.007 (hereafter referred to as ''*DNA Repair* 2010'').

ORI found that respondent knowingly, intentionally, and/or recklessly falsified protein immunoblot data by reusing and relabeling the same images to represent different experimental conditions in mammalian tissue culture models of DNA damage and repair in eighteen (18) figure panels in eleven (11) figures in one (1) grant application and six (6) published papers.

Specifically:

• Western blot images for total protein expression in distinct transgenic mouse cell lines were falsified by reusing immunoblot bands and relabeling them to represent different experiments in eleven (11) figure panels in two (2) papers, including:

—Figure 3D in *J Biol Chem.* 2017, representing β-actin expression (left side panel) in wildtype (WT), microRNA–21 (miR–21) knock-in, and miR–21$^{-/-}$ mouse embryonic fibroblast (MEF) cells exposed to irradiation

—Figure 4C in *J Biol Chem.* 2017, representing DNA–PKcs expression in miR–21 knock-in MEF cells exposed to irradiation

—Figure 5A in *J Biol Chem.* 2017, representing CDC25A and β-actin expression in WT, GSK3B$^{-/-}$, and Cyclin D1$^{-/-}$ MEF cells transfected with control or gene-specific silencing RNA (siRNA)

—Figure 1 in *J Biol Chem.* 2014, representing β-actin expression in Ku80$^{-/-}$ (Figure 1A) and Ogg1$^{-/-}$ (Figure 1C) MEF cells transfected with expression or control vectors

—Figure 3 in *J Biol Chem.* 2014, representing H2A expression in WT MEF (Figure 3A), Ku80$^{-/-}$ MEF (Figure 3B), Ogg1$^{-/-}$ MEF (Figure 3C), and Ogg1^{+} (rescue) MEF (Figure 3D) cells transfected with expression or control vectors and in the absence or presence of radiation exposure

—Figure 3D in *J Biol Chem.* 2014, representing Mre11 (left panel) expression in Ogg1^{+} (rescue) MEF cells transfected with expression or control vectors in the absence or presence of radiation exposure

—Figure 4B in *J Biol Chem.* 2014, representing Mre11 expression in Ogg1$^{-/-}$ MEF cells with control or Ape1 expression vector in the presence of low or high linear energy transfer (LET) irradiation

—Figure 5C in *J Biol Chem.* 2014, representing Ape1 and β-actin expression in WT MEF cells with or without gene depletion and transfected with control or various Ape1 expression vectors

• western blot images for total protein expression in human cell lines subject to gene depletion and/or overexpression were falsified by reusing immunoblot bands and relabeling them to represent different experiments in seven (7) figure panels in five (5) papers and one (1) grant application, including:

—Figure 4A in NIH grant application R21 HL154577–01, representing GPRC5A levels in different patient-derived cell lines with gene suppression or depletion

—Figure 4D in *J Biol Chem.* 2017, representing total DNA–PKcs, phosphorylated DNA–PKcs, CDC25A, and GSK3B levels in human embryonic kidney cells transfected with controls or various expression vectors and/or miR–21 mimics

—Figure 5C in *J Biol Chem.* 2017, representing CDC25A, GSK3B, Cyclin D1, and β-actin expression in human embryonic kidney cells with or without gene depletion and transfected with controls or miR–21 mimics

—Figure 5B in *Cell Death Dis.* 2014, representing p53 and p63 levels in human lung epithelial cells with or without gene depletion

—Figure 3A in *Cancer Res.* 2012a, representing TNFα levels in control and miR–21 overexpressing human lung epithelial cells at different time points following irradiation

—Figure 5A in *Cancer Res.* 2012b, representing XRCC4 levels in both human lung and brain epithelial cells with gene depletion at multiple time points and treated with or without an artificial microRNA

—Figure 3A in *DNA Repair* 2010, representing ATM and Ku70 levels in human glioblastoma-derived cells with or without gene depletion

• western blot images for proteins from chromatin DNA complexes in mouse cell lines transfected with control or expression vectors and in the absence or presence of irradiation were falsified by reusing immunoblot bands

and relabeling them to represent different experiments in three (3) figure panels in one (1) paper, including:

—Figure 3 in *J Biol Chem.* 2014, representing chromatin-bound γ-H2AX levels in WT MEF (Figure 3A), $Ogg1^{-/-}$ MEF (Figure 3C), and $Ogg1^{+}$ (rescue) MEF (Figure 3D) cells transfected with a control or expression vector and in the absence or presence of irradiation

Dr. Wang entered into a Voluntary Exclusion Agreement (Agreement) and voluntarily agreed to the following:

(1) Respondent agreed to exclude herself voluntarily for a period of four (4) years beginning on August 4, 2021, from any contracting or subcontracting with any agency of the United States Government and from eligibility for or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS' Implementation (2 CFR part 376) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the ''Debarment Regulations'').

(2) Respondent agreed to exclude herself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of four (4) years, beginning on August 4, 2021.

(3) As a condition of the Agreement, Respondent will request that the following papers be corrected or retracted in accordance with 42 CFR 93.407(a)(1) and § 93.411(b):

- *Cell Death Dis.* 2014 Jan;5(1):e1024
- *Cancer Res.* 2012 Sep 15;72(18):4707–13
- *Cancer Res.* 2012 Mar 1;72(5):1221–8
- *DNA Repair (Amst).* 2010 Nov 10;9(11):1170–5

Respondent will copy ORI and the Research Integrity Officer at EU on the correspondence.

Dated: September 15, 2021.

Wanda K. Jones,

Acting Director, Office of Research Integrity, Office of the Assistant Secretary for Health.

[FR Doc. 2021–20268 Filed 9–17–21; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–xxxx]

Agency Father Generic Information Collection Request. 60-Day Public Comment Request

AGENCY: Office of the Secretary, Health and Human Services (HHS).

ACTION: 60-Day notice of public information collections.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before November 19, 2021.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990-New-60D, and project title for reference, to Sherrette Funn, the Reports Clearance Officer, *Sherrette.funn@hhs.gov,* or call 202–795–7714.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Evaluation of the National Hypertension Control Initiative (NHCI).

Type of Collection: NEW Generic.

OMB No. 0990—OS/Office of Minority Health (OMH)

Abstract: As part of the federal response to COVID–19, the U.S. Department of Health and Human Services (HHS) has funded a new initiative involving two cooperative agreements with the American Heart Association (AHA) to improve COVID–19-related health outcomes by addressing hypertension (high blood pressure) among racial and ethnic minority populations.

The $32 million project from the HHS Office of Minority Health (OMH) and the Health Resources and Services Administration (HRSA) Bureau of Primary Health Care will support the implementation of the National Hypertension Control Initiative (NHCI), a national initiative to improve blood pressure control among the most at-risk populations, including racial and ethnic minorities.

The NHCI will support 350 participating HRSA-funded health centers by providing patient and provider education and training for effective hypertension control as well as integration of remote blood pressure monitoring technology into the treatment of hypertension for patients served by participating health centers. The project will also utilize the American Heart Association's targeted media campaigns and existing partnerships with community-based organizations (CBOs) to help reach Black, Latino, and other impacted communities with (i) culturally and linguistically appropriate messages, (ii) access to blood pressure screenings, and (iii) connection to health centers to encourage proper treatment and management of hypertension of screened individuals. This initiative serves to increase the number of adult patients with controlled hypertension and reduce the potential risk of COVID-related health outcomes.

AHA aims to conduct an evaluation to assess the feasibility of the implementation of each of the three NHCI strategies. The findings of this evaluation will inform the improvement and tailoring of AHA's communication approaches about the importance of and techniques for improving blood pressure control, including the benefits of accurately measuring, rapidly acting, and having a patient-focused approach to blood pressure control.

Methodology: The evaluation of the NHCI project will use a mixed methods design, integrating both quantitative and qualitative data collection and analyses. Three main goals of data collection will be to: (1) Track and monitor systems change implementation process information from Community Health Centers (CHCs) on a quarterly basis, (2) assess the capacity of NHCI partners to implement the NHCI project, their needs, the strengths and weaknesses of the systems change approach, and the feasibility of the implementation of the NHCI in their organizations and communities, and (3) assess the reach and success of NHCI project strategies implemented by partners.

ANNUALIZED BURDEN HOUR TABLE

Respondents (If necessary)	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
Community and Social Service Occupations (CBO quarterly data entry into MERD)	53	4	30/60	106
Consumers (ETS health lesson learning questionnaires)	63,600	1	10/60	10,600
Health care professionals (quarterly data entry in MERD)	350	4	1.5	2100
Health care professionals (annual focus group)	16	1	1.5	24
Community and Social Service Occupations (annual focus group)	16	1	1.5	24
Total	64,035			12,854

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2021–20276 Filed 9–17–21; 8:45 am]

BILLING CODE 4150–29–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: Biobehavioral and Behavioral Processes Integrated Review Group; Human Complex Mental Function Study Section.

Date: October 14–15, 2021

Time: 10:00 a.m. to 8:00 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: Joanna Szczepanik, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 1000D Bethesda, MD 20892 (301) 827–2242 *szczepaj@csr.nih.gov*

Name of Committee: Biology of Development and Aging Integrated Review Group; Mechanisms of Cancer Therapeutics—1 Study Section.

Date: October 18–19, 2021.

Time: 9:00 a.m. to 8:00 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: Maria Dolores Arjona Mayor, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 806D, Bethesda, MD 20892, (301) 827–8578, *dolores.arjonamayor@nih.gov.*

Name of Committee: Interdisciplinary Molecular Sciences and Training Integrated Review Group; Cellular and Molecular Technologies Study Section.

Date: October 20–21, 2021.

Time: 10:00 a.m. to 7:00 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: Tatiana V. Cohen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301–455–2364, *tatiana.cohen@nih.gov.*

Name of Committee: Biology of Development and Aging Integrated Review Group; Drug Discovery and Molecular Pharmacology Study Section.

Date: October 21–22, 2021.

Time: 9:00 a.m. to 8:00 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: Jeffrey Smiley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804 Bethesda, MD 20892, 301–594–7945 *smileyja@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Acute Neural Injury and Epilepsy Study Section.

Date: October 21–22, 2021.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Paula Elyse Schauwecker, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5201, Bethesda, MD 20892, 301–760–8207, *schauweckerpe@csr.nih.gov.*

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; Clinical Research and Field Studies of Infectious Diseases Study Section.

Date: October 21–22, 2021.

Time: 9:00 a.m. to 8:00 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: Pauline Cupit, Ph.D., Scientific Review Office,r Center for Scientific Review National Institute of Health, 6701 Rockledge Drive, Bethesda, MD 20892 301–827–3275, *cupitcunninghpm@mail.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Interdisciplinary Clinical Care in Specialty Care Settings Study Section.

Date: October 21–22, 2021.

Time: 9:00 a.m. to 7:00 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: Abu Saleh Mohammad Abdullah, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 827–4043, *abuabdullah.abdullah@nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genomics Computational Biology and Technology Study Section.

Date: October 21–22, 2021.

Time: 9:00 a.m. to 8:00 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: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892 301–827–7088, *methode.bacanamwo@nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Clinical Integrative Cardiovascular and Hematological Sciences Study Section.

Date: October 21–22, 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: Margaret Chandler, Ph.D., Scientific Review Officer, Center for Scientific Review National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7814, Bethesda, MD 20892, (301) 435–1743, *margaret.chandler@nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Auditory System Study Section.

Date: October 21–22, 2021.

Time: 9:30 a.m. to 8:00 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: Brian H. Scott, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892 301–827–7490, *brianscott@mail.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurotransporters, Receptors, and Calcium Signaling Study Section.

Date: October 21, 2021.

Time: 10:00 a.m. to 8:00 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: Peter B. Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7850, Bethesda, MD 20892, (301) 435–1239 *guthriep@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 15, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–20279 Filed 9–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Health, Behavior, and Context Study Section.

Date: October 18, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 2137C, Bethesda, MD 20892 (Video-Assisted Meeting).

Contact Person: Kimberly L. Houston, M.D., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 2137C, Bethesda, MD 20892, (301) 827–4902, *kimberly.houston@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 15, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–20263 Filed 9–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 Minority Health and Health Disparities Special Emphasis Panel; NIMHD Support for Conferences and Scientific Meetings (R13).

Date: October 27, 2021.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Gateway Plaza, 7201 Wisconsin Avenue, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Xinli Nan, M.D., Ph.D., Scientific Review Officer, Division of Scientific Programs, National Institute on Minority Health and Health Disparities, National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–594–7784, *Xinli.Nan@nih.gov*.

Dated: September 15, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–20280 Filed 9–17–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket Number USCG–2021–0738]

Offshore Patrol Cutter Acquisition Program; Draft Programmatic Environmental Impact Statement/ Overseas Environmental Impact Statement

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notice of availability of a Draft Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement; request for comments.

SUMMARY: The United States (U.S.) Coast Guard (Coast Guard), as the lead agency, announces the availability of the Draft Programmatic Environmental Impact Statement (PEIS)/Overseas Environmental Impact Statement (POEIS) for the Offshore Patrol Cutter (OPC) Program's Stage 2 acquisition of up to 21 OPCs and for the operation of up to 25 total OPCs. The complete OPC Program of Record comprises 25 OPCs. OPC Stage 1 is already under contract to provide the first 4 OPCs. OPC Stage 2 is the focus of this PEIS/POEIS and will provide the remaining 21 OPCs. This PEIS/POEIS is being prepared in compliance with the National Environmental Policy Act and the regulations implemented by the Council on Environmental Quality (CEQ) and

the Executive order titled ''Environmental Effects Abroad of Major Federal Actions.'' The Coast Guard has determined that a PEIS/POEIS is the most appropriate type of NEPA document for this action because of the scope and complexity of the proposed acquisition and operation of up to 25 OPCs. This Notice of Availability (NOA) announces the start of the public review and comment period on this PEIS/POEIS. After the Coast Guard addresses comments provided, Coast Guard will publish a final PEIS/POEIS.

DATES: Comments and related material must be post-marked or received by the Coast Guard on or before November 4, 2021.

ADDRESSES:

Obtaining Documents: You may access the Draft PEIS/POEIS using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search using docket number USCG–2021–0738 to access the Draft PEIS/POEIS.

Submitting Comments: You may submit comments on the Draft PEIS/POEIS by one of the following methods:

- *Via the Web:* You may submit comments identified by docket number USCG–2021–0738 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Scoping Process'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.
- *Via U.S. Mail:* OPC Program Manager (CG–9322), U.S. Coast Guard Headquarters, 2703 Martin Luther King Jr. Ave. SE, Stop 7800, Washington, DC 20593. Please note that mailed comments must be postmarked on or before the comment deadline of 45 days following publication of this notice to be considered.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: For information about this document contact Andrew Haley, Chief, Office of Environmental Management, Coast Guard at *HQS-SMB-OPC-EIS@uscg.mil* or 202–372–1821.

SUPPLEMENTARY INFORMATION: This NOA briefly summarizes the proposed project, including the purpose and need and reasonable alternatives. As required by NEPA and CEQ implementing regulations (40 CFR parts 1500 through 1508, specifically § 1502.3), a Federal agency must prepare an EIS if it is proposing a major Federal action to analyze the environmental consequences of implementing each of the alternatives, if carried forward for full review, following public scoping, by assessing the effects of each alternative on the human environment.

Purpose and Need for the Proposed Action

The Coast Guard's current fleet of Medium Endurance Cutters (MEC) consists of 28 operational vessels homeported in the Coast Guard's Area of Responsibility (AOR) in the Atlantic, Pacific, and Gulf of Mexico. MECs primarily operate outside the 12 nautical mile (nm) territorial seas and within the 200 nm Exclusive Economic Zone and primarily execute maritime law enforcement and search and rescue missions. Additional MEC operations occur in the Gulf of Mexico, the Caribbean Sea, and the Pacific between California and Panama. Current operational MECs have exceeded their designed 30-year service life and can no longer meet this need for the Coast Guard. Therefore, the Coast Guard must replace the aging MECs because they are too old and costly to be operationally effective. Some of the oldest MECs are already more than 55 years old and do not have sufficient hull life remaining to justify any attempts to modernize them. Therefore, the purpose of the Proposed Action is the acquisition and operation of up to 25 OPCs to replace the capabilities of the current operational MECs. OPCs have identical missions and operational characteristics as the MECs they replace. OPC differences include increased length to accommodate a fixed hanger for assigned aircraft, larger flight deck, greater at-sea endurance, an increased number of cutter boats, and modernized Command, Control, Computers, Navigation, and Combat systems. OPCs also feature enhanced environmental standards for clean air, noise, sewage, trash, and ballast.

Proposed Action and Alternative

Coast Guard has identified and analyzed three action alternatives and the No Action Alternative in the PEIS/POEIS for public review and comment.

Proposed Action (Alternative 1, Preferred Alternative): Under the Proposed Action, the Coast Guard would acquire and operate up to 25 OPCs with planned design lives of 30 years to fulfill mission requirements in the proposed action areas in the Atlantic Ocean, Gulf of Mexico, the Caribbean Sea, and Pacific Ocean, including the ice-free waters of Alaska, Hawaii, and Pacific Islands. Similar to the current fleet's operations, the Proposed Action would include vessel and aircraft operations as well as shipboard training exercises to meet the Coast Guard's mission responsibilities. OPCs would support the Coast Guard's missions that generally occur more than 50 nm (92 km) from shore and require long transit time to reach the farthest extent of the Coast Guard's AORs, forward deployment of forces with the U.S. Navy for National Defense, and an extended on-scene vessel presence.

An OPC's typical deployment schedule would be to perform law enforcement activities, which include interdicting any vessel suspected of illegal or unsafe activity in U.S. waters (*e.g.,* fishing without appropriate permits, carrying excessive passengers, or transporting contraband). However, the OPC would be expected to perform other federally-mandated emergent (*e.g.,* hurricane disaster response) or non-emergent missions, typically without sufficient time to return to port for additional provisions or reconfiguration. These missions include Ports, Waterways, and Coastal Security, Search and Rescue, Drug Interdiction, Migrant Interdiction, Living Marine Resource, Other Law Enforcement, and Defense Readiness. The OPC would also be required to enforce maritime environmental laws and regulations, escort vessels to protect national security, and to ensure safe maritime navigation. Coast Guard mandated missions are covered under Title 14 U.S.C. and 6 U.S.C. 468.

OPCs would carry up to three small, rigid-hull inflatable Over the Horizon (OTH) boats, but only one to two OTH boats would be launched at any one time in support of OPC operations. Operations with OTH boats would enhance operational effectiveness by allowing for simultaneous boarding, inspecting, seizing, and neutralizing of surface targets of interest (*i.e.,* civilians suspected of breaking the law or requiring assistance). The OTH boats would also perform in situations and areas where it is either physically impossible or dangerous for the OPC to navigate. OTH boats would support activities such as vessel boarding, passenger transfer, and rescue of persons in distress.

All OPCs would be flight deck-equipped with the ability to launch, recover, hangar, and maintain helicopters. The flight deck of the OPC would be capable of launching and recovering all variants of helicopters up

to equivalent weight of a Sikorsky S–92. In general, helicopters supporting an OPC would either be from an embarked aviation detachment, or would fly from an established airstrip on shore either to the OPC or from the OPC to shore. Helicopter flights associated with the Proposed Action would occur in all Coast Guard AORs, and could be used for transport of personnel and equipment and for conducting training (*e.g.,* landing qualifications), in addition to supporting all OPC missions. All aircraft would follow the Coast Guard's Air Operations Manual (COMDTINST M3710.1H, October 2018).

All OPCs would also have the ability to launch, recover, hangar, and maintain an Unmanned Aircraft System (UAS). Depending on available space, multiple UAS may be utilized. The OPC would have the capability to operate video-equipped UAS that would extend the visual capability of the OPC when conducting operations. The UAS would be deployed and recovered from the OPC. At this time, the specific type of UAS that would be deployed from the OPC is not known because the Coast Guard would acquire the most current UAS technology available after the OPCs are operational. Coast Guard UAS Division sets policies and Standard Operating Procedures specific to UAS operations, including regulations that differ from those governing manned flight operations.

Every 18–24 months, the OPC crew would undergo 3–4 weeks of training and evaluation, including over 100 drills and exercises in different scenarios (*e.g.,* flooding, combat, fires, refueling at sea, towing, active shooter) to demonstrate the crew's abilities to safely and effectively run the ship. During this training evaluation, a significant administrative portion is dedicated to ensure the ship's compliance with applicable laws, regulations, and policies. Some of the activities are integral to Coast Guard emergency response. Although emergency response is not a part of the Proposed Action, training is required. Therefore, training on an OPC for an emergency response is considered part of the Proposed Action. Training would entail practicing response to a simulated emergency while continuing the safe operation and navigation of the OPC.

Gunnery training may occur up to four times per year on each OPC vessel and would only occur in ranges authorized by the Coast Guard and when possible, in established Navy ranges, particularly when live ammunition is used. Areas with sensitive marine resources would not be used for gunnery training.

Vessel performance testing would occur up to annually and would typically occur near that vessel's homeport similar to testing currently conducted for MECs.

Coast Guard OPC operations and training would occur after delivery of each OPC from the shipbuilder to the Coast Guard. For example, OPC–1 delivery to the Coast Guard is expected in 2023 and would undergo approximately one year of training to become ''Ready for Operations.'' OPC–1 would then become operational in 2024. The last OPC (*i.e.,* OPC–25) is expected to be delivered in 2037 and would then become operational in 2038.

Alternative 2, Reduced Acquisition: The Coast Guard would explore the acquisition of fewer OPCs after the completion of OPC–1 through OPC–4 which are under contract. The Coast Guard would consider five, ten, or fifteen OPCs via a re-competition of the original OPC contract as replacements for a corresponding number of in-service MECs. The Coast Guard would then need to replace the remaining MECs on a one-for-one basis, using whatever replacement hulls the Coast Guard could obtain when deterioration or obsolescence requires decommissioning. The life cycle training and logistical costs of maintaining several unique hulls would exceed the corresponding costs of maintaining a class of 25 cutters that would be built specifically to conduct missions in the Coast Guard's AORs. Costs and challenges are similar to what is described under Alternative 3. Operations and training using OPCs acquired under Alternative 2 are the same as for Alternative 1.

Alternative 3, Purchase, Lease, and Inherit: The Coast Guard would explore various forms of cutter purchase or lease, or inherit vessels from the U.S. Navy, as the need arises. This would mean that as a MEC reaches or surpasses the end of its economic service life, that cutter would not necessarily be replaced with the same type of asset or by an asset with similar capabilities. One-for-one MEC replacement cost would increase more per replacement hull because it eliminates any workforce savings associated with ship capabilities designed specifically to conduct Coast Guard missions in areas that may exceed 50 nm (93 km) from shore. The purchase, lease, and inherit alternative include the lack of an existing domestic commercial vessel capable of meeting available options to Purchase and Build-to-Lease. This approach would not properly integrate Coast Guard systems, limiting ability of assets to communicate in real time and resulting in decreased efficiency throughout the system, as well as higher maintenance costs. Operations and training using OPCs acquired under Alternative 2 are the same as for Alternative 1.

No Action Alternative: The evaluation of a No Action Alternative is required by the regulations implementing NEPA. Under the No Action Alternative, the Coast Guard would acquire OPC–1 through OPC–4, then would fulfill its missions in the Atlantic and Pacific Oceans and Gulf of Mexico using existing assets, which are reaching the end of their service lives. The existing assets would continue to age, causing a decrease in efficiency of machinery as well as an increased risk of equipment failure or damage, and would not be considered reliable for immediate emergency response. In addition, it would become more difficult for an ageing fleet to remain in compliance with environmental laws and regulations and standards for safe operation. Further Service Life Extensions become more challenging as significant systems and parts are no longer available, which requires contracting for systems or parts to be made specifically for the vessel. Therefore, the No Action Alternative would not meet the Coast Guard's statutory mission requirements in the Atlantic and Pacific Oceans and Gulf of Mexico to provide air, surface, and shore-side presence in those areas.

The Coast Guard also enforces the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA), and without reliable Coast Guard presence, enforcement of these laws would be significantly reduced. As such, the No Action Alternative does not meet the purpose and need.

Summary of Expected Impacts

While the Coast Guard must work toward environmental compliance during the design and acquisition of OPCs, each vessel is not expected to impact the environment or biological resources until it is operational. In addition, vessel construction in commercial shipyards is not expected to impact any physical or biological resources.

Although the total number of OPCs may be subject to change, Congressional Authorization is for no more than 25. Therefore, the PEIS/POEIS analyzes the potential impact associated with the proposed acquisition and operation of up to 25 OPCs, as this would be the highest number projected to be operational in the Coast Guard's AORs.

Acoustic and physical stressors associated with the Proposed Action may potentially impact the physical and

biological environment in the AORs. Potential acoustic stressors include: The fathometer and Doppler speed log noise (navigation system), vessel noise, aircraft noise, and gunnery noise. Potential physical stressors include: Vessel movement, aircraft movement (helicopters, UAS), and marine expended materials (MEM).

Since the OPC AORs cover a broad geographic area, stressors associated with the Proposed Action are assessed to determine if they potentially impact air quality, ambient sound, biological resources (including critical habitat), and socioeconomic resources.

The PEIS/POEIS evaluates the likelihood that a resource would be exposed to or encounter a stressor and identify the potential impact associated with that exposure or encounter. The likelihood of an exposure or encounter is based on the stressor, location, and timing relative to the spatial and temporal distribution of each biological resource or critical habitat. No significant impacts to environmental resources were identified.

Anticipated Permits and Authorizations

The Proposed Action is programmatic in nature and each OPC would have a design service life of 30 years. As such, potential permits and authorizations are identified in the PEIS/POEIS. Certain approvals may be completed as part of the PEIS/POEIS, but specific permits and authorizations under the laws listed below will be determined through consultations with the appropriate regulatory agencies, and would not necessarily be issued until an OPC is operational in a specific geographic area. Implementation of all alternatives will ultimately require compliance with the following laws and regulations through issuance of permits and/or authorizations:

The Coastal Zone Management Act (CZMA; 16 U.S.C. 1451 *et seq.*) was enacted to protect the coastal environment from demands associated with residential, recreational, and commercial uses. The Coast Guard would determine the impact of the Proposed Action and provide a Coastal Consistency Determination or Negative Determination to the appropriate state agency for anticipated concurrence once the homeports are selected for the OPCs.

The Endangered Species Act (ESA) of 1973 (16 U.S.C. 1531 *et seq.*) provides for the conservation of endangered and threatened species and the ecosystems on which they depend. The Coast Guard anticipates engaging with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, pursuant to Section 7 of the ESA, which have jurisdiction over ESA-listed species and critical habitat (50 CFR 402.14(a)).

The Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) regulates ''take'' of marine mammals in U.S. waters. The term ''take'' as defined in Section 3 (16 U.S.C. 1362) of the MMPA, means ''to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.'' ''Harassment'' was further defined in the 1994 amendments to the MMPA 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 (*i.e.,* 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 (*i.e.,* Level B Harassment). The Coast Guard anticipates engaging with the National Marine Fisheries Service and the U.S Fish and Wildlife Service for potential Level B Harassment of marine mammals under their respective jurisdiction from proposed action activities.

The National Historic Preservation Act (NHPA; 16 U.S.C. 470, *et seq.*), Section 106, requires that each Federal agency identify and assess the effects its actions may have on historic resources, including potential effects on historic structures, archaeological resources, and tribal resources. The Coast Guard would determine if any historic resources are present in the project area, evaluate the potential for the proposed action to adversely affect these resources, and consult with the appropriate state agency and any interested or affected Tribes to resolve any adverse effects by developing and evaluating alternatives or measures that could avoid, minimize, or mitigate impacts.

The Clean Air Act (42 U.S.C. 7401, *et seq.*) regulates emissions from both stationary (industrial) sources and mobile sources. The Coast Guard evaluated the potential for increased emissions during proposed action activities to determine if the emissions would be in conformity with the State Implementation Plan for attainment of National Ambient Air Quality Standards.

Schedule for the Decision-Making Process

Following the comment period announced in this Notice of Availability, and after consideration of all comments received, Coast Guard will prepare a Final PEIS/POEIS for the acquisition of 21 OPCs and operation of up to 25 OPCs. In meeting CEQ regulations requiring EISs to be completed within 2 years the Coast Guard anticipates the Final PEIS/POEIS would be available in 2022. Availability of the Final PEIS/POEIS would be published in the **Federal Register** and would be available for a 30-day waiting period. Because new information may become available after the completion of the Draft or Final PEIS/POEIS, supplemental NEPA documentation may be prepared in support of new information or changes in the Proposed Action considered under the PEIS/POEIS.

Public Scoping Process

The Coast Guard is seeking comments on the potential environmental impacts that may result from the Proposed Action or preliminary Alternatives. The Coast Guard is also seeking input on relevant information, studies, or analyses of any kind concerning impacts potentially affecting the quality of the human environment as a result of the Proposed Action. NEPA requires Federal agencies to consider environmental impacts that may result from a Proposed Action, to inform the public of potential impacts and alternatives, and to facilitate public involvement in the assessment process. The PEIS/POEIS includes, among other topics, discussions of the purpose and need for the Proposed Action, a description of alternatives, a description of the affected environment, and an evaluation of the environmental impact of the Proposed Action and alternatives.

E.O. 12114, Environmental Effects Abroad of Major Federal Actions (44 FR 1957), directs Federal agencies to be informed of and take account of environmental considerations when making decisions regarding major Federal actions outside of the U.S., its territories, and possessions. E.O. 12114 requires Federal agencies to assess the effects of their actions outside the U.S. that may significantly harm the physical and natural environment. A PEIS/POEIS would include, among other topics, discussions of the purpose and need for the Proposed Action, a description of alternatives, a description of the affected environment, and an evaluation of the environmental impact of the Proposed Action and alternatives. The Coast Guard proposes to combine the PEIS and POEIS into one document, as permitted under NEPA and E.O. 12114, to reduce duplication.

The Coast Guard intends to follow the CEQ regulations implementing NEPA (40 CFR parts 1500 through 1599) by scoping through public comments. Scoping, which is integral to the process for implementing NEPA, provides a

process to ensure that (1) issues are identified early and properly studied; (2) issues of little significance do not consume substantial time and effort; (3) the Draft PEIS/POEIS is thorough and balanced; and (4) delays caused by an inadequate PEIS/POEIS are avoided.

Public scoping is a process for determining the scope of issues to be addressed in this PEIS/POEIS and for identifying the issues related to the Proposed Action that may have a significant effect on the environment. The scoping process began with publication of the Notice of Intent to prepare the PEIS/POEIS, published November 18, 2020 (85 FR 73491). The Coast Guard did not receive any comments or input on alternatives, information, or analysis relating to the Proposed Action during the 45-day public scoping period that began November 18, 2020 and ended January 4, 2021. In this Notice of Availability, the Coast Guard is providing the public with the opportunity to comment on the Draft PEIS/POEIS. After Coast Guard considers those comments, the Final PEIS/POEIS will be prepared and its availability similarly announced to solicit public review and comment. Comments received during the Draft PEIS/POEIS review period will be available in the public docket and made available in the Final PEIS/POEIS.

Pursuant to the CEQ regulations, Coast Guard invites public participation in the NEPA process. This notice requests public comments, establishes a public comment period, and provides information on how to participate.

The 45-day public comment period begins September 20, 2021 and ends November 4, 2021. Comments and related material submitted to the online docket via *https://www.regulations.gov/* must be received by the Coast Guard on or before November 4, 2021, and mailed submission, must be postmarked on or before that same date.

We encourage you to submit specific, timely, substantive, and relevant comments through the Federal portal at *https://www.regulations.gov,* on the site provided when searching the above docket number or searching for ''Offshore Patrol Cutter.'' If comments cannot be submitted using *https://www.regulations.gov,* contact the OPC program manager at *HQS-SMB-OPCEIS@uscg.mil.* If you cannot submit comments electronically, written comments can be sent to: OPC Program Manager (CG–9322), U.S. Coast Guard Headquarters, 2703 Martin Luther King Jr. Ave. SE, Stop 7800, Washington, DC 20593.

In submissions, please include the docket number for this Notice of Availability and provide reasoning for comments. To be considered timely, comments must be received on or before November 4, 2021 to be considered in the Draft PEIS/POEIS. Comments mailed to the contact above must be postmarked by November 4, 2021. We will consider all substantive and relevant comments received during the comment period.

We accept anonymous comments. Comments posted to *https://www.regulations.gov* 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).

We review all comments received, but we will only post comments that address the topic of the notice. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Documents mentioned in this Notice of Availability as being available in the docket, and posted public comments, will be in the online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this Proposed Action.

Dated: September 15, 2021.

Andrew T. Pecora,

Captain, U.S. Coast Guard, OPC Program Manager (CG–9322).

[FR Doc. 2021–20298 Filed 9–16–21; 11:15 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Extension From OMB of One Current Public Collection of Information: TSA Airspace Waiver Program

AGENCY: Transportation Security Administration, Homeland Security (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 1652–0033, 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 of information allows TSA to conduct security threat assessments on individuals on board aircraft operating in restricted airspace pursuant to an airspace waiver or flight authorization.

DATES: Send your comments by November 19, 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 1652–0033; TSA Airspace Waiver Program. TSA is seeking approval to extend this collection of information. The airspace waiver program allows U.S. and foreign general aviation aircraft operators to apply for approval to operate in U.S. restricted airspace, including flying over the United States and its territories. This program includes both processing of applications for airspace waivers and flight authorizations for flights operating under the Ronald Reagan Washington National Airport (DCA) Access Standard Security Program (*see* subpart B of 49

CFR part 1562), which requires name-based security threat assessments (STAs) for all passengers, flight crews and armed security officers on board each flight. TSA uses the information to conduct STAs of persons on these flights to protect against and mitigate threats to transportation or national security.

TSA collects information from applicants applying for a waiver or flight authorization either online via *https://waivers.faa.gov,* or by completing a waiver or flight authorization form, which can be requested via facsimile. To ensure adequate time to process the information and obtain approval, TSA recommends that applicants submit the request electronically within five business days before the start-date of the flight.

The type of information collected depends upon the purpose of the application. Both waiver and flight authorization requests must include the purpose of the flight, the aircraft type and registration number, including aircraft operator's company name and address, and the proposed itinerary. When applying for a waiver, the aircraft operator must submit the above information about the flight and provide the names, dates and places of birth, and Social Security or passport numbers for all passengers and crew on board the flight for TSA to perform a STA on each individual. Likewise, to obtain a flight authorization, the aircraft operator must submit the same information as for when applying for waiver on all passengers and flight crews, and as well as for armed security officers on board each flight for TSA to perform a name-based STA on each individual. The information collected about passengers, crew, and armed security officers, as applicable, must include names, dates and places of birth, and Social Security or passport numbers.

The estimated number of respondents is 8,801, and the annual reporting burden is 6,785 hours.

Dated: September 15, 2021.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2021–20293 Filed 9–17–21; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0107]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: H–2 Petitioner's Employment Related or Fee Related Notification

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), invites the general public and other Federal agencies to comment on this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until November 19, 2021.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0107 in the body of the letter, the agency name and Docket ID USCIS–2009–0015. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2009–0015.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2009–0015 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–2 Petitioner's Employment-Related or Fee-Related Notification.

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

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-

profit. The notification requirement is necessary to ensure that alien workers maintain their nonimmigrant status and will help prevent H–2 workers from engaging in unauthorized employment.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–2 Petitioner's Employment Related or Fee Related Notification is 1,700 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 850 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $8,500.

Dated: September 14, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–20202 Filed 9–17–21; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–53]

30-Day Notice of Proposed Information Collection: HOME Investment Partnerships Program; OMB Control No. 2506–0171

AGENCY: Office of the Chief Information Officer, Housing and Urban Development (HUD).

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* October 20, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *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: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on June 25, 2021 at 86 FR 33722.

A. Overview of Information Collection

Title of Information Collection: HOME Investment Partnerships Program.

OMB Approval Number: 2506–0171.

Type of Request: Revision of a currently approved collection.

Form Number: N/A.

Description of the need for the information and proposed use: The information collected through HUD's Integrated Disbursement and Information System (IDIS) (24 CFR 92.502) is used by HUD Field Offices, HUD Headquarters, and HOME Investment Partnerships Program (HOME) Participating Jurisdictions (PJs). The project-specific property, tenant, owner, and financial data is used to compile annual reports to Congress required at Section 284(b) of Title II of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 U.S.C. 12721 *et seq.*) (the Act) as well as to make program management decisions about how well PJs are achieving the statutory objectives of the HOME Program. Program management reports are generated by IDIS to provide data on the status of PJs' HOME grants and projects including the commitment and disbursement of HOME funds. These reports are provided to HUD staff as well as to HOME PJs.

Management reports required in conjunction with the Annual Performance Report (24 CFR 92.509) are used by HUD Field Offices to assess the effectiveness of locally designed programs in meeting specific statutory requirements and by Headquarters in preparing the Annual Report to Congress. Specifically, these reports permit HUD to determine compliance with the requirement that PJs provide a 25 percent match for HOME funds expended during the Federal fiscal year (Section 220 of the Act) and that program income be used for HOME eligible activities (Section 219 of the Act), as well as the Women and Minority Business Enterprise requirements (24 CFR 92.351(b)).

Financial, project, tenant and owner documentation are used to determine compliance with HOME Program cost limits (Section 212(e) of the Act), eligible activities (24 CFR 92.205), and eligible costs (24 CFR 92.206), as well as to determine whether PJs are complying with the income targeting and affordability requirements of the Act (Sections 214 and 215 of the Act). Other information collected under Subpart H of Part 92 (Other Federal Requirements) is primarily intended for local program management and is only viewed by HUD during routine monitoring visits. The written agreement with the owner for long-term obligation (24 CFR 92.504) and tenant protections (24 CFR 92.253) are required to ensure that the property owner complies with these important elements of the HOME Program and are also reviewed by HUD during monitoring visits. HUD reviews all other data collection requirements during monitoring to assure compliance with the requirements of the Act and other related laws and authorities.

HUD tracks PJ performance and compliance with the requirements of 24 CFR parts 91 and 92. PJs use the required information in the execution of their program, and to gauge their own performance in relation to stated goals.

Reg. section	Paperwork requirement	Number of respondents	Responses per annum	Total annual responses	Burden hour per response	Annual burden hours	Hourly rate	Annual cost
§ 92.61	Program Description and Housing Strategy for Insular Areas.	4.00	1.00	4.00	10.00	40.00	41.78	$1,671.20
§ 92.66	Reallocation—Insular Areas.	4.00	1.00	4.00	3.00	12.00	41.78	501.36
§ 92.101	Consortia Designation.	36.00	1.00	36.00	5.00	180.00	41.78	7,520.40
§ 92.201	State Designation of Local Recipients.	51.00	1.00	51.00	1.50	76.50	41.78	3,196.17
§ 92.200	Private-Public Partnership.	651.00	1.00	651.00	2.00	1,302.00	41.78	54,397.56
§ 92.201	Distribution of Assistance.	651.00	1.00	651.00	4.00	2,604.00	41.78	108,795.12
§ 92.202	Site and Neighborhood Standards.	651.00	1.00	651.00	2.00	1,302.00	41.78	54,397.56
§ 92.203	Income Determination.	20,001.00	1.00	20,001.00	2.00	40,002.00	41.78	1,671,283.56
§ 92.203	Income Determination.	350,000.00	1.00	350,000.00	0.75	262,500.00	41.78	10,967,250.00
§ 92.205(e)	Terminated Projects.	540.00	1.00	540.00	5.00	2,700.00	41.78	112,806.00
§ 92.206	Eligible Costs—Refinancing.	100.00	1.00	100.00	4.00	400.00	41.78	16,712.00
§ 92.210	Troubled HOME-Assisted Rental Projects.	25.00	1.00	25.00	0.50	12.50	41.78	522.25
§ 92.251(a)	Property Standards—New Construction.	10,200.00	2.00	20,400.00	3.00	61,200.00	41.78	2,556,936.00
§ 92.251(b)	Property Standards—Rehabilitation.	15,300.00	2.00	30,600.00	2.00	61,200.00	41.78	2,556,936.00
§ 92.252	Qualification as affordable housing: Rental Housing:.	3,200.00	1.00	3,200.00	5.00	16,000.00	41.78	668,480.00
§ 92.252(j)	Fixed and Floating HOME Rental Units.	3,200.00	1.00	3,200.00	1.00	3,200.00	41.78	133,696.00
§ 92.253	Tenant Protections (including lease requirement).	20,001.00	1.00	20,001.00	5.00	100,005.00	41.78	4,178,208.90
§ 92.254	Homeownership—Median Purchase Price.	80.00	1.00	80.00	5.00	400.00	41.78	16,712.00
§ 92.254	Homeownership—Alternative to Resale/recapture.	100.00	1.00	100.00	5.00	500.00	41.78	20,890.00
§ 92.254(a)(5)	Homeownership—Approval of Resale & Recapture.	2,000.00	1.00	2,000.00	1.50	3,000.00	41.78	125,340.00
§ 92.254(a)(5)	Homeownership—Fair Return & Affordability.	2.00	1.00	2.00	1.00	2.00	41.78	83.56
§ 92.254(f)	Homeownership program policies.	651.00	1.00	651.00	5.00	3,255.00	41.78	135,993.90
§ 92.300	CHDO Identification.	651.00	1.00	651.00	2.00	1,302.00	41.78	54,397.56
§ 92.300	Designation of CHDOs.	480.00	1.00	480.00	1.50	720.00	41.78	30,081.60
§ 92.300	CHDO Project Assistance.	651.00	1.00	651.00	2.00	1,302.00	41.78	54,397.56
§ 92.303	Tenant Participation Plan.	12,513.00	1.00	12,513.00	10.00	125,130.00	41.78	5,227,931.40
§ 92.351	Affirmative Marketing.	3,870.00	1.00	3,870.00	5.00	19,350.00	41.78	808,443.00
§ 92.354	Labor	20,001.00	1.00	20,001.00	2.50	50,002.50	41.78	2,089,104.45
§ 92.357	Debarment and Suspension.	9,765.00	1.00	9,765.00	1.00	9,765.00	41.78	407,981.70

Reg. section	Paperwork requirement	Number of respondents	Responses per annum	Total annual responses	Burden hour per response	Annual burden hours	Hourly rate	Annual cost
§ 92.501	HOME Investment Partnership Agreement (HUD 40093).	651.00	1.00	651.00	1.00	651.00	41.78	27,198.78
§ 92.502	Homeownership and Rental Set-Up and Completion.	8,000.00	1.00	8,000.00	2.00	16,000.00	41.78	668,480.00
§ 92.502	Tenant-Based Rental Assistance Set-Up (IDIS).	4,400.00	1.00	4,400.00	5.50	24,200.00	41.78	1,011,076.00
§ 92.502	IDIS Access Request form (HUD 27055).	100.00	1.00	100.00	0.50	50.00	41.78	2,089.00
§ 92.502(a)	Required Reporting of Program Income.	651.00	1.00	651.00	12.00	7,812.00	41.78	326,385.36
§ 92.504(c)	Written Agreement.	20,001.00	1.00	20,001.00	5.00	100,005.00	41.78	4,178,208.90
§ 92.504(d)(2)	Financial Oversight and HOME Rental projects.	21,700.00	1.00	21,700.00	1.00	21,700.00	41.78	906,626.00
§ 92.508	Recordkeeping-Subsidy Layering and Underwriting.	3,200.00	1.00	3,200.00	4.00	12,800.00	41.78	534,784.00
§ 92.508	Recordkeeping (Additional).	30,330.00	1.00	30,330.00	1.00	30,330.00	$41.78	$1,267,187.40
§ 92.509	Annual Performance Reports (HUD 40107).	651.00	1.00	651.00	2.50	1,627.50	41.78	67,996.95
§ 92.509	Management Reports—FY Match Report (HUD 40107A).	651.00	1.00	651.00	0.75	488.25	41.78	20,399.09
§ 92.550, § 91.525.	HUD Monitoring of Program Documentation and Activities.	651.00	1.00	651.00	0.25	162.75	41.78	6,799.70
	Direct Deposit Sign up form (SF 1199A).	15.00	1.00	15.00	0.25	3.75	41.78	156.68
	HOME ARP Allocation Plan.	651.00	1.00	651.00	20.00	13,020.00	41.78	543,975.60
	Supportive Services Setup and Completion Activities.	1,302.00	4.00	5,208.00	5.00	26,040.00	41.78	1,087,951.20
	Non-Congregate Shelter Setup and Completion Activities.	651.00	1.00	651.00	15.00	9,765.00	41.78	407,981.70
Totals		568,984.00				1,032,119.75		43,121,963.16

Annual cost is based on Actual Burden Hours (1,032,119.75) * the hourly rate for a GS–12 ($41.78)

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) If the information will be processed and used in a timely manner;

(3) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(4) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(5) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–20281 Filed 9–17–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6282–N–01]

The Performance Review Board

AGENCY: Office of the Deputy Secretary, Housing and Urban Development (HUD).

ACTION: Notice of appointments.

SUMMARY: The Department of Housing and Urban Development announces the establishment of the Departmental Performance Review Board (PRB) to make recommendations to the appointing authority on the performance and compensation of its Senior Executive Service (SES), Senior Level (SL) and Senior Technical (ST) professionals. The following persons may be named to serve on the PRB from 2021 to 2025. They are listed by type of appointment, name, and official title under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Persons desiring any further information about the PRB and its members may contact Kristen B. Bartlett, Director, Office of Executive Resources, Department of Housing and Urban Development, Washington, DC 20410. Telephone (202) 718–7943. (This is not a toll-free number). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

Name	Official title
CAREER SES	
AMMON, MATTHEW E	DIR OFC OF HEALTHY HOMES & LEAD HAZARD CONTROL.
BALLARD, DANIEL L	DEP ASST CHIEF FINANCIAL OFFICER, BUDGET.
BASTARACHE, DANIELLE L	DEP ASST SECRETARY, PUBLIC HOUSING & VOUCHER PRO.
BELL, KEISHA D	ASSOC GEN COUNSEL, ETHICS & PERSONNEL LAW.
BERENBAUM, DAVID L	DEP ASST SECRETARY, OFC OF HOUSING COUNSELING.
BETTS, SUSAN A	DEP ASST SECRETARY, FINANCE & BUDGET.
BLOM, DOMINIQUE G	GEN DEP ASST SECRETARY, PUBLIC & INDIAN HOUSING.
BOHLING, GAYLE E	DEP GEN COUNSEL, OPERATIONS.
BOYD, JANICE L	CHIEF MANAGEMENT OFFICER.
BROWN, AMY L	DEP GEN COUNSEL, HOUSING.
BRYON, JEMINE A	DEP ASST SECRETARY, SPECIAL NEEDS PROGRAMS.
BURKE, PATRICIA M	DIR OFC OF MULTIFAMILY PRODUCTION.
CHIN, ARTHUR A	CHIEF DIGITAL SERVICES OFFICER.
CLARK, PRISCILLA W	DEP CHIEF HUMAN CAPITAL OFFICER.
CLEMMENSEN, CRAIG T	DIR DEPARTMENTAL ENFORCEMENT CTR.
COOKE JR, KEVIN R	CHIEF FOIA & PRIVACY OFFICER.
COOPER–JONES, BARBARA M	SR VP OFC OF ENTERPRISE DATA TECH SOLUTIONS.
CORSIGLIA, NANCY E	CHIEF ADMINISTRATIVE OFFICER.
CULLEN, DEANDRA J	DEP ASST SECRETARY, OFC OF POLICY, LEGISLATIVE INITIATIVE.
DAUGHERTY, JOHN T	SR VP OFC OF SECURITIES OPERATIONS.
DAVIS, THOMAS R	DIR OFC OF RECAPITALIZATION.
DRAYNE, MICHAEL R	SR VP STRATEGIC PLANNING, POLICY AND COMMUNICATIONS.
DUPRE, BRIAN A	ASSOC GEN COUNSEL, LITIGATION.
ENZEL, DAVID H	GEN DEP ASST SECRETARY, FAIR HOUSING & EQUAL OPPORTUNITY.
FERRY, SHYLON C	DEP ASST SECRETARY, OPERATION.
FLEMING SCOTT, JIMMY	DEP CHIEF PROCUREMENT OFFICER.
FLEMING, EKANEM O	CHIEF BUSINESS & IT RESOURCE MGMT.
FLOM, RONALD C	CHIEF PROCUREMENT OFFICER.
FORERO, JAIME E	DEP ASST SECRETARY, OPERATIONS & MGMT.
FORRESTER, ALTHEA M	ASSOC GEN COUNSEL, ASST HOUSING & COMMUNITY DEVELOPMENT.
FRECHETTE, HEIDI J	DEP ASST SECRETARY, NATIVE AMERICAN PROG.
GAITHER, FELICIA R	DEP ASST SECRETARY, FIELD OPERATIONS.
GARCIA ROLON, JUAN C	ASSOC DEP ASST SECRETARY, REAC.
GETCHIS, JOHN F	SR VP OFC OF CAPITAL MARKETS.
GOLRICK, JANET A	CHIEF DISASTER & NATIONAL SECURITY OFFICER.
HADLEY, JOY L	DIR OFC OF LENDER ACTIVITIES & PROGRAM COMPLIANCE.
HALLIDAY, TOBIAS	DIR OFC OF ASSET MGMT & PORTFOLIO OVERSIGHT.
HIMES, IVERY W	DEP DIR, DISASTER INITIATIVES.
IJAZ, SAIRAH R	ASST CHIEF FINANCIAL OFFICER, SYSTEMS.
JANECEK, JILL A	CHIEF TECHNOLOGY OFFICER.
JEWITT, BRADLEY S	DEP CHIEF ADMINISTRATIVE OFFICER.
JOHNSON TURNER, BRENDA M	ASSOC DEP ASST SECRETARY, REAC.
JOHNSON, CALVIN C	DEP ASST SECRETARY, OFC OF RESEARCH, EVALUATION & MONITORING.
KEITH, GREGORY A	SR VP & CHIEF RISK OFFICER.
KIM, HUN S	CHIEF INFORMATION SECURITY OFFICER.
KOME, JESSIE H	DIR OFC OF BLOCK GRANT ASSIST.
KORNEGAY, EMILY M	ASST CHIEF FINANCIAL OFFICER, BUDGET.
KOSKINEN, LARRY A	CHIEF RISK OFFICER.
KUBACKI, MELAJO K	ASST CHIEF FINANCIAL OFFICER, FINANCIAL MGMT.
LITTLE, JEFFREY D	ASSOC DEP ASST SECRETARY, MULTFMLY HOUSING PROGRAMS.
LOFINMAKIN, ADETOKUNBO	SR VP & CHIEF FINANCIAL OFFICER.
LUKOFF, ROGER M	DEP ASST SECRETARY, HEALTHCARE PROGRAMS.
MATTHEWS, MONICA M	DIR STRATEGIC PLANNING & MGMT.
MCNEELY, KEVIN L	GEN DEP ASST SECRETARY, ADMINISTRATION.
MICHALSKI, LORI A	CHIEF HUMAN CAPITAL OFFICER.
MILLS, KRISTA	DIR FIELD POLICY & MGMT.

Name	Official title
MONTGOMERY, MATISHA D	CHIEF LEARNING OFFICER.
MORRIS, VANCE T	ASSOC GEN DEP ASST SECRETARY, HOUSING.
MULDERIG, ROBERT E	DEP ASST SECRETARY, PUBLIC HOUSING INVESTMENTS.
MULRAIN, LISA V	ASSOC GEN COUNSEL, FINANCE, PROCUREMENT & ADMINISTRATIVE.
NARODE, DANA M	ASSOC GEN COUNSEL, PROGRAM ENFORCEMENT.
NGUYEN, NHIEN T	CHIEF PERFORMANCE OFFICER.
NIGAM, NITA	ASST CHIEF FINANCIAL OFFICER, ACCOUNTING.
PAO, JEAN L	DIR OFC OF SMALL & DISADVANTAGED BUSINESS UTILIZATION.
PARKER, TENNILLE S	DIR DISASTER RECOVERY & SPECIAL ISSUES DIVISION.
PETERSON, CHRISTINA M	DIR OFC OF HUMAN CAPITAL SERVICES.
PORDZIK, LESLIE A	SR VP MORTGAGE–BACKED SECURITIES.
PRESTON, TAWANNA	SR VP OFC OF MGMT OPERATIONS & SR ADVISOR TO OFC OF PRES.
RAMOS, RUSSELL A	DEP CHIEF INFO SECURITY OFFICER.
REEVES, ANTHONY B	DEP ASST SECRETARY, OPERATIONS.
RICHARDSON, TODD M	GEN DEP ASST SECRETARY, POLICY DEVELOPMENT & RESEARCH.
ROBINSON, JOZETTA R	DIR EXECUTIVE SECRETARIAT.
SANTA ANNA, AARON	ASSOC GEN COUNSEL, LEGISLATIONS & REGULATIONS.
SARDONE, VIRGINIA M	DIR OFC OF AFFORDABLE HOUSING.
SARGEANT, JUAN C	DEP CHIEF INFO OFFICER, INFRASTRUCTURE & OPERATION.
SAUNDERS, ELISSA O	DIR OFC OF SINGLE FAMILY PROGRAMS DEVELOPMENT.
SCOTT, PAUL A	BUSINESS CHANGE & INTEGRATION OFFICER.
SHERIFF, KEVIN V	ASSOC DEP ASST SECRETARY, PUBLIC HOUSING & VOUCHER.
TOLBERT, SHERECE M	ASSOC GEN COUNSEL, INSURED HOUSING & URBAN DEVELOPMENT.
TOMCHICK III, GEORGE J	DEP CHIEF FINANCIAL OFFICER.
USOWSKI, KURT G	DEP ASST SECRETARY, ECONOMIC AFFAIRS.
WEBBER, CHRISTOPHER S	PRIN DEP CHIEF INFORMATION OFFICER.
WORDEN, JEANINE M	ASSOC GEN COUNSEL, FAIR HOUSING.
NON-CAREER SES	
BAILEY, PEGGY F	SR ADVISOR
BROWN, VICTORIA C	DEPUTY CHIEF OF STAFF.
BRUNDAGE, SARAH J	GEN DEP ASST SECRETARY, CONGRESSIONAL & INTERGOVERNMENTAL RELATIONS.
BUSH, KEVIN J	DEP ASST SECRETARY, GRANT PROGRAMS.
CARLILE, JOSEPH W	SR ADVISOR.
CHO, RICHARD S	SR ADVISOR, HOUSING & SERVICE.
HANDELMAN, ETHAN D	DEP ASST SECRETARY, MULTIFAMILY HOUSING.
JEMISON II, JAMES A	PRIN DEP ASST SECRETARY, COMMUNITY PLANNING & DEVELOPMENT.
JONES, JENNIFER C	CHIEF OF STAFF.
JOSEPH, JULIENNE Y	DEP ASST SECRETARY, SINGLE FAMILY HOUSING.
KEEGAN, ROBIN J	DEP ASST SECRETARY, ECONOMIC DEV.
KOLLURI, LOPA P	PRIN DEP ASST SECRETARY, HOUSING.
MCCARGO, ALANNA B	SR ADVISOR.
METRAKAS, EUGENIA M	CHIEF OPERATIONS OFFICER.
PEREZ, MICHELE P	ASST DEP SECRETARY, FIELD POLICY & MGMT.
SAMBERG CHAMPION, SASHA M	DEPUTY GEN COUNSEL, ENFORCEMENT.
WINTER, BENJAMIN J	DEP ASST SECRETARY, POLICY DEVELOPMENT.
SES LIMITED	
GARVIN, JOHN L	SR ADVISOR, ORGANIZATION, TRANSFORMATION & MODERNIZATION.

Dated: September 14, 2021.

Adrianne Todman,

Deputy Secretary.

[FR Doc. 2021–20205 Filed 9–17–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7036–N–10]

60-Day Notice of Proposed Information Collection: Consolidated Plan, Annual Action Plan & Annual Performance Report; OMB Control No: 2506–0117

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow 60 days of public comment.

DATES: *Comments Due Date:* November 19, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–5535

(this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Gloria Coates, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; by email at *gloria.l.coates@hud.gov* or telephone at 202–402–2184. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Consolidated Plan & Annual Performance Report.

OMB Approval Number: 2506–0117.

Type of Request: Extension.

Form Number: N/A.

Description of the need for the information and proposed use: The Departments collection of this information is in compliance with statutory provisions of the Cranston Gonzalez National Affordable Housing Act of 1990 that requires participating jurisdictions to submit a Comprehensive Housing Affordability Strategy (Section 105(b)); the 1974 Housing and Community Development Act, as amended, that requires states and localities to submit a Community Development Plan (Section 104(b)(4) and Section 104(m)); and statutory provisions of these Acts that requires states and localities to submit applications and reports for these formula grant programs. The information is needed to provide HUD with preliminary assessment as to the statutory and regulatory eligibility of proposed grantee projects for informing citizens of intended uses of program funds.

Members of the Affected Public: States and local governments participating in the Community Development Block Grant Program (CDBG), the Home Investment Partnership Program (HOME), the Emergency Solutions Grants Program (ESG), the Housing Opportunities for Persons with AIDS/HIV Program (HOPWA) or the Housing Trust Fund (HTF).

Estimated Number of Respondents: 1,234 localities and 50 states.

Estimated Number of Responses: 1.

Consolidated Plan & Performance Reports: 2,468 localities, 100 states.*

Average Hours per Response: 305 (localities), 741 (states).

Total Estimated Burdens: 413,420.

* Includes combined Consolidated Plan and Annual Action Plan and separate performance report.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Total U.S. burden hours	Hourly cost per response	Total annual cost
Consolidated Plan & Performance Reports:							
Localities	*1,234	1	1234	305	376,370	**$41.78	$15,724,738
States	*50	1	50	741	37,050	**41.78	1,547,949

*Total number of respondents of 1,284 = sum of localities (1,234) and states (50). Total localities of 1,234 includes 1,227 entitlements + 3 non-entitlements (Hawaii, Kauai, Maui) and four Insular Areas (Guam, Mariana Islands, Samoa, Virgin Islands).

**Estimates assume a blended hourly rate that is equivalent to a GS–12, Step 1, Federal Government Employee.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Principal Deputy Assistant Secretary for Community Planning and Development, James Arthur Jemison II, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Aaron Santa Anna, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Aaron Santa Anna,

Federal Liaison for the Department of Housing and Urban Development.

[FR Doc. 2021–20199 Filed 9–17–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900 253G; OMB Control Number 1076–0190]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Indian Highway Safety Grants

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Indian Affairs (BIA), are proposing to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before October 20, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent

within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Ms. Kimberly Belone, Indian Highway Safety Program Coordinator, 1001 Indian School Road NW, Albuquerque, NM 87104; or by email to *Kimberly.belone@bia.gov.* Please reference OMB Control Number 1076–0190 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact L.G. Robertson, Indian Highway Program Director, 1001 Indian School Road NW, Albuquerque, NM 87104 by email at *Lawrence.robertson@bia.gov,* or by telephone at 505–563–3780. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on May 13, 2021 (86 FR 26231). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the BIA; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the BIA enhance the quality, utility, and clarity of the information to be collected; and (5) how might the BIA minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: This information is collected from Tribal entities concerning population, land base, highway miles and statistical data concerning vehicle fatalities, crashes, traffic enforcement actions and proposed financial data. This data collected is a requirement for the BIA Indian Highway Safety Program (IHSP) to fulfil the data obligations of 23 CFR 1300.11 and will be used for review and consideration by the IHSP Selection Committee for consideration of grant awards.

Proposed Revisions to This Information Collection

Travel & Training Form: New form for registration and travel expense reimbursements based on actual travel costs, not to exceed the Federal travel regulations.

Child Passenger Safety Seat Grant Application: Minor revisions to format, content, and instructions.

Law Enforcement Grant Application: Minor revisions to format, content, and instructions.

Title of Collection: Indian Highway Safety Grants.

OMB Control Number: 1076–0190.

Form Number: None.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Tribal governments.

Total Estimated Number of Annual Respondents: 485 per year, on average.

Total Estimated Number of Annual Responses: 2,256 per year, on average.

Estimated Completion Time per Response: For applications, 4 hours, on average; for monthly reports, 3–11 hours, on average; and for annual reports, 5–9 hours, on average.

Total Estimated Number of Annual Burden Hours: 15,316 on average.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually for grant applications and annual reports; monthly for reports.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Elizabeth K. Appel,

Director, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2021–20257 Filed 9–17–21; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[21X.LLHQ320000.L13200000.PP0000]

Extension of Public Comment Period for the Notice of Intent To Conduct a Review of the Federal Coal Leasing Program and To Seek Public Comment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of extension of public comment period.

SUMMARY: On August 20, 2021, the Bureau of Land Management (BLM) published a Notice of Intent to Conduct a Review of the Federal Coal Leasing Program in the **Federal Register** and requested public comments. This notice extends the public comment period for 15 days to allow for further public comment and consideration to occur.

DATES: The BLM will consider written comments received or postmarked on or before October 5, 2021.

ADDRESSES: You may submit written comments by the following methods:

- *Email: BLM_HQ_320_CoalProgramReview@blm.gov.* This is the preferred method of commenting.
- *Mail, personal, or messenger delivery:* National Coal Program Review, In care of: Thomas Huebner, BLM Wyoming State Office, 5353 Yellowstone Rd, Cheyenne, WY 82009.

FOR FURTHER INFORMATION CONTACT: Lindsey Curnutt, Chief, Division of Solid Minerals, email: *lcurnutt@blm.gov,* telephone: 480–708–7339. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact Ms. Curnutt. This service is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM published a notice on August 20, 2021 (86 FR 46873), inviting comments on the scope of the BLM's review of the Federal coal leasing program. The initial comment period ends September 20, 2021. For additional details on the original notice, please visit the **Federal Register's** website: *https://*

www.govinfo.gov/content/pkg/FR-2021-08-20/pdf/2021-17827.pdf.

The BLM has received requests for an extension of the public comment period and has decided to extend the comment period by 15 days to provide the public with additional time to provide comments.

The BLM invites interested agencies, States, American Indian tribes, local governments, industry, organizations, and members of the public to submit comments or suggestions to assist in identifying significant issues that the BLM should consider in its review of the Federal coal program.

The Department of the Interior also intends to conduct government-to-government consultation with affected Indian tribes about the Federal coal leasing program and to consider the potential environmental, social, and cultural impacts of the coal program on indigenous communities and their lands during this review.

(Authority: 43 U.S.C. 1701 *et seq.,* 30 U.S.C. 181 *et seq.,* 30 U.S.C. 351 *et. seq.*)

Nada Wolff Culver,

Deputy Director, Policy and Programs, Bureau of Land Management.

[FR Doc. 2021–20283 Filed 9–17–21; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV00000.L10200000.XZ0000. LXSSH1060000.212.HAG 21–0300]

Notice of Public Meetings for the John Day-Snake Resource Advisory Council, Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management's (BLM) John Day-Snake Resource Advisory Council (RAC) will meet as follows.

DATES: The John Day-Snake RAC will meet Thursday, October 21, 2021, from 8 a.m. to 1:30 p.m. Pacific Time, and will then host a field tour in the afternoon to the Restoration Fuels Torrefaction Plant until 5:30 p.m. The RAC will reconvene Friday, October 22, 2021, from 8 a.m. to 1 p.m. A public comment period will be offered each day and the meetings and field tour are open to the public in their entirety.

ADDRESSES: The meetings will be held at the Malheur National Forest Supervisor's Office, 431 Patterson Bridge Rd., John Day, OR 97845. The October 21 field tour includes a visit to the Restoration Fuels Torrefaction Plant located at 60339 US–26, John Day, OR 97845. A virtual meeting may substitute for an in-person meeting depending on local health restrictions in place at the time of the meeting. Additional meeting details and a final agenda will be published on the RAC web page at least 10 days in advance of the meetings at *https://www.blm.gov/get-involved/resource-advisory-council/near-you/oregon-washington/john-day-rac.*

FOR FURTHER INFORMATION CONTACT: Larisa Bogardus, Public Affairs Officer, 3100 H St., Baker City, OR 97814; telephone: 541–219–6863; email: *lbogardus@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1 (800) 877–8339 to contact Larisa. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 15-member John Day-Snake RAC was chartered by and its members were appointed by the Secretary of the Interior. Its diverse perspectives are represented in commodity, conservation, and general interests. It provides advice to the BLM and, as needed, U.S. Forest Service resource managers regarding management plans and proposed resource actions on public land in the John Day-Snake area.

Agenda items for October 21 include a presentation from the Oregon Department of Fish and Wildlife on mule-deer habitat and upcoming salmon runs; a motorized and non-motorized trail access discussion; a wild horse and burro update; and a fire season overview. The afternoon field tour is to the Restoration Fuels thermal treatment facility where the RAC will learn about methods that utilize tree thinnings and low-value wood materials from stewardship projects in national forests and private-land treatments to produce environmentally friendly fuel for energy. Attending public participants must provide their own transportation and personal amenities for the duration of the field tour. Participants must register to attend the field tour at least 14 days in advance using the contact contained in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Agenda items for the October 22 meeting include a review of recreation fee proposals for the BLM Prineville District; a Blue Mountain Forest Plan update; and agency updates. Depending on the number of people wishing to address the RAC and the time available, the amount of time for oral public comments may be limited. The public may send written comments to the RAC in response to material presented. Comments can be mailed to the BLM Vale District; Attn. Darrel W. Monger; 100 Oregon St.; Vale, OR 97918. The Designated Federal Officer will attend the meetings, take minutes, and publish detailed meeting minutes on the RAC web page (see the **ADDRESSES** section earlier).

Before including your address, phone number, email address, or other personal identifying information in your comments, please be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

(Authority: 43 CFR 1784.4–2)

Darrel W. Monger,

Vale District Manager.

[FR Doc. 2021–20290 Filed 9–17–21; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–AKR–CAKR–DENA–GAAR–LACL–WRST–32369; PPAKAKROR4, PPMPRLE1Y.LS0000]

Request for Nominations for the National Park Service Alaska Region Subsistence Resource Commission Program

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS) is seeking nominations for individuals willing to represent subsistence users on the following Subsistence Resource Commissions (SRC): The Cape Krusenstern National Monument SRC, the Denali National Park SRC, the Gates of the Arctic National Park SRC, the Lake Clark National Park SRC, and the Wrangell-St. Elias National Park SRC.

DATES: Nominations must be postmarked by December 20, 2021.

ADDRESSES: Nominations should be sent to: Joshua T. Ream, Ph.D., (Xíxch'i Toowóo), Subsistence Program Manager, National Park Service, Alaska Regional Office, 240 W 5th Avenue, Anchorage, AK 99501, or email at *joshua_ream@nps.gov,* or via telephone at (907) 644–3596.

FOR FURTHER INFORMATION CONTACT: Joshua T. Ream, Ph.D., (Xíxch'i Toowóo), via telephone at (907) 644–3596.

SUPPLEMENTARY INFORMATION: The NPS SRC program is authorized under section 808 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3118).

The SRCs hold meetings to develop NPS subsistence program recommendations and advise on related regulatory proposals and resource management issues.

Each SRC is composed of nine members: (a) Three members appointed by the Secretary of the Interior; (b) three members appointed by the Governor of the State of Alaska; and (c) three members appointed by a Regional Advisory Council (RAC), established pursuant to 16 U.S.C. 3115, which has jurisdiction within the area in which the park is located. Each of the three members appointed by the RAC must be a member of either the RAC or a local advisory committee within the region who also engages in subsistence uses within the park or national monument.

We are now seeking nominations for those members of each of the SRCs listed above.

These members are to be appointed by the Secretary of the Interior.

Members will be appointed for a term of three years. Members of the SRC serve without compensation. However, while away from their homes or regular places of business in the performance of services for the SRC, and as approved by the Designated Federal Officer (DFO), members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under Section 5703 of Title 5 of the United States Code.

SRC meetings will take place at such times as designated by the DFO. Members are expected to make every effort to attend all meetings. Members may not appoint deputies or alternates.

We are seeking nominations for members to represent subsistence users on each of the five SRCs listed above. All those interested in serving as members, including current members whose terms are expiring, must follow the same nomination process.

Nominations should be typed and should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the SRC, and to permit the Department to contact a potential member.

Authority: 5 U.S.C. Appendix 2.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2021–20278 Filed 9–17–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0032606; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Mississippi Department of Archives and History, Jackson, MS

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Mississippi Department of Archives and History (MDAH) has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Mississippi Department of Archives and History. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Mississippi Department of Archives and History at the address in this notice by October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Meg Cook, Director of Archaeology Collections, Mississippi Department of Archives and History, Museum Division, 222 North Street, P.O. Box 571, Jackson, MS 39205, telephone (601) 576–6927, email *mcook@mdah.ms.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Mississippi Department of Archives and History, Jackson, MS. The human remains and associated funerary objects were removed from six sites in Tunica County, Mississippi.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of human remains was made by the Mississippi Department of Archives and History professional staff in consultation with representatives of the Alabama-Coushatta Tribe of Texas [previously listed as Alabama-Coushatta Tribes of Texas]; Alabama-Quassarte Tribal Town; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Jena Band of Choctaw Indians; Miami Tribe of Oklahoma; Mississippi Band of Choctaw Indians; Quapaw Nation [previously listed as The Quapaw Tribe of Indians]; The Chickasaw Nation; The Choctaw Nation of Oklahoma; The Muscogee (Creek) Nation; and The Osage Nation [previously listed as Osage Tribe] (hereafter referred to as ''The Tribes'').

History and Description of the Remains

Beginning in 1971, human remains representing, at minimum, 11 individuals were removed from the following sites in Tunica County, MS: Beaver Dam (22TU513), Canon (22TU523), Clay Ball (22TU600), Martin #2 (22TU534), Parker-McClintock (22TU594), and Sledge (22TU510). The human remains belong to individuals of unidentified sex and age. No known individuals were identified. Associated funerary objects were removed from the Canon, Parker-McClintock, and Sledge sites. The 15 associated funerary objects are three lots of ceramic sherds, one lot of ceramic vessels, one lot of charcoal, one lot of clay beads, one lot of daub,

two lots of faunal bones, one lot of fired clay, two lots of lithic debitage, one lot metal, one lot pit fill, and one lot of unworked stone.

The Mississippi Department of Archives and History has determined that the human remains of these individuals are Native American through the circumstances of acquisition, as well as through the observance of biological markers consistent with this ancestry. The circumstances of acquisition, including excavation notes and associated funerary objects, show that these human remains are affiliated with Mississippian cultures that are indigenous to these areas of Mississippi. Present day Indian Tribes associated with these cultures include The Tribes.

Determinations Made by the Mississippi Department of Archives and History

Officials of the Mississippi Department of Archives and History have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 11 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 15 associated funerary objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and The Tribes.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Meg Cook, Director of Archaeology Collections, Mississippi Department of Archives and History, Museum Division, 222 North Street, P.O. Box 571, Jackson, MS 39205, telephone (601) 576–6927, email *mcook@mdah.ms.gov,* by October 20, 2021. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to The Tribes may proceed.

The Mississippi Department of Archives and History is responsible for notifying The Tribes that this notice has been published.

Dated: September 7, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021–20264 Filed 9–17–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–32470; PPWOCRADP2, PCU00RP14.R50000]

National Historic Landmarks Committee of the National Park System Advisory Board Meeting

AGENCY: National Park Service.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the National Historic Landmarks Committee (Committee) of the National Park System Advisory Board (Board) will meet as indicated below.

DATES: The virtual meeting will be held on Thursday, October 21, 2021, from 10:00 a.m. to 5:00 p.m. (EST).

ADDRESSES: The meeting will be held virtually at the date and time noted above and instructions and access information will be provided online at *https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-committee-meetings.htm.* Please check the program website at *https://www.nps.gov/subjects/nationalhistoriclandmarks/index.htm* for the most current meeting information.

FOR FURTHER INFORMATION CONTACT: Dr. Lisa Davidson, Acting Program Manager, National Historic Landmarks Program, National Park Service, 1849 C Street NW, Mail Stop 7228, Washington, DC 20240, or email *Lisa_Davidson@nps.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting of the Committee is to evaluate nominations of historic properties in order to advise the Board of the qualifications of each property being proposed for National Historic Landmark designation, and to make recommendations regarding the possible designation of those properties as National Historic Landmarks to the Board at a future meeting. The Committee also makes recommendations to the Board regarding amendments to existing designations and proposals for withdrawal of designation. The members of the Committee are:

Mr. Joseph Emert, Chair
Dr. David G. Anderson
Dr. Ethan Carr
Dr. Julio Cesar Capó
Dr. Cynthia G. Falk
Dr. Richard Longstreth
Dr. Alexandra M. Lord
Mr. John L. Nau III
Dr. Vergil E. Noble
Dr. Toni M. Prawl
Mr. Adam Smith
Dr. Sharita Jacobs Thompson
Dr. Carroll Van West
Dr. Richard Guy Wilson

The meeting will be open to the public. Pursuant to 36 CFR part 65, any member of the public may file, for consideration by the Committee, written comments concerning the National Historic Landmark nominations, amendments to existing designations, or proposals for withdrawal of designation.

Comments should be submitted to Sherry A. Frear, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service, 1849 C Street NW, Mail Stop 7228, Washington, DC 20240, or email *nhl_info@nps.gov* no later than October 20, 2021. All comments received will be provided to the Committee and the Board.

Purpose of the Meeting: The Board and its Committee may consider the following nominations:

California

POND FARM POTTERY, Sonoma County, CA

Colorado

WINKS PANORAMA, Gilpin County, CO

Connecticut

BARNUM INSTITUTE OF SCIENCE AND HISTORY, Bridgeport, CT

Idaho

STRATEGIC AIR COMMAND GROUND ALERT FACILITY, Mountain Home Air Force Base, Elmore County, ID

Indiana

MONTGOMERY COUNTY JAIL AND SHERIFF'S RESIDENCE, Crawfordsville, IN

Iowa

POTTAWATTAMIE COUNTY JAIL AND SHERIFF'S RESIDENCE, Council Bluffs, IA

Texas

RIO VISTA BRACERO RECEPTION CENTER, Socorro, TX

West Virginia

JEFFERSON COUNTY COURTHOUSE, Charlestown, WV

Proposed Amendments to Existing Designations

District of Columbia

CARTER G. WOODSON HOUSE (updated documentation), Washington, DC

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 36 CFR 65.5.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2021–20277 Filed 9–17–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0032608; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Archaeology and Ethnology, Harvard University, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of both sacred objects and objects of cultural patrimony. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Peabody Museum of Archaeology and Ethnology. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Peabody Museum of Archaeology and Ethnology at the address in this notice by October 20, 2021.

FOR FURTHER INFORMATION CONTACT: Patricia Capone, Curator and NAGPRA Director, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email *pcapone@fas.harvard.edu.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, that meet the definitions of sacred objects and objects of cultural patrimony under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Items

In 1889, one cultural item was removed from the White Earth Indian Reservation in northwest Minnesota. Dr. Walter James Hoffman acquired the item, a birchbark scroll, when studying the Midewiwin on behalf of the Bureau of American Ethnology. In 1891, the Bureau of American Ethnology donated the scroll to the United States National Museum, known today as the National Museum of Natural History. The Peabody Museum of Archaeology and Ethnology received the birchbark scroll in 1906, as part of an exchange with the National Museum of Natural History. The scroll measures 36 x 11 cm. and is inscribed with eight separate figures. Museum documentation describes it as a ''Record of a song used in gathering of remedies.'' The birchbark scroll has been identified as both a sacred object and an object of cultural patrimony.

In the early 1900s, one cultural item was removed from the White Earth Indian Reservation in northwest Minnesota by Albert G. Heath, a collector and dealer of Native American objects in the early half of the 1900s. In March of 1952, the Denver Art Museum received the item, a birchbark scroll, as an anonymous donation through Julius Carlebach, a prominent New York art dealer. The Peabody Museum of Archaeology and Ethnology received the scroll in March of 1953, as part of an exchange with the Denver Art Museum. The birchbark scroll measures 134 x 31 cm. and is made up of three separate panels that have been hand-stitched together with fiber twine. Each panel is inscribed with a detailed scene. Museum documentation describes the birchbark scroll as ''used as a memory device in rites of the Midewiwin Society.'' The birchbark scroll has been identified as both a sacred object and an object of cultural patrimony.

Museum documentation and information obtained through consultation with representatives from the Minnesota Chippewa Tribe, Minnesota (White Earth Band), indicate these two cultural items are Ojibwe and are from the White Earth Indian Reservation, Minnesota. Historical and ethnographic data indicate that birchbark scrolls are part of the ritual items of the Midewiwin religion. Consultation evidence specifies the physical presence of the scrolls at Midewiwin ceremonies, as well as their importance to Mide practitioners in the dissemination of cosmological information and ceremonial practices. These two items meet the definition of sacred objects because they are specific ceremonial objects required by the Minnesota Chippewa Tribe, Minnesota (White Earth Band), to properly perform Midewiwin ceremonies.

Historical and ethnographic data demonstrate that these two cultural items also have ongoing historical, traditional, and cultural importance central to the Minnesota Chippewa Tribe, Minnesota (White Earth Band). Consultation evidence indicates that birchbark scrolls are not owned or alienable by an individual; rather, individuals serve as caretakers for the scrolls. These caretakers serve as custodians of the community knowledge, collective legacy, and heritage contained within the birchbark scrolls. These two cultural items meet the definition of objects of cultural patrimony because they have ongoing historical, traditional, and cultural importance central to the Minnesota Chippewa Tribe, Minnesota (White Earth Band) for the proper performance of Midewin ceremonies, and could not have been alienated or conveyed by an individual.

Determinations Made by the Peabody Museum of Archaeology and Ethnology, Harvard University

Officials of the Peabody Museum of Archaeology and Ethnology, Harvard University have determined that:

• Pursuant to 25 U.S.C. 3001(3)(C), the two cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

• Pursuant to 25 U.S.C. 3001(3)(D), the two cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.

• Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and objects of cultural patrimony and the Minnesota Chippewa Tribe, Minnesota (White Earth Band).

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email *pcapone@fas.harvard.edu,* by October 20, 2021. After that date, if no additional claimants have come forward, transfer of control of the sacred objects and objects of cultural patrimony to the Minnesota Chippewa Tribe, Minnesota (White Earth Band) may proceed.

The Peabody Museum of Archaeology and Ethnology, Harvard University is responsible for notifying the Minnesota Chippewa Tribe, Minnesota (White Earth Band) that this notice has been published.

Dated: September 7, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021–20262 Filed 9–17–21; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1218]

Certain Variable Speed Wind Turbine Generators and Components Thereof Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that on September 10, 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: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5468. 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).

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 against certain variable wind speed turbine generators and components thereof by Siemens Gamesa Renewable Energy Inc., Siemens Gamesa Renewable Energy A/S, and Gamesa Electric S.A.U. 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 administrative law judge's recommended determination on remedy and bonding issued in this investigation on September 10, 2021. Comments should address whether issuance of the recommended limited exclusion order in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended limited exclusion order are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended limited exclusion order;

(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 limited exclusion order within a commercially reasonable time; and

(v) explain how the recommended limited exclusion order would impact consumers in the United States.

Written submissions must be filed no later than by close of business on October 6, 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–1218'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.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 by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and

210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. 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: September 15, 2021.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2021–20286 Filed 9–17–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–540–543 and 731–TA–1283–1287 and 1290 (Review)]

Cold-Rolled Steel Flat Products From Brazil, China, India, Japan, Korea, and the United Kingdom; Notice of Commission Determination To Conduct Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to the Tariff Act of 1930 to determine whether revocation of the countervailing duty orders on cold-rolled steel flat products from Brazil, China, India, and Korea and the antidumping duty orders on cold-rolled steel flat products from Brazil, China, India, Japan, Korea, and the United Kingdom would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date.

DATES: September 7, 2021.

FOR FURTHER INFORMATION CONTACT: Caitlyn Hendricks (202–205–2058), 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.* 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 through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

SUPPLEMENTARY INFORMATION: On September 7, 2021, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)). The Commission found that the domestic interested party group response and the respondent interested party group responses from Brazil, Japan, and the United Kingdom to its notice of institution (86 FR 29286, June 1, 2021) were adequate and that the respondent interested party group responses from China, India, and Korea were inadequate. However, the Commission determined to conduct full reviews concerning the orders on cold-rolled steel flat products from China, India, and Korea to promote administrative efficiency considering its determinations to conduct full reviews of the orders with respect to Brazil, Japan, and the United Kingdom. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: September 14, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–20224 Filed 9–17–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0003]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; Revision of a Currently Approved Collection; Report of Multiple Sale or Other Disposition of Pistols and Revolvers—ATF Form 3310.4

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ) will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until October 20, 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.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

Type of Information Collection: Revision of a currently approved collection.

The Title of the Form/Collection: Report of Multiple Sale or Other Disposition of Pistols and Revolvers.

The agency form number, if any, and the applicable component of the Department sponsoring the collection: Form number: ATF Form 3310.4.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Business or other for-profit.

Other: Federal Government and State, Local, or Tribal Government.

Abstract: The Report of Multiple Sale or Other Disposition of Pistols and Revolvers—ATF Form 3310.4 is used to report multiple sale or other disposition of two or more pistols, revolvers, or any combination of pistols or revolvers to an unlicensed person, whether it occurs one time or within five consecutive business days.

An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: An estimated 82,011 respondents will complete this form approximately 6.33365 times annually, and it will take each respondent approximately 15 minutes to complete their responses.

An estimate of the total public burden (in hours) associated with the collection: The estimated annual public burden associated with this collection is 129,857 hours, which is equal to 82,011 (# of respondents) * 6.33365 (# of responses per respondent) * .25 (15 mins).

An Explanation of the Change in Estimates: The increase in total respondents, responses, and burden hours, by 4,106, 63,495, and 15,873 hours respectively, is due to the revision of agency estimates, and a general increase in the number of respondents since the last renewal in 2018.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Mail Stop 3E.405A, Washington, DC 20530.

Dated: September 14, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–20187 Filed 9–17–21; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 20–15]

Salman Akbar, M.D.; Decision and Order

On March 2, 2020, a former Acting Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause and Immediate Suspension of Registration (hereinafter, OSC) to Salman Akbar, M.D. (hereinafter, Respondent). Administrative Law Judge Exhibit (hereinafter, ALJ Ex.) 1, (OSC) at 1. The OSC informed Respondent of the immediate suspension of his DEA Certificate of Registration Number BA5092856 (hereinafter, registration) and proposed its revocation, the denial of any pending applications for renewal or modification of such registration, and the denial of any pending applications for additional DEA registrations pursuant to 21 U.S.C. 824(a)(4) and 823(f), because Respondent's ''continued registration is inconsistent with the public interest.'' *Id.* (citing 21 U.S.C. 824(a)(4) and 823(f)).

In response to the OSC, Respondent timely requested a hearing before an Administrative Law Judge. ALJ Ex. 2. The hearing in this matter was conducted from July 21–22, 2020 at the DEA Hearing Facility in Arlington, Virginia, with the parties and their witnesses participating through video-teleconference. On August 20, 2020, Chief Administrative Law Judge John J. Mulrooney (hereinafter, Chief ALJ) issued his Recommended Rulings, Findings of Fact, Conclusions of Law and Decision (hereinafter, Recommended Decision or RD). On September 9, 2020, the Government and Respondent filed exceptions to the Recommended Decision (hereinafter, Gov Exceptions and Resp Exceptions, respectively). Having reviewed the entire record, I find the Respondent's Exceptions without merit and I adopt the Chief ALJ's rulings, findings of fact, conclusions of law, and recommended sanction with minor modifications, where noted herein.[*A]

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I hereby revoke DEA Certificate of Registration No. BA5092856 issued to Salman Akbar, M.D. Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I further hereby deny any pending application of Salman Akbar, M.D. to renew or modify this registration, as well as any other pending application of Salman Akbar, M.D. for registration in Virginia. This Order is effective October 20, 2021.

Anne Milgram,

Administrator.

The Respondent's Exceptions

In his Posthearing Brief, Respondent acknowledged that the Government had ''offered sufficient evidence to establish a prima facie case,'' but he argued that his registration should not be revoked, because he had ''countered the Government's showing with substantial mitigating evidence that demonstrates his continued registration will not be harmful to the public interest.'' ALJ Ex. 20 (Resp Posthearing), at 1. The Chief ALJ disagreed with Respondent, finding that revocation was the appropriate remedy, based on Respondent's failure to accept responsibility for his misconduct and his failure to offer sufficient remedial evidence. RD, at 33–38. In determining that Respondent had not adequately accepted responsibility, the Chief ALJ relied in part on Respondent's statements that he always issues prescriptions within the usual course of professional practice and for a legitimate medical purpose. *See, e.g., id.* at 35 (citing Tr. 427–29).

Respondent takes Exception to the Chief ALJ's reliance on these statements. Respondent argues that these statements do not negate his acceptance of responsibility, because he made them ''as a layman physician and not as a person versed in law.'' Resp Exceptions, at 1. Respondent asserts that he ''recognized that he failed to meet the standards of care established by Virginia law,'' but he ''did not . . . recognize

[*A] I have made minor, nonsubstantive, grammatical changes to the RD. Where I have made substantive changes, omitted language for brevity or relevance, or where I have added to or modified the Chief ALJ's opinion, I have noted the edits in brackets, and I have included specific descriptions of the modifications in brackets or in footnotes marked with an asterisk and a letter.

that under DEA regulations this meant as a matter of law that the drugs were not issued for a legitimate medical purpose within the usual course of professional practice.'' *Id.* Respondent states that he ''recognizes now that as a legal matter he did not establish a bona fide doctor-patient relationship, but when testifying he believed as a matter of fact that he was acting as a doctor attempting to provide treatment to a patient in need of care.'' *Id.* at 3.

I reject Respondent's Exception for several reasons. First, Respondent's statement that he ''recognized that he failed to meet the standards of care established by Virginia law'' is not supported by the record. During the following exchange, Respondent repeatedly and emphatically affirmed that the prescriptions that he issued were within the usual course of professional practice in Virginia:

> Q: And you issued [all of] these prescriptions, you believe, acting in the ordinary course of professional practice?
>
> A: Absolutely, it was in the course of my medical practice.
>
> Q: And that's again, true for all of the—for the prescription for tramadol that you issued on July 23, 2019?
>
> A: It's absolutely true.
>
> Q: And that's true for the prescription for tramadol and the prescription for Ativan that you issued on August 28, 2019?
>
> A: That is correct, and I have no doubts about it.
>
> Q: And do you also believe that you issued the prescriptions for Ativan and tramadol on September 27, 2019, when in doing so you were acting in the ordinary course of professional practice for a physician in Virginia?
>
> A: Absolutely acting in the course of my medical practice.
>
> Q: And you were acting in the usual course of professional practice on November 5, 2019, when you issued prescriptions to Patient SD for tramadol and for Ativan?
>
> A: I was acting in the course of my medical practice.

Tr. 428–29. I am also not persuaded by Respondent's implication that he did not understand that by testifying that he issued prescriptions ''in the usual course of professional practice in Virginia,'' he was testifying that the prescriptions were issued in accordance with Virginia law and the applicable Virginia standard of care. Respondent did not convey any confusion when he testified that he ''ha[d] no doubts'' that he ''absolutely'' issued the prescriptions in the usual course of professional practice. *Id.* If he had misunderstood what the phrase ''in the usual course of professional practice'' meant, he could have asked for clarification. This phrase should not have been foreign to Respondent, because he had just observed the testimony of the Government's medical expert, who repeatedly testified that Respondent's prescriptions were not issued in the usual course of professional practice in Virginia. *See, e.g., id.* at 205, 214, 218, 220, 231, 255, 258–59, 261, 282–87, 337, 439.

Second, I disagree with Respondent's argument that he was merely testifying as a layperson who was not well versed in the law, and therefore, that his statements should not be found as undermining his acceptance of responsibility. Respondent was not testifying merely as a layperson, but as a Virginia physician and a DEA registrant who is expected to be knowledgeable about the basic tenets of medical practice and the appropriate prescribing of controlled substances. Respondent's failure to appreciate his obligations under federal and state law further demonstrates that his continued registration is inconsistent with the public interest. *See, e.g., The Medicine Shoppe,* 79 FR 59,504, 59,508–11 (2014). In *Medicine Shoppe,* the respondent initially accepted responsibility for his misconduct, but later testified that he ''never do[es] diversion'' and that he disagreed with the Government's expert's testimony that he filled unlawful prescriptions. *Id.* at 59,509–10. The respondent testified: ''There's no prescription that [the Government's medical expert] said that I should have [sic] filled that I looked at it from her point of view.'' *Id.* at 59,510. Based on this testimony, the former Deputy Administrator found that the respondent's ''understanding of his obligations as a dispenser of controlled substances [was] so lacking as to preclude a finding that Respondent's registration is consistent with the public interest.'' *Id.* at 59,510 (citing 21 U.S.C. 823(f) and 824(a)(4)). Respondent's testimony in this case similarly evidences a failure to appreciate his basic obligations under federal and state law, which demonstrates that his registration is inconsistent with the public interest.

Finally, I give little weight to Respondent's assertion that he *now* recognizes that he did not establish a bona fide doctor-patient relationship, but when he testified ''he believed as a matter of fact that he was acting as a doctor attempting to provide treatment to a patient in need of care.'' *Id.* at 3. I give little weight to these statements that were made off of the record. At the hearing, Respondent's remorse for his misconduct quickly dissipated when he was cross examined. *See, e.g.,* Tr. 428–29. Moreover, Respondent minimizes his misconduct in his Exceptions, which undercuts his acceptance of responsibility and elucidates his lack of familiarity with federal and state law.[*B] For example, Respondent states that when he testified, he believed as a factual matter that he prescribed medication ''for a legitimate purpose . . . of providing medical care to a patient. . . who presented with back pain and anxiety.'' Resp Exceptions, at 3 (citing Tr. 380–81). And although Respondent acknowledges that he did not comply with the Virginia standard of care, he asserts that ''from a layman's perspective,'' he believed that he was ''acting as a physician'' who ''was prescribing [] medication for a licit purpose,'' not ''as a common drug dealer giving drugs to anyone willing to pay a certain price.'' *Id.*

Respondent's attempts to distinguish himself from a ''common drug dealer'' indicate that he fails to appreciate the egregiousness of his misconduct. Respondent ignored Patient SD's admissions that he had taken controlled substances from a friend, and he failed to comply with even the most basic requirements of the applicable Virginia standard of care, such as performing a physical examination and establishing a diagnosis for Patient SD's back pain. *See, e.g.,* Tr. 78–79, 207–211, 228–30. After issuing three tramadol prescriptions to Patient SD, Respondent asked SD during the fourth visit, ''[W]hat diagnosis are we using for you? For the back pain. We got to have a diagnosis, and granted, you aren't getting a whole lot of it from me, but, ah, what can I use. Do you know any reason why you have back pain?'' Gov't Ex. 13, at 2. Respondent issued a fourth tramadol prescription at that visit, even though Patient SD said that he had ''no idea'' what was causing the back pain, and told Respondent that he had been ''pretty good for a while'' when Respondent asked him where his pain was located. *Id.*

Given Respondent's approach to prescribing opioids, I am concerned that Respondent continues to imply that he was ''attempting to provide treatment to a patient in need of care'' and not ''dispensing medications for anyone seeking a fix.'' Resp Exceptions, at 3. Therefore, I reject Respondent's Exceptions and concur with the Chief ALJ's conclusions that Respondent did not unequivocally accept responsibility for his misconduct, and that his

[*B] *See George Pursley, M.D.,* 85 FR 80,162, 80,188 (2020) (finding that Respondent's attempts to minimize his misconduct indicated that he ''lack[ed] familiarity with applicable controlled substance legal requirements'' and ''put into question the value he assigned to practicing medicine in compliance with the applicable standard of care'').

registration is inconsistent with the public interest.

The issue before the Administrator is whether the record as a whole establishes that it would be inconsistent with the public interest under 21 U.S.C. 824(a)(4) and 823(f) to allow Respondent to retain his DEA registration.

The decision below is based on my consideration of the entire Administrative Record, including all of the testimony, admitted exhibits, and the oral and written arguments of counsel. I adopt the ALJ's Recommended Decision with noted modifications.

David M. Locher, Esq. and John E. Beerbower, Esq., for the Government
Joseph R. Pope, Esq. for the Respondent

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

The Allegations *C [1] [2]

The Government alleges that the Respondent's DEA registration should be revoked because, over the course of four visits, the Respondent issued seven illegitimate controlled substance prescriptions to a DEA undercover Task Force Officer. ALJ Ex. 1, at 2.

The Evidence

Stipulations

The parties entered into factual stipulations which were accepted by the tribunal. The following factual matters are deemed conclusively established in this case:

1. The Respondent is registered with DEA as a practitioner to handle substances in Schedules II through V under DEA COR No. BA5092856. The Respondent's registered address is 10708 Old Prescott Road, Richmond, Virginia 23233.*D

2. The Respondent's COR expires by its own terms on June 30, 2020.[3]

3. Oxycodone is a Schedule II controlled substance pursuant to 21 C.F.R § 1308.12(b)(1)(xiii).*E Percocet is a brand name drug containing oxycodone.

4. Alprazolam is a Schedule IV controlled substance pursuant to 21 CFR 1308.14(c)(2). Xanax is a brand name drug containing alprazolam.

5. Diazepam is a Schedule IV controlled substance pursuant to 21 CFR 1308.14(c)(16).*F Valium is brand name drug containing diazepam.

6. Lorazepam is a Schedule IV controlled substance pursuant to 21 C.F.R § 1308.14(c)(30).*G Ativan is a brand name drug containing lorazepam.

7. Tramadol is a Schedule IV controlled substance pursuant to 21 CFR 1308.14(b)(3).

8. Government Exhibit 1 is a true and correct copy of the Respondent's patient file for Patient SD.

9. On July 23, 2019, the Respondent issued a prescription to Patient SD for 20 dosage units of tramadol 50 mg.

10. Government Exhibit 2 is a true and correct copy of the prescription for 20 dosage units of tramadol 50 mg that the Respondent issued to Patient SD on July 23, 2019.

11. Government Exhibit 3 contains a true and correct recording of the Respondent's interaction with Patient SD on July 23, 2019.

12. Government Exhibit 4 is a true and correct transcript of the Respondent's interaction with Patient SD on July 23, 2019.

13. On August 28, 2019, the Respondent issued prescriptions to Patient SD for 20 dosage units of tramadol 50 mg and 30 dosage units of Ativan 0.5 mg.

14. Government Exhibit 5 is a true and correct copy of the prescriptions the Respondent issued to Patient SD on August 28, 2019.

15. Government Exhibit 6 contains a true and correct video recording of the Respondent's interaction with Patient SD on August 28, 2019.

16. Government Exhibit 7 is a true and correct transcript of the Respondent's interaction with Patient SD on August 28, 2019.

17. On September 27, 2019, the Respondent issued prescriptions to Patient SD for 30 dosage units of tramadol 50 mg and 30 dosage units of Ativan 0.5 mg.

18. Government Exhibit 8 is a true and correct copy of the prescriptions the Respondent issued to Patient SD on September 27, 2019.

19. Government Exhibit 9 contains a true and correct video recording of the Respondent's interaction with Patient SD on September 27, 2019.

20. Government Exhibit 10 is a true and correct transcript of the Respondent's interaction with Patient SD on September 27, 2019.

21. On November 5, 2019, the Respondent issued prescriptions to Patient SD for 30 dosage units of tramadol 50 mg and 30 dosage units of Ativan 0.5 mg.

22. Government Exhibit 11 is a true and correct copy of the prescriptions issued to Patient SD on November 5, 2019.

23. Government Exhibit 12 contains a true and correct video recording of the Respondent's interaction with Patient SD on November 5, 2019.

24. Government Exhibit 13 is a true and correct transcript of the Respondent's interaction with Patient SD on November 5, 2019.

25. Patient SD was provided with a document entitled ''Pain Treatment with Opioid Medications: Patient Agreement'' during his visit to the Respondent's clinic on November 5, 2019.

26. Government Exhibit 14 is a true and correct copy of the Virginia Prescription Drug Monitoring Program Audit Report showing searches by the Respondent for Patient SD.

27. Government Exhibit 16 contains a true and correct copy of ''New Safety Measures Announced for Opioid Analgesics, Prescription Opioid Cough Products, and Benzodiazepines,'' published by the Food and Drug Administration (FDA).

28. Government Exhibit 16 contains a true and correct copy of the FDA label for Ativan.

The Government's Case

The Government's case consisted of the testimony from the lead Diversion Investigator on the case, the DEA Task Force Officer who made undercover visits to the Respondent's office, and an expert witness.

Diversion Investigator

As its first witness, the Government called a Diversion Investigator (hereinafter, DI), who testified that he has been a DI for seven years, the last two of which have been in the Richmond Field Office. Tr. 27. DI was the lead investigator in the case against the Respondent. *Id.* at 30. He testified that the investigation into the Respondent's prescribing practices began when DEA received a tip from an individual who stated that they were a patient of the Respondent. *Id.* This individual informed DEA that ''a lot of drug addicts'' seemed to be frequenting the Respondent's office. *Id.* This tip was received and documented by the office's assigned Task Force Officer (hereinafter, TFO). *Id.* at 32.

Acting on the tip information, DI consulted numerous databases, both inside and outside DEA. *Id.* at 33. One of the databases he checked was the Virginia Prescription Monitoring Program (hereinafter, the Virginia PMP or the PMP) database to analyze data for any possible patterns regarding the Respondent's controlled substance prescribing. *Id.* at 33, 63; Gov't Ex. 14. The witness explained that the Virginia

*C I have omitted the RD's discussion of the procedural history to avoid repetition with my introduction.

[1] [Footnote omitted, *see supra* n.*C]

[2] [Omitted footnote discussing the administrative tribunal's jurisdiction over the immediate suspension order.]

*D According to Agency Records, Respondent's registered address has changed to 909 Hioaks RD, Suite F, Richmond, Virginia 23225–4038.

[3] Counsel for both parties have represented that the Respondent timely filed an application to renew his DEA registration in advance of these proceedings. [Citation omitted.]

*E This stipulation cites to the version of the regulation that was effective from February 7, 2019, to August 15, 2019. The lettering of the regulation's various subsections has changed in subsequent versions, but there were no substantive changes that impact my Decision.

*F This stipulation cites to the version of the regulation that was effective from December 14, 2015, to June 16, 2019. The lettering of the regulation's various subsections has changed in subsequent versions, but there were no substantive changes to the regulation that impact my Decision.

*G This stipulation cites to the version of the regulation that was effective from December 14, 2015, to June 16, 2019. The lettering of the regulation's various subsections has changed in subsequent versions, but there were no substantive changes to the regulation that impact my Decision.

PMP database allows investigators to determine the prescriptions a practitioner has issued and where the prescriptions were dispensed. Tr. 33. DI explained that he was searching for potential ''red flags,'' such as prescriptions for high strengths and dosages of medications that are commonly abused or diverted and prescriptions for high strengths/dosages of these drugs that are dispensed to multiple people residing at the same address. *Id.* at 62. DI testified that the PMP data regarding the Respondent presented some unusual commonalities among individuals within the same household who were patients of the Respondent.[4] *Id.* at 63. He testified that, at least in his view at the time, these data points constituted red flags which warranted further investigation. *Id.*

DI testified that the investigation of the Respondent progressed to the deployment of a DEA TFO who conducted multiple undercover visits to the Respondent's practice. *Id.* at 34. According to DI, TFO made four undercover visits (hereinafter, UC Visits) to the Respondent's office using an alias (Scott Davis).[5] *Id.* at 34–35. The UC Visits were conducted on July 23, 2019 (hereinafter, UC Visit #1), August 28, 2019 (hereinafter, UC Visit #2), September 27, 2019 (hereinafter, UC Visit #3), and November 5, 2019 (hereinafter, UC Visit #4), respectively. *Id.* at 35. It is DI's understanding that the UC Visits were recorded by the TFO using a concealed device, and that controlled substance prescriptions were issued to the TFO by the Respondent at the culmination of each visit. *Id.* at 36; *see* Gov't Exs. 2, 3, 5, 6, 8, 9, 11, 12. Each of the scrips procured by the TFO from the Respondent's office were turned over to the Richmond DEA office and maintained in the DEA evidence system. Tr. 36. The recordings likewise were maintained in the DEA evidence system, and were subsequently transcribed by a Federal Bureau of Investigation (hereinafter, FBI) transcriber. Tr. 36–37, 50; *see* Gov't Exs. 4, 7, 10, 13.

Using the information acquired during the course of the investigation, a search warrant was secured by DEA and executed at the Respondent's clinic on March 3, 2020. Tr. 37. In the course of this search, the medical records for the TFO under his fictitious name (Scott Davis or Patient SD) were among the documents identified and seized. *Id.;* Gov't Ex. 1. Additionally, DEA requested data from the Virginia Department of Health Professions, which reflected that the Respondent had queried the Virginia PMP regarding Patient SD.[6] *[H] Tr. 38; Gov't Ex. 14. DI's testimony was used to authenticate multiple Government exhibits, which included documents uncovered during the search as well as those produced in the course of the investigation.[7] Following the execution of the search warrant, DEA personnel hired an expert, Dr. John F. Dombrowski, to evaluate what they had acquired and learned during the course of their investigation. Tr. 62.

DI presented as an objective regulator and investigator with no discernable motive to fabricate or exaggerate. The testimony of this witness was sufficiently detailed, plausible, and internally consistent to be afforded full credibility in this case.

TFO

The Government presented the testimony of the agent who conducted the undercover visits to the Respondent's practice, TFO. TFO testified that he has been a detective with the City of Greenfield (Wisconsin) Police Department (GPD) for eighteen years and has been cross-designated by DEA as a TFO for the past seven years. Tr. 66–69. He was assigned to assist in the investigation that spawned the current charges against the Respondent. *Id.* at 66–68. TFO testified that he is experienced in undercover work, having personally conducted and provided testimony regarding somewhere between 100 and 200 undercover operations. *Id.* at 69.

TFO testified that he assumed the name Scott Davis (for which he had a fabricated driver's license) to conduct his operation at the Respondent's office and that he recorded his UC Visits on audio visual recording equipment. *Id.* at 70, 87. TFO testified that following a preliminary visit with the Respondent's office staff, he appeared for a July 23, 2019 office visit (UC Visit #1). *Id.* at 71. Upon his arrival, the Respondent's office staff had the TFO pay an office visit fee[8] and fill out a medical questionnaire. *Id.* at 73; Gov't Ex. 1, at 7. According to TFO, based on his experience, he completed the questionnaire in such a way as to monitor whether the prescriber was fulfilling his responsibility to ensure that pain medications were not being diverted. *Id.* at 75–77. Under the heading ''Reason for Visit,'' the TFO put the words ''need new doctor prescription.'' Gov't Ex. 1, at 7; Tr. 119. Although he knew he planned to (falsely) describe back discomfort to the Respondent, the TFO intentionally declined to check the box adjacent to ''Back Problems'' in the ''Past Medical History'' section of the form. Gov't Ex. 1, at 7; Tr. 74. Similarly, the TFO left a blank response to the query, ''Do you use recreational drugs?'' Gov't Ex. 1, at 7. TFO recounted that neither of these potential diversion red flags were raised with him by the Respondent or his staff during any of his UC Visits.[9] Tr. 74–75.

After completing the medical questionnaire during UC Visit #1, the TFO was escorted to an exam room by a staff member and had his vitals taken. *Id.* at 75, 77, 88. The Respondent met with the TFO after the staff finished taking his vitals. *Id.* at 77. The cover story the TFO presented to the Respondent was that he is an active

[4] The Government did not base its case on multiple patients living at the same address. This information was offered and considered strictly to explain information which informed the DI's investigative progress.

[5] DI Pumphrey confirmed that Scott Davis is a fictitious name. Tr. 34.

[6] [Content of footnote addressed in text.]6

[*H] This sentence was modified to clarify that DEA requested Respondent's Virginia PMP queries from the Virginia Department of Health Professions.

[7] Government Exhibit 1 contains the medical records that the Respondent's office maintained under the name Scott Davis (Patient SD), which were retrieved during the search of the Respondent's clinic. Tr. 38–39. Government Exhibit 2 is a copy of a prescription for tramadol written by the Respondent for Patient SD at UC Visit #1. *Id.* at 40–41, 42–46. Government Exhibit 3 is a video recording of UC Visit #1. *Id.* at 46–48. Government Exhibit 4 is a transcript of the UC Visit #1 videotape. *Id.* at 49–50. Government Exhibit 5 contains the prescriptions written for Patient SD at UC Visit #2. *Id.* at 51–52. Government Exhibit 6 is the video recording of UC Visit #2. *Id.* at 53–54. Government Exhibit 7 is a transcript of the UC Visit #2 videotape. *Id.* at 54–55. Government Exhibit 8 contains the prescriptions for tramadol and Ativan that were written by the Respondent for Patient SD at UC Visit #2. *Id.* at 55–56. Government Exhibit 9 is the video recording of UC Visit #3. *Id.* at 56–57. Government Exhibit 10 is a transcript of the UC Visit #3 videotape. *Id.* at 57. Government Exhibit 11 is the two prescriptions for tramadol and Ativan written by the Respondent for Patient SD at UC Visit #3. *Id.* at 57–58. Government Exhibit 12 is a video recording of UC Visit #4. *Id.* at 58–59. Government Exhibit 13 is the transcript of the UC Visit #4 videotape. *Id.* at 59. Government Exhibit 14 documents the queries to the Virginia PMP made regarding the Respondent as part of the investigation. *Id.* at 59. DI confirmed that he ran the query and received the information on April 3, 2020. *Id.* at 59–60. He further testified that this data was a ''special request'' in that he directly contacted the Virginia Department of Health Professionals to request this data. *Id.* at 60. Government Exhibit 14 is the document he received as a result of this inquiry. *Id.* at 60–61.

[8] Tr. 75.

[9] The form demonstrates a miniscule dot outside each of the respective boxes pertaining to the use of recreational drugs and back problems. Gov't Ex. 1, at 7; Tr. 120–21, 154–56. The dots are tiny and do not provide any level of ambiguity as to the responses (or lack thereof). Indeed, during his testimony, the Respondent, beyond a general acknowledgement of their existence, Tr. 378, did not allude to any significance that should be attached to these two little dots, and no significance is placed on their presence for the purposes of this recommended decision.

construction worker[10] who recently moved to the Richmond area from Milwaukee and needed to establish with a new doctor to refill his medications. *Id.* at 78; Gov't Ex. 4, at 2. On his questionnaire, the TFO indicated a specific strength and dosage of Percocet[11] under the ''Current Medications'' section. Gov't Ex. 1, at 7. Upon meeting TFO, the Respondent initiated his contact with ''What's going on? What can I help you with?'' Gov't Ex. 4, at 2. When the TFO started to explain his move to the area and need for a new physician (all of which was contrived), the Respondent interrupted with ''For this kinda stuff? Percocet?'' and described Percocet as ''[a]lmost outlawed.'' *Id.; see also* Tr. 123. The TFO told the Respondent that the Percocet he referred to on the questionnaire was for his back, and that he moved to perform construction work in the Richmond area. Gov't Ex. 4, at 2. The Respondent asked the TFO, ''[s]o where in the back, and how much Percocet are you needing?'' *Id.* The TFO volunteered the following rather startling admission: ''Unfortunately, I had to, uh, like from a friend or a girlfriend, that sort of thing, get some pills here and there. Uh, the tramadol's actually been working pretty decent.'' [12] *Id.* at 3; Tr. 78–79. Without any follow-up or even apparent reaction to the revelation that his patient had just admitted to acquiring diverted drugs,[13] the Respondent asked him about the source of his back pain, to which the TFO replied that he did not know, but that at some point he had fallen from a ladder and recovered by ''just doing [his] job.'' Gov't Ex. 1, at 4; Tr. 79. Later in their conversation, the Respondent admonished the TFO that ''[j]ust because you fell off of a ladder doesn't mean anything.'' Gov't Ex. 1, at 7. The witness told the Respondent that there were no radiation symptoms down the legs.[14] *Id.* at 4. There was some additional discussion about other options and creams and the Respondent reiterated that ''[t]he rules are so strict about Percocet. Especially 10 [milligram dosage].'' *Id.* at 5. After confirming on multiple occasions that the TFO brought no imaging, and explaining that he would, at some point, have to procure an x-ray, the Respondent explained that while he would not be prescribing Percocet, ''I can give you a few tramadols[15] until you can get an x-ray, and you're going to have to show me that there is something going on with your back.'' *Id.* The TFO testified that he never provided any imaging to the Respondent at that visit. Tr. 89–90.

The TFO told the Respondent that he thought he could procure an ''older'' x-ray or MRI[16] from his former address in Milwaukee, that he kept working while prescribed oxycodone for a couple of years,[17] and that since he was on oxycodone for that long, ''it's like, I mean, I can't just stop.'' [18] Gov't Ex. 4, at 6, 8. There was no follow-up from the Respondent regarding the TFO's estimation that he was unable to ''just stop'' taking oxycodone. *Id.* The Respondent gave no indication that he was concerned about potential dependence or addiction.

When the TFO raised the issue that he has ''a tough time, like falling asleep, and relaxing at the end of the day,'' the Respondent's reaction was ''Ok, and here's some Trazadone[19] for that,'' describing the medication as the ''[m]ost commonly prescribed sleeping medicine in the country.'' *Id.* at 6–7. Although at one point during their brief, eight-minute[20] time together, the Respondent touched the TFO's back through his shirt for one-to-two seconds,[21] no physical exam was conducted on the undercover officer by anyone at any time during UC Visit #1. Tr. 77, 83. The Respondent prescribed twenty 50 milligram (mg) tramadol tablets, which the TFO did not fill. Gov't Ex. 2; Tr. 85–86.

The TFO returned to the Respondent's office for another undercover visit on August 28, 2019 (UC Visit #2). Tr. 87. Similar to his first UC Visit, the TFO paid an office visit fee, and was escorted to an exam room for two-to-three minutes, where his vital signs were taken and he was asked the reason for his visit. *Id.* at 89. He was joined in the exam room by the Respondent shortly thereafter, where the TFO informed the doctor that he had come for a tramadol refill. *Id.* at 89. In response to the Respondent's inquiry about the imaging results the TFO had agreed to bring, the latter told him that he had located them in Milwaukee, but neglected to bring them with him. *Id.* at 89–90, 136; Gov't Ex. 7, at 2. The Respondent replied, ''Uhhh, I need that. Alright, I'll just give you twenty for now, and ah, I need you to bring that . . . . Then I'll give you more.'' Gov't Ex. 7, at 2; *see also* Tr. 136. The Respondent went on to explain that once he has the opportunity ''to look at'' the imaging ''we could do regular sixty [tablets], if there is . . . [s]ignificant pathology . . . [o]f your back.'' Gov't Ex. 7, at 3.

The Respondent asked the TFO if he experienced spasms, but got no answer. *Id.* He again touched a spot on the TFO's back through his shirt for one-to-two seconds, and was told by his patient that he had identified the locus of pain, ''if it's bothering me, uh, that's where it is.'' Gov't Ex. 7, at 3; Tr. 90–91, 137. Remarkably, the Respondent explained his understanding of the prescribing standard to the TFO in this way:

> Alright, right now, I can only list back pain as a diagnosis, but ya know, in our file we need more than that. Like a herniated disc, or a compressed disc, or something, ya know? Something more concrete.

Gov't Ex. 7, at 3. After another assurance that he would bring his imaging on his next visit, the TFO made the following request: ''Oh, oh, I was gonna say, c-can I get a scrip for Xanax too?'' explaining that the tramadol ''helps me during the day, but the Xanax makes me feel a lot better and relaxed in the evening.'' *Id.* at 4. A few follow up questions by the Respondent made it clear that the TFO did not know (or was not willing to say) what his prior dose of Xanax was. *Id.* The Respondent confided in his patient that since the emergence of the current opioid crisis, ''I don't like to prescribe Xanax anymore,'' and noted the addictive qualities of Xanax. *Id.* The Respondent said he would be willing to prescribe Ativan as a less addictive alternative. *Id.* at 4–5; Tr. 92. No mental status exam was conducted. Tr. 92. In fact, no questions about any mental health conditions were directed to the TFO. *Id.* The TFO's response to all of this was to let the Respondent know that he had also tried Valium in the past, to which the Respondent replied, ''No, no, no, no, no.'' Gov't Ex. 7, at 4–5. Just as was true at UC Visit #1, no physical exam was conducted by the Respondent or any staff member during UC Visit #2. Tr. 89. The TFO was asked no questions about how he was doing on the previously-prescribed tramadol, but at the conclusion of his four-minute visit with the Respondent, he received

[10] Tr. 125.

[11] The TFO testified that he chose Percocet based on his understanding that it is a medication that is ''more highly sought after by addicts.'' Tr. 164.

[12] The questionnaire contained no reference to tramadol. Gov't Ex. 1, at 4.

[13] Tr. 79; Gov't Ex. 1, at 4.

[14] The TFO testified that he volunteered this in ''trying to minimize the symptoms.'' Tr. 83.

[15] Tramadol is a Schedule IV controlled substance. 21 CFR 1308.4(b)(3); Stip. 7.

[16] Tr. 89–90. The TFO was unable to recall whether he told the Respondent that he had an x-ray or an MRI. *Id.* at 79.

[17] The questionnaire contained no reference to oxycodone. Gov't Ex. 1, at 4.

[18] The TFO testified that he told the Respondent he could not just stop ''because I wanted to show that I was dependent—potentially addicted but dependent upon that pain medication.'' Tr. 84.

[19] Trazadone is not a controlled substance.

[20] Tr. 85.

[21] Tr. 81–82, 90–91, 133. The TFO testified that he was wearing a T-shirt. Tr. 82.

prescriptions for tramadol and Ativan. Gov't Ex. 5, at 1–2.

The TFO paid another undercover visit to the Respondent's practice on September 27, 2019 (UC Visit #3). Tr. 94. Like his other visits, he paid his office fee, was escorted to an exam room, had his vitals taken, and waited for the doctor. *Id.* at 96. Before the staff member departed, the TFO did take the opportunity to assure her that he was presently experiencing neither pain nor anxiety. *Id.* at 97.

Upon the Respondent's arrival in the exam room, the TFO told him he was there for tramadol and Ativan refills. *Id.* Consistent with the TFO's assurances to the staff member, he told the Respondent, regarding his back pain, ''I'm feeling pretty good.'' Gov't Ex. 10, at 2; *see also* Tr. 98–99, 142, 162. When he re-told the Respondent that he did not know the cause of his back pain,[22] the Respondent presented the following suggestion: ''Why don't we just give you twenty of tramadol? It's no big deal.'' Gov't Ex. 10, at 2. When the Respondent inquired about any factors that might exacerbate the back issues, the TFO responded with, ''Yeah, I mean, like right now I feel ok, but [you n]ever know.'' *Id.* The Respondent's reaction to this non-sequitur answer was to propose various activities that possibly could make this worse, but this patient was not taking the bait. *Id.* at 2–3. He merely offered that ''the Ativan was pretty good.'' *Id.* at 3. The Respondent's astonishing response to this colloquy was:

> Alright, no problem. Ativan is a low, uh, low benzodiazepine, um, equivalent. Ok. So it's probably a better one to use anyway. Ok? Yeah. I'll increase the number of tramadols to thirty. Ok?

Id. Not surprisingly, the TFO readily concurred in this unsolicited medication increase, which was unsupported by any discussion about the relative merits or efficacy of the prior dose of twenty tablets, to which the Respondent amicably replied, ''You happy? Good.'' *Id.* Following some level of banter, doctor and patient ended their time together. *Id.* As was true in the other adventures at the Respondent's office, the TFO provided no imaging or other medical records,[23] and no physical exam was performed on the TFO by the Respondent or any staff member. Tr. 96, 98. One variation in this visit is that the Respondent did not touch the TFO's back at all. *Id.* at 98. There was no inquiry about the efficacy of (or anything else about) the previously-prescribed tramadol, but at the conclusion of the two minutes the two men spent together during UC Visit #3, the Respondent issued prescriptions for Ativan and an increased dosage of tramadol. *Id.* at 99–102, 162; Gov't Ex. 8, at 1–2.

The TFO's final undercover visit to the Respondent's office (UC Visit #4) occurred on November 5, 2019. Tr. 102. As had generally been the routine, the TFO paid his office visit fee and was taken back into an exam room by a staff member where vital signs were taken. *Id.* at 104. In a slight variation from prior experience, the TFO was presented with a pain management contract[24] and two questionnaires. *Id.* at 104–107, 111. The first questionnaire is entitled, ''Generalized Anxiety Disorder 7–Item (GAD–7) Scale'' (Anxiety Questionnaire), and the second bore the title, ''Pain Diagram and Pain Rating'' (Pain Questionnaire). *Id.;* Gov't Ex. 1, at 12–13. The TFO put extremely low marks and low frequency of occurrence on both questionnaires, demonstrating a low level of symptoms. Gov't Ex. 1, at 12–13; Tr. 107, 109–11, 146–52.

After the staff member departed, the Respondent entered. Tr. 112. The TFO told the Respondent that he was feeling ''[n]ot too bad,'' and that he came in for the ''[s]ame thing as the last few times. Just the refills.'' Gov't Ex. 13, at 2; Tr. 112. The Respondent told the TFO he was refreshing his recollection by examining his chart, and narrated his recall process as follows:

> Ok. So what diagnosis are we using for you? For the back pain. We got to have a diagnosis, and granted, you aren't getting a whole lot of it from me, but, ah, what can I use[?] Do you know any reason why you have back pain?

Gov't Ex. 13, at 2. Once again, the TFO assured the Respondent that he ''ha[d] no idea'' why he had back pain. *Id.; see also* Tr. 112. He elaborated that he liked what the Respondent was prescribing, ''[b]ecause it's been pretty good for a while . . . .'' Gov't Ex. 13, at 2. The TFO pointed to a spot on his back and identified the spot as the locus of the pain, ''[i]f it would be bothering me.'' *Id.*

As had become their custom during their visits, the TFO provided neither imaging nor prior medical records,[25] but Respondent asked, ''[D]o you mind getting a chest film for me?'' Gov't Ex. 13, at 3. Beyond a two-to-three second finger push on the back through the TFO's shirt, no physical examination took place, and no dialogue occurred regarding the efficacy of the medications prescribed in the past, physical function, mental health, or pain level. Tr. 113–15. This time, the TFO pushed back a bit on acquiring an x-ray, citing a current lack of insurance as an impediment.[26] Tr. 145. However, the lack of insurance and concomitant lack of imaging did not serve as an impediment to the Respondent continuing to write controlled substance prescriptions, and at the end of the visit, the TFO walked away with prescriptions for tramadol and Ativan. Gov't Ex. 11; Tr. 115–17.

The TFO presented as an objective law enforcement officer with no apparent agenda beyond telling the truth. When asked, he was freely willing to agree with the Respondent's counsel on numerous points, but presented the impression of being confident in what he remembered about the case. Overall, this witness's testimony was sufficiently detailed, internally consistent, and plausible to be afforded full credibility in this case.

Dr. John F. Dombrowski, M.D., F.A.S.A.

The Government called Dr. John F. Dombrowski as its final witness. Tr. 168. Dr. Dombrowski testified that he is currently employed as a physician at the Washington Pain Center in Washington, DC[27] *Id.* He holds licenses to practice medicine in Maryland, Virginia, Florida, and the District of Columbia. *Id.;* Gov't Ex. 15. Dr. Dombrowski received his medical training at Georgetown University and Yale University before entering private practice in Richmond, Virginia, and eventually coming to practice in Washington, DC Tr. 170; Gov't Ex. 15. In addition to working as a physician, he is presently the CEO of the Washington Pain Center. Tr. 171; Gov't Ex. 15. In his capacity as a physician, Dr. Dombrowski performs injection therapy as an anesthesiologist as well as medication management for chronic pain patients. Tr. 171. He is additionally the director of several methadone clinics in the Washington, DC, area, as well as a detox facility in Maryland. *Id.* at 171–72; Gov't Ex. 15. His primary areas of expertise are anesthesiology, addiction medicine, and pain medicine. Tr. 172. Dr. Dombrowski is a member of the American Society of Anesthesiology, the Interventional Pain Societies, and some other professional organizations relating to his areas of specialty. *Id.;* Gov't Ex. 15. Dr. Dombrowski has board certifications from the American Board of Pain

[22] Tr. 97.

[23] Tr. 98.

[24] Gov't Ex. 1, at 2–3.

[25] Tr. 112.

[26] The Respondent asked the TFO to ''let [him] know when [he has] insurance so [the Respondent] can set [him] up for that x-ray.'' Gov't Ex. 13, at 5.

[27] Dr. Dombrowski's *curriculum vitae* (hereinafter, CV) was received into evidence without objection. Gov't Ex. 15; Tr. 170.

Medicine, the American Board of Addiction Medicine, the American Board of Anesthesiology, the National Board of Medical Examiners, and the American Board of Preventive Medicine. Tr. 348; Gov't Ex. 15. Additionally, he maintains a clinical practice and is a DEA registrant. Tr. 172–73. His practice includes the regular prescribing of controlled substances, including but not limited to opioids and benzodiazepines. *Id.* at 173. In the past, he has provided expert testimony regarding the medical practice of other physicians.[28] *Id.* He has previously opined professionally on the use of opioid medications to treat chronic pain. *Id.* at 174. In forming his expert opinion, Dr. Dombrowski reviewed the relevant Virginia laws relating to the standard of care for prescribing opioids for chronic pain. *Id.* at 175. In the absence of an objection, Dr. Dombrowski was tendered and accepted as an expert in the applicable standards of care for prescribing controlled substances within the usual course of professional practice in Virginia. *Id.* at 176–77.

Dr. Dombrowski testified that in order to be compliant with the standard of care in Virginia, a physician must establish a medical relationship with a patient by taking a thorough history, performing a physical exam, and acquiring any necessary lab work before prescribing a controlled substance.[29] *Id.* at 179, 211–12. Dr. Dombrowski described finding a diagnosis as the ''hallmark'' for proper controlled substance prescribing in Virginia. *Id.* at 185. According to the witness, discerning a correct diagnosis, or in other words, divining the etiology for the pain symptom, ''is everything because once I determine what the problem is, then I can come up with a host of modalities to treat that one problem.'' *Id.* at 199. ''Pain,'' Dr. Dombrowski explained, ''is just a symptom, it's not the reason.'' *Id.* at 200.

In regard to establishing a valid diagnosis, he testified that a medical history and physical constitute about eighty percent of a proper diagnosis. *Id.* at 179. It is Dr. Dombrowski's view that the objective aspects of the physical examination ''bolster'' the subjective observations of the patient. *Id.* at 182. The physical examination, as described by Dr. Dombrowski, generally includes some level of bodily manipulation to attempt to explore and replicate the pain symptoms, followed by testing to investigate potential issues, such as neurologic compromise.[30] *Id.* at 182–83. The witness described some of the fairly extensive standard steps required in a proper physical examination, to include spine palpation, having the patient stand up and touch their toes, twisting movements of various parts of the body, conducting a heel-toe walk, a sensory evaluation, and conducting a straight-leg raise exercise. *Id.* at 195–97. The witness also discussed the vital role of testing, such as obtaining an MRI, CT scan, or other imaging ''to back up your diagnosis.'' [31] *Id.* at 211–12. In response to a query by the Respondent's counsel at the hearing about a patient presenting with a generalized complaint of back pain, Dr. Dombrowski supplied the following explanation of some of the precursor steps required in Virginia to meet the minimum controlled substance prescribing standard:

> So basically what you first want to do is take a thorough history, before you even get to the exam. Talking about where's the pain; how has the pain affected you; how has it affected your quality of life, your activities of daily living; the quality of the pain in terms of burning, stabbing, aching, et cetera? Where is the pain located, where does the pain go? Does it run down a leg, does it remain in your back? Et cetera. And then along with that—before you even get into the physical, which I'll get to, you also want to understand . . . how long have you had it for? Is this acute? Is this chronic? [ ] [W]hat have you tried in the past? Were there x-rays in the past? Things like that to give me, as a new physician, some understanding of then how to move forward. Once I understand the patient's thorough history and getting all that information, before we even do the exam, then we go do the exam. The exam for back pain just would be obviously having the patient stand. Ask them . . . [to] point to where it hurts. And they would then direct me where it hurts. I would place my hand or hands there, palpate, feel, in terms . . . of if the muscles are tight or are they soft? If I push hard, does it reproduce the pain? And then along with that, we start then having the patient move, to see if movement would cause pain, such as forward flexion, back extension, or rotation to the sides. To see if it, again, exacerbates the pain that they have or mitigates—makes it better. And that gives me an understanding on what particular diagnosis it is. And then moving forward outside of the back exam . . . you . . . do a neurologic exam. Again, assessing for any pain to the extremities. And with that pain, is there associated weakness? Having them stand on their feet, heels, feeling their thighs . . . . That's just a cursory exam. There's other things that we can talk about, but that's a basic exam. I hope that explained it.

Id. at 325–27.

Dr. Dombrowski highlighted the importance of acquiring prior medical records and probing issues such as past substance abuse in compiling an adequate medical history. *Id.* at 183–84. He explained that prior substance abuse does not necessarily stand as a barrier to pain treatment, but it could oblige the physician to employ more caution, potentially requiring such measures as urine drug screens (hereinafter, UDS) and/or pill counts. *Id.* at 184, 202.

A mental status evaluation, according to the witness, may also be required to gauge the patient's true need for pain medication, as well as a discussion regarding the risks, benefits, and dangers associated with prescribed drugs. *Id.* at 184–87. Dr. Dombrowski also testified that informed consent and the utilization of an opioid contract is a required controlled substance prescribing standard in Virginia. *Id.* at 187–88. Documentation of the steps taken, according to Dr. Dombrowski, is also an element in meeting the controlled substance prescribing standard in Virginia. *Id.* at 189–91.

Dr. Dombrowski testified that after reviewing the transcripts of visits and medical records prepared in connection with the Respondent's care of the TFO, in his expert opinion, the Respondent's controlled substance prescribing fell below the applicable standard in Virginia. *Id.* at 205, 214, 218, 220, 231, 255, 258–59, 261, 282–87, 337, 439. The witness determined that a proper physical exam was never conducted, and that to the extent the progress notes indicated such an exam was conducted, those notes, when compared to the UC videotapes and transcripts, are patently false. *Id.* at 207–211, 228–30. No proper physical [32] or mental health diagnoses were ever made or supported by the charts. *Id.* at 230, 232–36, 254, 283. Lacking also across board in the visits is a substance abuse history, a

[28] Dr. Dombrowski estimates that his work as an expert witness is roughly comprised of sixty percent defense work and forty percent plaintiff work. Tr. 173–74.

[29] Dr. Dombrowski described the taking of a thorough history and conducting a thorough physical as the ''mainstay'' of the prescribing standard. Tr. 211.

[30] The witness acknowledged that there could be a difference between the comprehensive level of examination conducted during a first visit to a physician and subsequent visits where the examination may become more focused. Tr. 192–93, 227.

[31] In a confusing and peculiar twist, at another point in his testimony, Dr. Dombrowski also testified that in his opinion, today's doctors ''get way too many tests [and] don't spend enough time talking to patients.'' Tr. 329.

[32] Dr. Dombrowski also observed that the TFO's pain symptoms as self-reported in the Pain Questionnaire (Gov't Ex. 1, at 12) appear to be so minimal that they call into question the Respondent's decision to prescribe controlled substances to address them. Tr. 261–65. The Government's expert made the same observations and conclusions regarding the TFO's purported mental health issues as self-reported in the Anxiety Questionnaire (Gov't Ex. 1, at 13), which were likewise so mild as to call into question the decision to prescribe controlled medications to treat them. Tr. 270–73.

psychosocial history, a mental status evaluation, UDS testing, a documented risk/benefits discussion, an exit strategy discussion, a medication disposal discussion, or anything approaching a proper, documented diagnosis. *Id.* at 212–218, 221–24, 227–28, 237–38, 244–48, 252–60, 277–82, 337, 443. Regarding UC Visit #2, Dr. Dombrowski specifically observed that the TFO returned to the office well beyond a time where the prescribed medication would, if taken as directed, have run out, and despite this lapse, no follow-up was pursued by the Respondent. *Id.* at 223–25. The standard of care, according to Dr. Dombrowski, would require the prescriber to seek clarification from the patient as to what effect the lapse had on symptom control, or as the witness put it, ''I mean, do you even need my medication?'' *Id.* at 224. UC Visit #3 had the same gapped medication issue, with the same lack of follow-up on the Respondent's part. *Id.* at 248–50. The witness testified that in some cases the Respondent's prescribing fell below the standard of care by his absence of preliminary ground work, other times by the relative paucity of (even subjective) symptoms, and other times by his lack of follow-up questions in the face of indicia that should have called the *bona fides* of the patient's intentions and genuine need for medication into issue. *Id.* at 268–69, 272–73, 277, 337–38. The Respondent also fell short of the Virginia prescribing standard of care when he increased the TFO's tramadol dosage with no documented explanation and no conceivable basis being provided by the chart entries or interactions as video-recorded at the time of UC Visit #3. *Id.* at 255–56.

Dr. Dombrowski also discussed his observations regarding a PMP report generated to reflect the Respondent's queries concerning the TFO. *Id.* at 225. Specifically, the fact that the Respondent (or his staff) actually queried the PMP and were, thus, aware that the TFO was not filling any of the prescriptions he issued needed, at a minimum, to be explored and resolved with the patient, and his failure to do so fell below the applicable prescribing standard in Virginia. *Id.* at 226, 250–51, 273–74, 276–77. Failure by the Respondent to follow up on the patient's request for specific medications by name also fell below the applicable standard. *Id.* at 235–36, 251.

Also below the applicable standard, according to Dr. Dombrowski, was a failure to comply with follow-up requirements attendant upon the black box warning issued by the FDA regarding the simultaneous prescribing of opiates and benzodiazepines.[33] *Id.* at 239–44. The Respondent prescribed this dangerous combination of medicines without engaging in any precautionary and follow-up steps, such as establishing and documenting extenuating circumstances. *Id.* at 239–44, 283.

Dr. Dombrowski testified that, in his expert opinion, none of the controlled substance prescriptions detailed in the Government's case were issued for a legitimate medical purpose in the normal course of a professional practice. *Id.* at 286.

The Government's expert witness presented as a qualified, measured, knowledgeable expert, with no indications of any agenda beyond a dispassionate evaluation of the facts applied to the applicable standard. His testimony was persuasive, and in this case, his opinions are entitled to controlling weight.

The Respondent's Case

The Respondent's case consisted exclusively of his own testimony.[34] He testified that he currently maintains a private internal medicine practice that treats physical and mental health issues in what he characterizes as ''an underprivileged and lower socioeconomic population of the Richmond area, and particularly the inner city [of] Richmond.'' Tr. 353–54. The Respondent reckons that he is treating twenty to thirty percent of his private practice patients with opioids. *Id.* at 353–56.

In addition to the Respondent's private practice, he testified that he also works at two rehabilitation hospitals run by Encompass,[35] which he describes as ''a national corporation that is running inpatient rehabilitation hospitals as well as outpatient home health agencies.'' *Id.* at 365. The Respondent explained that in his hospital practice he manages the post-acute care of patients discharged from acute care facilities. *Id.* The Respondent related that the hospital aspect of his practice involves pain management to the extent he fills in for staff physiatrists when they are unavailable.[36] *Id.* at 369. According to the Respondent, between his private practice and hospital responsibilities, he is currently at work seven days a week. *Id.* at 368.

The Respondent remembered the TFO and remembered his interactions with him as patient Scott Davis. *Id.* at 376, 378–79. In that regard, the Respondent testified that he was unable to specifically recall whether he conducted a straight-leg raise on the patient, but was of the opinion that he would have, because it is his custom to do so. *Id.* at 381. The Respondent related that he observed the patient walk approximately thirty to forty feet inside the office on his way out, and specifically recalled directing him to office staff to guide him on procuring an x-ray. *Id.* at 381–82. He testified that he assessed the amount of Percocet the TFO disclosed as previously prescribed as a ''large dosage.'' *Id.* at 378. The Respondent described himself as being ''cognizant of [his patients'] financial struggles'' and attributed his decision to prescribe pain medication without reviewing imaging as justified by his desire ''to help a construction worker get through the day without having to lose his job.'' *Id.* at 383; *see also id.* at 426–27. He also noted, that in his opinion, the risks associated with the tramadol he prescribed to the TFO are curtailed by the drug's ''very low addictive potential.'' *Id.* at 383. It was this same low-addictive-risk estimation that also persuaded the Respondent to discount the TFO's admission that he had procured drugs illegally through his friend and girlfriend. *Id.* at 384. When prompted by his counsel, the Respondent expressed recognition that this was an errant course of action, because ''I have to be very strict with the DEA rules,'' and if asked to do so again, the Respondent represented that he ''will wholeheartedly counsel them for a long time.'' *Id.*

The Respondent acknowledged that, after listening to the testimony of the Government's expert, his medical examination of the TFO was not as thorough as it should have been, and that under the circumstances, his prescribing of Ativan, and combining medications as he did, was a mistake. *Id.* at 384–85, 387. The Respondent represented that he ''take[s] responsibility.'' *Id.* at 385. During his testimony, he provided assurances that he has (after practicing medicine for approximately seventeen years) recently taken continuing medical education courses[37] so that he now understands the basic elements for a rudimentary physical examination. *Id.* at 384–85.

The Respondent's limited confessions of error notwithstanding, the issue of

[33] Gov't Ex. 16.

[34] The Respondent's CV was received into the record without objection. Resp't Ex. 1; Tr. 352.

[35] The Respondent testified that he has worked at Encompass hospitals for about three years. Tr. 371.

[36] The Respondent offered that a post-surgery hip fracture patient is a common example of where he would regularly provide pain management and prescribe pain medications, such as tramadol, oxycodone, or hydrocodone. Tr. 369.

[37] Resp't Exs. 2–5.

whether he comprehends and accepts that he was wrong presents as entirely unclear on this record. He took issue with the TFO's recollection that he palpated his back for one-to-two seconds,[38] and maintained that it was really a six-to-seven second evolution. *Id.* at 386. The Respondent also quibbled with the time spent with the patient during UC Visit #3, pushing back on the testimony that it was only two minutes, suggesting that it may have been three. *Id.* at 388–89. The Respondent explained that he prescribed Ativan because he recalled a reference to anxiety on the TFO's intake form.[39] *Id.* at 387. More fundamentally, when asked if he issued the prescriptions to the TFO for a legitimate medical purpose, all ambiguity fled him, and he responded with an unequivocal ''I surely did. There was nothing illegitimate about it.'' *Id.* at 427. Additionally, even though the evidence reflected that the exams memorialized in his progress notes never occurred during any of the UC Visits, the Respondent would only offer, ''I'm not sure, I may not have [conducted those exams],'' and, ''I may have, I may not have. I was on autopilot and . . . there may be errors in the documentation.'' *Id.* at 430, 432, 433. The Respondent would not concede that notes reflecting examinations clearly shown as fictional by the UC Visit recordings were in fact false, offering ''I am not sure if it is or not'' and ''I cannot be conclusive about it.'' *Id.* at 432–34. The strongest admission on this issue that he could muster during his testimony was the possibility of an ''error in documentation.'' *Id.* at 433. Indeed, the Respondent insisted that each charged prescription was issued for a legitimate medical purpose because ''I do not issue prescriptions for illegitimate medical purposes,'' and clarified that he has ''no doubts about it.'' *Id.* at 427–28. Likewise, the Respondent was equally committed to the proposition that every one of the charged prescriptions was issued in the usual course of professional practice, asserting that he was ''[a]bsolutely acting in the course of [his] medical practice.'' *Id.* at 429.

In addressing the boost in tramadol that occurred unsolicited at the conclusion of UC Visit #3, the Respondent explained the increase by saying that he ''became a bit more comfortable with the patient,'' because he was not seeking early refills and he ''felt that [the TFO] was not diverting any—there was no signs of diversion—no signs of doctor shopping.'' *Id.* at 391–92; *see also id.* at 393–94. The Respondent's basis for concluding that the patient was not doctor shopping was based on his review of PMP data. *Id.* at 392. Interestingly, a review of PMP data would have also informed the Respondent that the prescriptions he issued to the TFO were never actually dispensed, but the Respondent testified that doctor shopping was essentially his exclusive focus in reviewing PMP data.[40] The Respondent ascribed his discounting of the information about the no-fills based on his view that pharmacies, particularly ''outlying pharmacies,'' [41] frequently do not enter dispensing data into the PMP. *Id.* at 393. He testified that he declined to follow up on this potential anomaly because ''[i]t's very time-consuming.'' *Id.* at 395. Thus, the Respondent by his own admission ascribed confidence in the PMP insofar as it reflected no other prescribers, but none to the extent that the prescribed medications were not being filled. *Id.* at 393–95.

On the issue of remedial steps, the Respondent testified that he has completed numerous continuing medical education courses (hereinafter, CME) aimed at improving his controlled substance prescribing practices, and that some of the courses provided him with valuable information. Resp't Exs. 2–5; Tr. 384–85, 398–415. The Respondent testified that the CME he completed was done online with a quiz administered at the conclusion. Tr. 414–21. The Respondent also offered the corrective action plan (hereinafter, CAP) that he had apparently filed with the Agency in accordance with 21 U.S.C. 824(c)(3). Resp't Ex. 8; Tr. 421–22. The CAP modestly proposes that the Respondent will take two specified CMEs (and such other additional CMEs which may be designated by DEA). Resp't Ex. 8. The CAP further proposes that the Respondent is willing to undergo a period of ''partial suspension'' of his COR pending completion of these CMEs that will restrict him to prescribing under Schedules IV and V. *Id.*

The Respondent testified that these proceedings have emotionally affected him in a way that is more grave than the COVID–19 epidemic. Tr. 424. His sleeping has been affected and he describes himself as being ''anxious all the time.'' *Id.* The Respondent offered assurances that he ''will not prescribe until [he] ha[s] the data,'' and that although ''[i]n the past, in [his] practice, [he] used to cut people breaks. [He] will not do that anymore, [he]'ll be 100 percent by the book and by the rules.'' *Id.* at 424–25. The Respondent then proposed the novel argument that he had no intention of ever even using his COR to prescribe controlled substances (*i.e.,* to conduct the regulated activity that is authorized by a DEA registration), but that he merely wanted to maintain his registered status to assist him in securing employment. *Id.* at 425–26.

It is beyond argument that the Respondent is the witness with the most at stake in these proceedings, and thus, is the witness with the greatest pressures to influence his perspective and testimony. However, even apart from these considerations, there was much in the Respondent's presentation that devalued his credibility and the force that can be attached to his testimony. When faced with examinations that he noted in his progress notes, which he plainly saw did not take place in the UC Visit videos, the Respondent was unwilling to admit what his eyes could scarcely deny: He did not perform the examinations he documented. *Id.* at 432–33. Even after agreeing with much of Dr. Dombrowski's testimony, the Respondent relentlessly adhered to his position that his prescriptions were issued for a legitimate medical purpose and in the usual course of a professional medical practice. *Id.* at 427–29. His unambiguous commitments to prescribe within the applicable standard of care in the future were matched with his equally unambiguous commitment to never prescribe again so long as the Agency maintains him in status so that he can secure medical employment. *Id.* at 424–26. The only thing that appeared sure about the Respondent's testimony was an apparent commitment to saying anything under oath that might induce the Agency to continue him in status. That is not to say that the Respondent's testimony was completely bereft of any reliability. Indeed, there were biographical and other elements of his testimony that can be credited, but

[38] Tr. 81–82, 90–91, 133.

[39] Gov't Ex. 1, at 7.

[40] The Respondent also sought support in reports he obtained from the PMP administrators regarding the relative percentage of his controlled substance prescribing compared to his peers. Resp't Ex. 7; Tr. 362–64. However, the value of this evidence was mortally undermined by the designation on the printout that the Respondent was being compared to geriatric medicine practitioners. Resp't Ex. 7; Tr. 434–35. The Respondent theorized that his PMP designation may have been a residual effect from a time when he did a lot of work in nursing homes. Tr. 436. Dr. Dombrowski persuasively testified that because physicians treating geriatric patients tend to prescribe higher amounts of pain medication due to the chronic problems associated with age, the comparison of geriatric practice with the Respondent's practice is not a relevant one. Tr. 440–41. Accordingly, this evidence is of negligible value in these proceedings.

[41] There was no indication in the record that the TFO would have been utilizing an ''outlying pharmacy,'' or what geographic location constituted a pharmacy to be ''outlying.''

where (as happened not infrequently here) his testimony stands in conflict with other reliable evidence of record, it must be viewed with great caution and skepticism.

Other facts required for a disposition of the present case are set forth in the balance of this decision.

The Analysis

Public Interest Determination: The Standard

Under 21 U.S.C. 824(a)(4), the Agency may revoke the DEA registration of a registrant if the registrant ''has committed such acts as would render his registration . . . inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Congress has circumscribed the definition of public interest in this context by directing consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f).

''These factors are to be considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Agency may properly give each factor whatever weight it deems appropriate in determining whether a registrant's DEA registration should be revoked. *Id.; see Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Moreover, the Agency is ''not required to make findings as to all of the factors,'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *Morall,* 412 F.3d at 173, and is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (holding that the Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors, and that remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest . . . .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009).

In adjudicating a revocation of a DEA registration, the DEA has the burden of proving that the requirements for the revocation it seeks are satisfied. 21 CFR 1301.44(e). Where the Government has met this burden by making a *prima facie* case for revocation of a registrant's COR, the burden of production then shifts to the registrant to show that, given the totality of the facts and circumstances in the record, revoking the registrant's COR would not be appropriate. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008). Further, ''to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the re-occurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010); *accord Krishna-Iyer,* 74 FR at 464 n.8. In determining whether and to what extent a sanction is appropriate, consideration must be given to both the egregiousness of the offense established by the Government's evidence and the Agency's interest in both specific and general deterrence. *David A. Ruben, M.D.,* 78 FR 38,363, 38,364, 38,385 (2013).

Normal hardships to the registrant, and even to the surrounding community, which are attendant upon lack of registration, are not a relevant consideration. *See Linda Sue Cheek, M.D.,* 76 FR 66,972, 66,972–73 (2011); *Gregory D. Owens, D.D.S.,* 74 FR 36,751, 36,757 (2009). Further, the Agency's conclusion that ''past performance is the best predictor of future performance'' has been sustained on review in the courts, *Alra Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie,* 419 F.3d at 483; *see also Ronald Lynch, M.D.,* 75 FR 78,745, 78,754 (2010) (holding that the respondent's attempts to minimize misconduct undermined acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66,138, 66,140, 66,145, 66,148 (2010); *George C. Aycock, M.D.,* 74 FR 17,529, 17,543 (2009); *Krishna-Iyer,* 74 FR at 463; *Steven M. Abbadessa, D.O.,* 74 FR 10,077, 10,078 (2009); *Med. Shoppe-Jonesborough,* 73 FR at 387.

Although the burden of proof at this administrative hearing is a preponderance-of-the-evidence standard, *see Steadman* v. *SEC,* 450 U.S. 91, 100–03 (1981), the Agency's ultimate factual findings will be sustained on review to the extent they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481–82. While ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Administrator's ability to find facts on either side of the contested issues in the case, *Shatz* v. *U.S. Dep't of Justice,* 873 F.2d 1089, 1092 (8th Cir. 1989), all ''important aspect[s] of the problem,'' such as a respondent's defense or explanation that runs counter to the Government's evidence, must be considered. *Wedgewood Vill. Pharmacy* v. *DEA,* 509 F.3d 541, 549 (D.C. Cir. 2007); *see Humphreys* v. *DEA,* 96 F.3d 658, 663 (3d Cir. 1996). The ultimate disposition of the case ''must be 'in accordance with' the weight of the evidence, not simply supported by enough evidence 'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' '' *Steadman,* 450 U.S. at 99 (quoting *Consolo* v. *FMC,* 303 U.S. 607, 620 (1966)).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past Agency precedent must be adequately supported, *Morall,* 412 F.3d at 183, but mere unevenness in application does not, standing alone, render a particular discretionary action unwarranted. *Chein* v. *DEA,* 533 F.3d 828, 835 (D.C. Cir. 2008), *cert. denied,* 555 U.S. 1139 (2009); *cf. Dep't of Homeland Security* v. *Regents of Univ. of Cal.,* No. 18–587, 592 U.S. __, slip op. at 22–23 (June 18, 2020) (holding that an agency must carefully justify significant departures from prior policy where reliance interests are implicated). It is well settled that, because the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in this recommended decision are entitled to significant deference, *see Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951), and that this recommended decision constitutes an important part of the record that must be considered in the Agency's final decision. *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are by no means binding on the Administrator and do not limit the

exercise of that discretion. 5 U.S.C. 557(b); *River Forest Pharmacy, Inc.* v. *DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* § 8(a) (1947).

Factors Two and Four: The Respondent's Experience Dispensing Controlled Substances and Compliance With Federal, State, and Local Law

The Government has founded its theory for sanction exclusively on Public Interest Factors Two and Four,[42] and it is under those two factors that the lion's share of the evidence of record relates.[43] In this case, the gravamen of the allegations in the OSC, as well as the factual concentration of much of the evidence presented, share as a principal focus the manner in which the Respondent has managed that part of his practice relative to prescribing controlled substances and acts allegedly committed in connection with that practice. Thus, it is analytically logical to consider Public Interest Factors Two and Four together. That being said, Factors Two and Four involve analysis of both common and distinct considerations.

The DEA regulations provide that to be effective, a prescription must be issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice. 21 CFR 1306.04(a). The Supreme Court has opined that, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006). Further, the Agency's authority to revoke a registration is not limited to instances where a practitioner has intentionally diverted controlled substances. *Bienvenido Tan,* 76 FR 17,673, 17,689 (2011); *see MacKay,* 75 FR at 49,974 n.35 (holding that revocation is not precluded merely because the conduct was ''unintentional, innocent, or devoid of improper motive'').

To effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the [Controlled Substances Act (CSA)].'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005). Consistent with the maintenance of that closed regulatory system, subject to limited exceptions not relevant here, a controlled substance may only be dispensed upon a prescription issued by a practitioner, and such a prescription is unlawful unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 U.S.C. 829; 21 CFR 1306.04(a). Furthermore, ''[a]n order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. 829] and the person knowingly . . . issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' 21 CFR 1306.04(a).

The prescription requirement is designed to ensure that controlled substances are used under the supervision of a doctor, as a bulwark against the risk of addiction and recreational abuse. *Aycock,* 74 FR at 17,541 (citing *Gonzales,* 546 U.S. at 274); *United States* v. *Moore,* 423 U.S. 122, 135, 142–43 (1975) (noting that evidence established that a physician exceeded the bounds of professional practice when he gave inadequate examinations or none at all, ignored the results of the tests he did make, and took no precautions against misuse and diversion). The prescription requirement likewise stands as a proscription against doctors ''peddling to patients who crave the drugs for those prohibited uses.'' *Aycock,* 74 FR at 17,541 (citing *Gonzales,* 546 U.S. at 274). A registered practitioner is authorized to dispense, which the CSA defines as ''to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner.'' 21 U.S.C. 802(10); *see also Rose Mary Jacinta Lewis,* 72 FR 4035, 4040 (2007). The courts have sustained criminal convictions based on the issuing of illegitimate prescriptions where physicians conducted no physical examinations or sham physical examinations. *United States* v. *Alerre,* 430 F.3d 681, 690–91 (4th Cir. 2005), cert. denied, 574 U.S. 1113 (2006); *United States* v. *Norris,* 780 F.2d 1207, 1209 (5th Cir. 1986).

While true that the CSA authorizes the ''regulat[ion of] medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood,'' *Gonzales,* 546 U.S. at 909–10, an evaluation of cognizant state standards is essential. *Joseph Gaudio, M.D.,* 74 FR 10,083, 10,090 (2009); *Kamir Garces-Mejias,* M.D., 72 FR 54,931, 54,935 (2007); *United Prescription Servs., Inc.,* 72 FR 50,397, 50,407 (2007). In this adjudication, the evaluation of the Respondent's prescribing practices must be consistent with the CSA's recognition of state regulation of the medical profession and its bar on physicians from engaging in unlawful prescribing. *Aycock,* 74 FR at 17,541. The analysis must be ''tethered securely'' to state law and federal regulations in application of the public interest factors, and may not be based on a mere disagreement between experts as to the most efficacious way to prescribe controlled substances to treat chronic pain. *Volkman* v. *DEA,* 567 F.3d 215, 223 (6th Cir. 2009) (citing *Gonzales,* 546 U.S. at 272, 274).

Under the CSA, it is fundamental that a practitioner establish and maintain a *bona fide* doctor-patient relationship in order to act ''in the usual course of . . . professional practice and to issue a prescription for a legitimate medical purpose.'' *Mackay,* 75 FR at 49,973 (internal quotations omitted); *Stodola,* 74 FR at 20731; *Shyngle,* 74 FR at 6057–58 (citing *Moore,* 423 U.S. at 141–43). The CSA generally looks to state law to determine whether a *bona fide* doctor-patient relationship was established and maintained. *Stodola,* 74 FR at 20,731; *Shyngle,* 74 FR at 6058; *Garces-Mejias,* 72 FR at 54,935; *United Prescription Servs.,* 72 FR at 50407.

Here, the relevant provisions of state law largely mirror the CSA and its regulations where they do not go

[42] ALJ Ex. 19, at 29.

[43] The record contains no recommendation from any state licensing board or professional disciplinary authority (Factor One), but, aside from cases establishing a complete lack of state authority, the presence or absence of such a recommendation has not historically been a case-dispositive issue under the Agency's precedent. *Patrick W. Stodola, M.D.,* 74 FR 20,727, 20,730 (2009); *Krishna-Iyer,* 74 FR at 461. Similarly, there is no record evidence of a conviction record relating to regulated activity (Factor Three). Even apart from the fact that the plain language of this factor does not appear to emphasize the absence of such a conviction record, myriad considerations are factored into a decision to initiate, pursue, and dispose of criminal proceedings by federal, state, and local prosecution authorities which lessen the logical impact of the absence of such a record. *See Robert L. Dougherty, M.D.,* 76 FR 16,823, 16,833 n.13 (2011); *Dewey C. MacKay, M.D.,* 75 FR 49,956, 49,973 (2010) (''[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry.''), *aff'd, MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011); *Ladapo O. Shyngle, M.D.,* 74 FR 6056, 6057 n.2 (2009). Therefore, the absence of criminal convictions militates neither for nor against the revocation sought by the Government. Because the Government's allegations and evidence fit squarely within the parameters of Factors Two and Four and do not raise ''other conduct which may threaten the public health and safety,'' *see* 21 U.S.C. 823(f)(5), Factor Five militates neither for nor against the sanction sought by the Government in this case.

beyond it. *Compare* Va. Code Ann. § 54.1–3303(C) *with* 21 CFR 1304.06(a). Section 54.1–3303(A), like its CSA counterpart,[44] limits controlled substance prescribing to licensed practitioners. The Virginia Code also requires that a *bona fide* patient-practitioner relationship precede the issuing of all prescriptions (controlled and non-controlled)[45] in the state. Va. Code Ann. § 54.1–3303(B). The elements of a *bona fide* patient-practitioner relationship are spelled out in the code, and require that prior to prescribing, the practitioner must have:

(i) Obtained or caused to be obtained a medical or drug history of the patient; (ii) provided information to the patient about the benefits and risks of the drug being prescribed; (iii) performed or caused to be performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically; and (iv) initiated additional interventions and follow-up care, if necessary, especially if a prescribed drug may have serious side effects. Except in cases involving a medical emergency, the examination required pursuant to clause (iii) shall be performed by the practitioner prescribing the controlled substance, a practitioner who practices in the same group as the practitioner prescribing the controlled substance, or a consulting practitioner.

Id.

The Virginia Administrative Code provides further direction for practitioners prescribing opioids for chronic pain. 18 Va. Admin. Code § 85–21–60. Under this provision:

Prior to initiating management of chronic pain with a controlled substance containing an opioid, a medical history and physical examination, to include a mental status examination, shall be performed and documented in the medical record, including: (1) The nature and intensity of the pain; (2) current and past treatments for pain; (3) underlying or coexisting diseases or conditions; (4) the effect of the pain on physical and psychological function, quality of life, and activities of daily living; (5) psychiatric, addiction, and substance misuse history of the patient and any family history of addiction or substance misuse; (6) a urine drug screen or serum medication level; (7) a query of the [PMP]; (8) an assessment of the patient's history and risk of substance misuse; and (9) a request for prior applicable records.

Va. Admin. Code § 85–21–60(A). Furthermore, prior to opioid drug treatment initiation, the prescribing doctor is required to counsel the patient on known risks and benefits of opioid therapy, patient responsibilities regarding storing and disposal, and a treatment exit strategy. *Id.*

The applicable Virginia Code provisions are completely consistent with the standards as outlined by the Government's expert, Dr. Dombrowski. Tr. 179, 183–88, 199, 211–12. Beyond the specified elements of the requisite relationship, history, examination, counseling, and follow-up care, Dr. Dombrowski explained that informed consent, exit strategy counseling, and adequate documentation also comprise vital parts of the prescribing standards in Virginia. Tr. 184–91. Beyond the Respondent's unsupported protestations that all of his controlled substance prescribing has been legal,[46] the testimony of the Government's expert stands uncontroverted on the present record. When an administrative tribunal elects to disregard the uncontradicted opinion of an expert, it runs the risk of improperly declaring itself as an interpreter of medical knowledge. *Ross* v. *Gardner,* 365 F.2d 554 (6th Cir. 1966). There is no shortage of reliable expert knowledge in the present record, it is uncontroverted, and it is not favorable to the Respondent.

In reviewing the evidence of record (including the stipulations of the parties), and applying the consistent and unchallenged controlled substance prescribing standards applicable in Virginia, the evidence preponderantly establishes the Respondent's registration and practitioner status, as well as the Government's allegations that he prescribed controlled substances to the TFO during the course of four undercover visits. Accordingly, OSC allegations 3, 6, 7, 8, 9, 11, 12, 15, 16, 19, and 20 are SUSTAINED.

The OSC in this case also alleges that the Respondent engaged in unprofessional conduct as that term is defined in the Virginia Code.[47] ALJ Ex. 1, at ¶¶ 10, 14, 18, 22. [Specifically, the OSC alleges violations of four subsections of Va. Code Ann. § 54.1–2915. ALJ Ex. 1 at ¶ 5.c (stating that ''Va. Code Ann. § 54.1–2915(A) defin[es] unprofessional conduct as including, among other things: [3] '[i]ntentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient or patients;' [12] '[c]onducting his practice in a manner contrary to the standards of ethics of his branch of the healing arts;' [*I] [13] '[c]onducting his practice in such a manner as to be a danger to the health and welfare of his patients or to the public;' and [17] '[v]iolating any provision of statute or regulation, state or federal, relating to the manufacture, distribution, dispensing, or administration of drugs''); *id.* at ¶¶ 6 (stating that Respondent issued four prescriptions in violation of ''federal and Virginia law noted in paragraphs 4–5, above'').[*J] I find that Respondent violated subsections three and thirteen, based on Dr. Dombrowski's testimony confirming that Respondent engaged in conduct that was likely to injure Patient SD, as well as Dr. Dombrowski's testimony that Respondent committed numerous treatment failures that led to the prescribing of controlled substances outside of the applicable standard of

[44] 21 U.S.C. 802(21), 823(f).

[45] Regarding the prescribing of controlled substances, the Virginia Code specifically requires compliance with federal telemedicine provisions which do not impact the current proceedings. Va. Code Ann. § 54.1–3303(B).

[46] Tr. 427–29.

[47] [Footnote omitted.]

[*I] Although Dr. Dombrowski testified that Respondent did not comply with ethical standards, *see* Tr. 287, the Government did not notify Respondent of this testimony in the OSC or in its prehearing statements. Therefore, I do not consider the Government's allegations with respect to subsection twelve in my public interest analysis.

[*J] I find that the OSC provided adequate notice of the Virginia Code subsections that the Government charged Respondent with having violated. Although the Chief ALJ did not sustain these allegations based in part, because there were ''multiple potential factual scenarios [ ] available under a single statutory scheme,'' and the Government did not sufficiently specify the application of the facts to the alleged violations, *see* RD, at 30, upon further review, I find that the Government quoted from four subsections of Va. Code Ann. § 54.1–2915(A) in paragraph five, and then identified the prescriptions in paragraph six that violated the state laws enumerated in paragraph five. *See* OSC, at ¶¶ 5.c, 6. The Government afforded Respondent the opportunity to prepare a defense by identifying each subsection of the Virginia Code at issue, and by providing a factual basis for its allegations that Respondent could have harmed or injured a patient. *See, e.g.,* OSC, at 5–7 (noting that Respondent prescribed opioids and benzodiazepines concurrently, and that the concurrent prescribing of these drugs ''poses a significant risk of addiction or other adverse consequences''); Gov't Prehearing, at 19, 22, 25 (same); *id.* at 14 (stating that Dr. Dombrowski was expected to testify that ''Respondent's actions put Patient S.D. at risk for harm, including addiction or other adverse medical outcomes;'') *see also Darrell Risner, D.M.D.,* 61 FR 728, 730 (1996) (''[T]he parameters of the hearing are determined by the prehearing statements.''). Although I agree that the charging documents would have benefited from further explanation, I find that the prehearing statement and the OSC together provided adequate notice in order for the Respondent to ''be timely informed of . . . the matters of fact and law asserted.'' 5 U.S.C. 554(b)(3); *see also* 21 CFR 1301.37(c) (requiring that the OSC ''contain a statement of the legal basis for [a] hearing and for the denial, revocation, or suspension of registration and a summary of the matters of fact and law asserted''). Previous Agency Decisions have stated that ''[t]he primary function of notice is to afford [a] respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation that refutes the charge of unlawful behavior.'' *Wesley Pope, M.D.,* 82 FR 14,944, 14,947 (2017) (internal citation omitted). Because I have found that these allegations were adequately noticed, I have added this section addressing these allegations.

care in Virginia and not for a legitimate medical purpose. Tr. 286; *see also, e.g., id.* at 207–11.*K Additionally, I find that Respondent violated subsection seventeen based on my finding above that Respondent violated state and federal law. Therefore, OSC allegations 10, 14, 18, and 22 are SUSTAINED.][48] [49]

In the OSC, the Government also charged the Respondent with an additional violation of state law in asserting that the Respondent was in violation of the Virginia Code for failing to prescribe naloxone [50] (the Virginia Naloxone Regulation). ALJ Ex. 1 at ¶¶ 13, 17, 21. This is a novel charge for this tribunal.[51] The Virginia Naloxone Regulation, in pertinent part, states that when initiating opioid treatment, a practitioner shall ''[p]rescribe naloxone for any patient when risk factors of overdose, substance abuse, doses in excess of 120 [morphine milligram equivalent] per day, or concomitant benzodiazepine[s] are present.'' 18 Va. Admin. Code § 85–21–70(B)(3).*L

An analysis of the relative merits of this novel allegation are best considered within the framework of Public Interest Factor Four (compliance with applicable state laws relating to controlled substances). 21 U.S.C. 823(f)(4). The actions of a regulatory agency must bear a rational relationship to the purposes of the statute it is charged with enforcing. *See Judulang* v. *Holder,* 556 U.S. 42, 63 (2011) (invalidating Board of Immigration Appeals decision making practice where the ''rule [was] unmoored from the purposes and concerns of the immigration laws''). [Consequently, when the Agency has analyzed whether state law violations are relevant to its Factor Four analysis, it has considered whether those state laws have a rational relationship to the core purposes of the CSA in preventing drug abuse and diversion.]*M *Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR 10,876, 10,900 (2018) [(stating that the state law provisions at issue ''go to the heart of the controlled substance anti-diversion mission—drug abuse prevention and control'')].*N *O

[As explained above, my consideration of a violation of a state law under Factor Four must bear a rational relationship to a core purpose of the CSA, as does my consideration of all the public interest factors. *See Judulang* v. *Holder,* 556 U.S. at 63. Additionally, the language of Factor Four requires that the state law be ''relat[ed] to controlled substances.'' These two concepts are easily conflated, but they are importantly distinct. In this case, I find that Respondent's violation of the Virginia Naloxone Regulation [52] bears a rational relationship to a core purpose of the CSA such that it is appropriate for me to consider it under Factor Four, and also that the state regulation is ''relat[ed] to controlled substances'' as the statute requires. 21 U.S.C. 823(a)(4). Respondent's failure to prescribe naloxone put Patient SD at risk for overdose or death resulting from concurrent opioid and benzodiazepine prescriptions.*P Thus, Respondent's violation of this regulation bears a rational relationship to the core purposes of the CSA of preventing the abuse of controlled substances and the adverse health consequences that might result from such abuse.

I have omitted the RD's discussion of the purpose of the Virginia Naloxone Regulation and its legislative history,

*K The RD states that ''DEA is without authority to hold that a registrant has committed unprofessional conduct regarding the practice of medicine, a clear function of the state's police powers.'' RD, at 30 (citing *Gonzales,* 546 U.S. at 274). While I agree with the Chief ALJ that findings on these matters often require expertise in assessing unprofessional conduct that the Agency lacks, the state law violations in this case were supported by the unrebutted testimony of a Virginia medical expert, Dr. Dombrowski. Dr. Dombrowski testified that Respondent prescribed a dangerous combination of controlled substances without ''engaging in any precautionary and follow-up steps,'' Tr. 239–44, 283, and he confirmed that Respondent's conduct was likely to cause injury to Patient SD. *Id.* at 286. Therefore, I find that Dr. Dombrowski's testimony provides a basis for sustaining these state law violations.

Although I am considering these additional allegations of violations of state law, they ultimately do not add substantially to my analysis under Factors Two and Four. I agree with the Chief ALJ that these violations further support my conclusion that Respondent's prescribing fell below the applicable standard of care in Virginia. *See* RD, at 31 n.49 (''[C]onduct which falls within a state's definition of unprofessional conduct (or is otherwise improper under state law), which supports the proposition that a practitioner's prescribing fell below the applicable standard of care (as is the case here), will generally be supportive of a finding that a registrant's controlled substance prescribing was in violation of the CSA.'').

[48] [Footnote omitted.]

[49] [Content of footnote discussed above, *see supra* n.*K.]

[50] [The RD took official notice, pursuant to 5 U.S.C. 556(e) and 21 CFR 1316.59(e), that naloxone was an opioid antagonist that is commonly used to counter the effects of an opioid overdose and/or adverse reaction. RD, at 31 n.50 (citing 81 FR 44,714 (2016)). The RD notified the parties that they may file objections to this official notice within fifteen calendar days from receipt of the RD. *Id.* Neither party filed objections, so I adopt the Chief ALJ's finding.]

[51] The Government's expert witness, Dr. Dombrowski, did not include the prescribing of naloxone within the elements required to satisfy the Virginia controlled substance prescribing standard of care.

*L Text deleted for consistency with my finding below that the violation of the Virginia Naloxone Regulation is sufficiently related to the CSA's core purposes to be considered under Factor Four.

*M Modified for clarification.

*N Citations omitted. I have also deleted text for consistency with my finding below that the violation of the Virginia Naloxone Regulation is sufficiently related to the CSA's core purposes to be considered under Factor Four.

*O We have previously identified the CSA's core purposes of preventing drug abuse and diversion by analyzing the statute's legislative history. *See, e.g., John O. Dimowo, M.D.,* 85 FR 15,800, 15,810 n.K, M (2020); *Fred Samimi, M.D.,* 79 FR 18,698, 18,709–10 (2014). As further discussed herein, it is axiomatic that another core purpose of the CSA is to protect patients from the drug-related deaths and injuries that may result from drug abuse and diversion. This core purpose is evident in the CSA's legislative history and underlies the entire statute.

In 1984, Congress expanded DEA's authority to deny practitioners' applications for DEA registrations by adding the public interest factors to Section 823. Controlled Substances Penalties Amendments Act of 1984, Public Law 98–473, 511, 98 Stat. 1837, 2073 (1984) (codified at 21 U.S.C. 823(f)(1)–(5)). Prior to the addition of these public interest factors, DEA's grounds to deny a practitioner's application were limited. DEA was required to grant an application unless the applicant was not ''authorized to dispense . . . [controlled substances] under the law of the State in which they practice[d].'' Controlled Substances Act, Public Law 91–513, 303, 84 Stat. 1236, 1255 (1970) (codified at 21 U.S.C. 823(f)). The Senate Report explained that because of DEA's ''very limited'' grounds for denial, the Controlled Substances Act had not been very effective at addressing diversion at the practitioner level, where eighty to ninety percent of diversion occurs. Senate Report, at 261–62, 1984 U.S.C.C.A.N., at 3443–44. Thus, the public interest factors were added to ''strengthen the Government's authority to regulate controlled substances.'' Senate Report, at 262, 1984 U.S.C.C.A.N., at 3444.

The Senate Report observed that ''[i]t is estimated that between 60 and 70 percent of all drug-related deaths and injuries involve drugs that were originally part of the legitimate drug production and distribution chain.'' Senate Report, at 260, 1984 U.S.C.C.A.N., at 3442. The CSA seeks to prevent these drug-related deaths and injuries by ''maintaining . . . [a] 'closed' system at the practitioner level. Senate Report, at 262, 1984 U.S.C.C.A.N., at 3444. The CSA's focus on patient safety is evident in the Senate Report's discussion of the procedures for scheduling drugs. The Senate Report observes that it is important to have swift procedures for scheduling new drugs, because of the ''significant health problem[s]'' that may result when an ''as yet uncontrolled drug rapidly enters the illicit market.'' *Id.* Indeed, drugs are designated as controlled substances precisely because of their potential to harm patients. *See, e.g.,* Senate Report, at 261, 1984 U.S.C.C.A.N., at 3443 (noting that drugs are placed into one of five schedules ''based on the severity of the abuse potential of a particular drug, the extent to which it leads to physical or psychological dependence, and has an accepted medical use . . .''). Thus, at its core, the CSA seeks to protect patients from the adverse health consequences that may result from dangerous and addictive drugs. Therefore, as found below, my consideration under Factor Four of a state law violation that significantly increases the risk of these adverse consequences is related to a core purpose of the CSA.

[52] 18 Va. Admin. Code § 85–21–70(B)(3).

*P Respondent issued concurrent prescriptions to Patient SD for opioids and benzodiazepines on August 28, 2019; September 27, 2019; and November 5, 2019, but he failed to prescribe naloxone, as required by state law. Tr. 93–94, 101, 116; Gov't Ex. 5, 8, 11; 18 Va. Admin. Code § 85–21–70(B)(3) (requiring naloxone to be prescribed when opioids and benzodiazepines are prescribed concurrently).

because I have concluded that the regulation, as applied to the facts of this case, supplies a sufficient nexus to controlled substances to be appropriately considered under Factor Four. In analyzing the legislative intent of the state law, the RD was likely addressing a particular Agency decision, which stated that in determining whether a state law is ''related to controlled substances'' under Factor Four, ''the mere fact that a violation of a state rule occurs in the context of the dispensing of controlled substances does not necessarily mean that the violation has a sufficient nexus to the CSA's core purpose of preventing the diversion and abuse of controlled substances.'' *Fred Samimi, M.D.,* 79 FR 18,698, 18,710 (2014) (citing 21 U.S.C. 823(f)(4). As explained above, I concur that a violation of state law must have a rational relationship to the core purposes of the CSA in order for me to consider it under Factor Four; however, that important concept should not be conflated with whether the state law is ''relat[ed] to controlled substances'' as required by the statute, which is what seemed to happen when the former Administrator in *Samimi* cited to the *intent of the state law itself* as the basis for finding that the law in that case was not sufficiently *related to controlled substances. Id.* (finding that the particular state law's ''provisions [were] not directed at preventing diversion''). Nothing in the CSA itself nor its legislative history requires such a limited view of ''laws relating to controlled substances,'' and although these sentences in *Samimi* could be read to imply that the Agency would be required to assess the state law's purpose, I can find no reason to analyze the legislative intent of every state law alleged for consideration under Factor Four. *See* 21 U.S.C. 823(f)(4).

In fact, the Agency has—both prior to and subsequent to the *Samimi* decision—frequently considered violations of state statutes that are applicable to all medications, not just controlled substances, under Factor Four without analyzing the legislative intent of these statutes. *See, e.g., Joseph Gaudio, M.D.,* 74 FR 10,083, 10,091 (2009) (considering under Factor Four the respondent's violation of a state law that stated that it is ''unprofessional conduct'' for a physician to ''provid[e] treatment . . . via electronic or other means unless the licensee has performed a history and physical examination of the patient . . .''); *Carol Hippenmeyer, M.D.,* 86 FR 33,748, 33,768 (considering under Factor Four the respondent's violation of state laws stating that it is ''unprofessional conduct'' for a physician to fail to ''maintain adequate medical records'' and to ''prescrib[e] . . . a prescription medication . . . to a person unless the [physician] first conducts a physical or mental health status examination of that person or has previously established a doctor-patient relationship''). The core purpose of these statutes may not be directed at preventing the abuse and diversion of controlled substances; however, when the state addresses prescribing that presents a risk of diversion or substance abuse, these are the statutes that are charged. For example, the Arizona Medical Board frequently cites violations of the state laws requiring physicians to maintain adequate medical records and perform physical examinations in disciplinary actions against physicians who are prescribing controlled substances without taking appropriate steps to prevent diversion.[*Q]

Therefore, a broad interpretation of ''laws relating to controlled substances'' in Section 823(f)(4) is consistent with previous Agency Decisions. It is also consistent with the Supreme Court's interpretation of the phrase ''relating to'' in other contexts. According to the Supreme Court, the phrase ''in relation to'' is to be interpreted expansively, and means ''with reference to'' or ''as regards.'' *Smith* v. *United States,* 508 U.S. 223, 237 (1993).[*R]

Thus, prior Agency Decisions and Supreme Court precedent support my conclusion that the Virginia Naloxone Regulation is related to controlled substances under Factor Four and that Respondent's violation of the regulation is relevant to my Factor Four analysis under the CSA.] [53] [54] [55] [*S]

Recommendation

The evidence of record preponderantly establishes that the Respondent has committed acts which render his continued registration inconsistent with the public interest. *See* 21 CFR 1301.44(e) (establishing the burden of proof in DEA administrative proceedings). Because the Government has met its burden in demonstrating that the revocation it seeks is authorized, to avoid sanction the Respondent must show that given the totality of the facts and circumstances revocation is not warranted. *See Med. Shoppe-Jonesborough,* 73 FR at 387. In order to rebut the Government's *prima facie* case, the Respondent must demonstrate

[*Q] *See Hippenmeyer,* 86 FR at 33,768 n.62 (citing, *e.g., In the Matter of Brian R. Briggs, M.D.,* No. MD–15–0164A, 2017 WL 554258 (Feb. 2, 2017) (issuing a Letter of Reprimand and placing respondent on probation for prescribing controlled substances to a live-in girlfriend—who was also receiving opioids from other providers—without maintaining medical records and without ''perform[ing] and document[ing] an appropriate physical and mental examination''); *In the Matter of Warren Moody, M.D.,* No. MD–07–0874A, 2007 WL 3375035 (Oct. 16, 2007) (summarily suspending physician's license for various forms of misconduct, including prescribing controlled substances to friends without maintaining medical records); *In the Matter of David Landau, M.D.,* No. MD–17–0777A, 2018 WL 2192279 (Apr. 16, 2018) (issuing a Letter of Reprimand against a physician for various forms of misconduct, including prescribing controlled substances to a friend without maintaining adequate medical records).

[*R] The *Smith* decision involved an offer to trade an automatic weapon for cocaine. 508 U.S. at 225. The decision addressed the question of whether the exchange of a firearm for cocaine constitutes using a firearm ''during and in relation to . . . [a] drug trafficking crime'' within the meaning of 18 U.S.C. 924(c)(1). *Id.* The Supreme Court's analysis cited prior Supreme Court and appellate court decisions interpreting the phrase ''in relation to'' and concluding that the phrase should be interpreted expansively. *Id.* at 237; *see, e.g., District of Columbia* v. *Greater Washington Board of Trade,* 506 U.S. 125, 129 (1992) (''We have repeatedly stated that a law 'relate[s] to' a covered employee benefit plan . . . 'if it has a connection with or reference to such a plan.' . . . This reading is true to the ordinary meaning of 'relate to' . . . and thus gives effect to the 'deliberately expansive' language chosen by Congress.''); *United States* v. *Harris,* 959 F.2d 246, 261 (D.C. Cir. 1992) (per curiam) (''The only limitation is that the guns be used ''in relation'' to the drug trafficking crime involved, which we think requires no more than the guns facilitate the predicate offense in some way.''); *United States* v. *Phelps,* 877 F.2d 28 (9th Cir. 1989) (concluding that the situation was ''unusual'' and not covered, the court stated that ''the phrase 'in relation to' is broad'').

The Supreme Court also cited a dictionary definition in its analysis. 508 U.S. at 237–38. It stated that ''[a]ccording to Webster's, 'in relation to' means 'with reference to' or 'as regards.' '' *Id.* at 237. It concluded, thus, that the phrase ''in relation to,'' at a minimum, ''clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.'' *Id.* at 238. The Court also stated that ''the gun at least must 'facilitate[e], or ha[ve] the potential of facilitating,' the drug trafficking offense.'' *Id.*

[53] [Footnote omitted.]

[54] [Footnote omitted.]

[55] [Footnote omitted.]

[*S] As found above, there is substantial record evidence that Respondent issued controlled substance prescriptions outside the usual course of the professional practice and beneath the applicable standard of care in Virginia and in violation of state law. I, therefore, have concluded that Respondent engaged in misconduct which supports the revocation of his registration. *See Wesley Pope,* 82 FR 14,944, 14,985 (2017).

For purposes of the imminent danger inquiry, my findings also lead to the conclusion that Respondent has ''fail[ed] . . . to maintain effective controls against diversion or otherwise comply with the obligations of a registrant'' under the CSA. 21 U.S.C. 824(d)(2). At the time the Government issued the OSC, the Government had clear evidence that Respondent repeatedly issued prescriptions without having a sound rationale or legitimate medical purpose for doing so, which establishes ''a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance . . . [would] occur in the absence of the immediate suspension'' of Respondent's registration. *Id.*

not only an unequivocal acceptance of responsibility but also a demonstrable plan of action to avoid similar conduct in the future. *See Hassman,* 75 FR at 8236. He has accomplished neither objective.

Agency precedent is clear that a respondent must unequivocally admit fault as opposed to a ''generalized acceptance of responsibility.'' *The Medicine Shoppe,* 79 FR 59,504, 59,510 (2014); *see also Lon F. Alexander, M.D.,* 82 FR 49704, 49,728 (2017). To satisfy this burden, a respondent must ''show true remorse'' or an ''acknowledgment of wrongdoing.'' *Alexander,* 82 FR at 49,728 (citing *Michael S. Moore,* 76 FR 45,867, 45,877 (2011); *Wesley G. Harline,* 65 FR 5665, 5671 (2000)). The Agency has made it clear that unequivocal acceptance of responsibility is paramount for avoiding a sanction. *Dougherty,* 76 FR at 16,834 (citing *Krishna-Iyer,* 74 FR at 464). This feature of the Agency's interpretation of its statutory mandate on the exercise of its discretionary function under the CSA has been sustained on review. *Jones Total Health Care Pharmacy, LLC* v. *DEA,* 881 F.3d 823, 830–31 (11th Cir. 2018); *MacKay,* 664 F.3d at 822; *Hoxie,* 419 F.3d at 483.

As discussed, *supra,* on the issue of remedial steps aimed at the avoidance of reoccurrence, the Respondent, in addition to promises that he will be compliant in the future, has submitted into evidence the CAP [56] he previously filed with the Agency, as well as several certificates showing completion from some CME courses that the Respondent completed online. Resp't Exs. 2–8; Tr. 414–21. The Respondent's CAP contains a somewhat minimalist proposal that he will take two specified CMEs (and other additional CMEs designated by DEA). Resp't Ex. 8. The CAP further proposes that the Respondent is willing to undergo a period of ''partial suspension'' of his COR pending completion of these CMEs that will restrict him to prescribing under Schedules IV and V. *Id.* In addition to these rather modest plans for remedial action, the Respondent (to the apparent surprise of everyone at the hearing) tendered a remarkable, novel, and illogical proposal. He offered that if the Agency would only grant him a registration to handle controlled substances, he would covenant never to actually use it. Tr. 425–26. The Respondent explained that he seeks the reinstatement and continuation of his COR, not to conduct the regulated activity it authorizes, but rather, because he considers it a necessary prerequisite to securing or continuing employment as a physician. *Id.*

Suffice it to say that the Respondent's remedial action plans are unimpressive at best, and in the case of his attempt to secure a non-functional COR, illogical and cynical, but inasmuch as the evidence of record fails to demonstrate an unequivocal acceptance of responsibility, the issue of remedial steps could hardly be considered as case dispositive. The Agency has consistently held that for either prong (acceptance of responsibility and remedial steps) to be considered in sanction amelioration, both prongs must have been established. *Ajay S. Ahuja, M.D.,* 84 FR 5479, 5498 n.33 (2019); *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care,* 81 FR 79,188, 79,202–03 (2016); *Hassman,* 75 FR at 8236. If one prong is absent, the other becomes irrelevant. Both or neither has been the rule for many years. The Respondent quibbled on the precise amount of seconds devoted to palpations,[57] and refused to accept that examinations, which were documented in the paperwork but clearly absent from the UC Visit videotapes, did not take place.[58] As discussed in considerable detail, *supra,* even after sitting through the Government's evidence, the Respondent maintains that all of the controlled substance prescriptions he ever issued (including those issued during the four UC Visits established in these proceedings) were legitimate and within the usual course of a professional practice. Tr. 427–29. The Respondent presented as a practitioner who genuinely believes he did nothing really that wrong. As he described it, he ''used to cut people 'breaks,''' but ''will not do that anymore . . . .'' Tr. 424–25. The Respondent's closing brief representation that ''he has fully accepted responsibility . . .'' [59] is simply not supported by the record. Without plumbing the depths of what constitutes an unequivocal acceptance of responsibility, it is clear that a terse ''[yes], I do'' response to an inquiry from his counsel about whether he made ''a mistake'' by what he characterized as prescribing a ''low[-]addictive potential'' and low-overdose potential drug to the undercover patient so the hapless patient could ''get through the day and get through [his] work,'' [60] misses the mark.

While the transgressions alleged and proved here are serious and numerous, it is arguable that a true, unequivocal acceptance of responsibility, coupled with a thoughtful plan of remedial action could have gone a long way to supporting a creditable case for sanction lenity. Indeed, while true that the Agency's precedents hold the lack of an unambiguous acceptance of responsibility and a remedial action plan as a cold bar to the avoidance of a sanction,[61] the wisdom of the Agency's policy is vindicated in this case by the reality that the Respondent still believes that he has never issued a controlled substance prescription that was not legitimate and not within the usual course of a professional practice. The only potential he sees for error appears to be his innate kindness, which caused him to ''cut breaks'' to his fellow man. He was confronted with progress notes written in his own hand detailing the results of examinations that he never administered, yet he would not concede his mendacity. As highlighted by the Government in its closing brief,[62] the Respondent's generation of false chart information supports the fair inference that he was attempting to create a justification for controlled substance prescriptions he understood to be unsupportable under the law. *See Syed Jawed Akhter-Zaidi, M.D.,* 80 FR 42,963, 49,964 (2015) (holding that where a practitioner creates a false record when prescribing a controlled substance, there is a presumption that the practitioner [''falsified the records in order to justify the prescribing of controlled substances, and that in prescribing the controlled substances, Respondent acted outside the usual course of professional practice and lacked a legitimate medical purpose'']). He spent tiny minutes of time with the TFO before issuing controlled substances and dickered about the amount of seconds actually devoted to the interaction and the palpations. This is a man who believes he made no true mistakes. The Agency is thus faced with a choice of imposing a registration sanction or imposing none and therein creating a strong likelihood that it will be instituting new proceedings, charging the same conduct against the same doctor soon thereafter. To the extent the Respondent, after being present at this hearing, does not see that he was not acting as a reliable registrant, it is highly unlikely that he will see the light in a month, a week, or a day from an Agency action that affords him another chance. To be sure, the Respondent credibly testified that getting caught and being put into proceedings caused a certain degree of

[56] Resp't Ex. 8.

[57] Tr. 388–89.

[58] Tr. 430–33.

[59] ALJ Ex. 20, at 15.

[60] *Id.*

[61] *Hassman,* 75 FR at 8236.

[62] ALJ Ex. 19, at 34.

emotional consternation,[63] but that is not the same as accepting responsibility, which is something he clearly is unwilling to do. On this point there is little room for logical, dispassionate dissent. Thus, in the face of a *prima facie* case, without the Respondent meeting the evidence with a convincing, unequivocal acceptance of responsibility and proposing thoughtful, concrete remedial measures geared toward avoiding future transgressions, the record supports the imposition of a sanction. That a sanction is supported does not end the inquiry, however.

In determining whether and to what extent imposing a sanction is appropriate, consideration must also be given to the Agency's interest in both specific and general deterrence and the egregiousness of the offenses established by the Government's evidence. *Ruben,* 78 FR at 38,364, 38,385. Considerations of specific and general deterrence in this case militate in favor of revocation. As discussed, *supra,* the Respondent has made it clear that he feels that he was not so much wrong as misunderstood and, in a way, nitpicked. As discussed, *supra,* he feels his prescriptions were legitimate, if lenient. Tr. 424–425. Although he uttered words in support of regret, where a person does not accept as true the errors shown to him by hard evidence, the hopes of true future deterrence are diminished, and mortally so. The interests of specific deterrence, therefore, compel the imposition of a sanction.

Likewise, as the regulator in this field, the Agency bears the responsibility to deter similar misconduct on the part of others for the protection of the public at large. *Ruben,* 78 FR at 38,385. To continue the Respondent's registration privileges on the present record would send a message to the regulated community that it is acceptable to spend less than ten minutes, and sometimes less than two minutes with a patient, conduct no exams, document exams not conducted, procure neither prior records nor objective testing, prescribe dangerous controlled substances, increase the dosages without basis or regret, and continue to do so even in the face of information that the purported patient is not even filling the prescriptions. The interests of general deterrence militate powerfully in favor of a sanction on this record.

Regarding the egregiousness of the Respondent's conduct, as discussed, *supra,* the Respondent did virtually nothing to satisfy (or even further) his responsibilities as a DEA registrant on four occasions. He had no basis for a valid diagnosis, he had no prior medical records, called no prior treating physician, had no imaging, conducted no examination to speak of, doctored up phony examination results, ignored evidence that the prescriptions were not being filled by his purported patient, disregarded the gaps where the patient would have been without the medicine he was prescribing (even if it had been dispensed and taken as directed), and actually increased the dosage for no articulated reason beyond the fuzzy concept that he had an increased level of ''comfort[ ]'' [64] (based apparently on little more than the TFO's decision to keep coming back for more drugs). Even disregarding the very real likelihood that these four UC Visits presented a vivid snapshot of the Respondent's practice in general, the blithe manner in which he doled out controlled medicine to this undercover officer was nothing short of astonishing. The egregiousness of the established transgressions in this case, and the reckless abandon with which the Respondent ignored his obligations provides a unique window into the systemic gravity of the current opioid crisis.

A balancing of the statutory public interest factors, coupled with consideration of the Respondent's failure to meaningfully accept responsibility, the absence of record evidence of thoughtful and continuing remedial measures to guard against recurrence, and the Agency's interest in deterrence, supports the conclusion that this Respondent should not continue to be entrusted with a registration.

Accordingly, it is respectfully recommended that the Respondent's DEA COR should be REVOKED, and any pending applications for renewal should be DENIED.

Dated: August 20, 2020.

John J. Mulrooney, II,

U.S. Chief Administrative Law Judge.

[FR Doc. 2021–20247 Filed 9–17–21; 8:45 am]

BILLING CODE 4410–09–P

[63] Tr. 424.

[64] Tr. 391–94.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 19–31]

Lisa M. Jones, N.P.; Dismissal of Proceedings

I. Introduction

On June 28, 2019, a former Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Lisa Mae Jones, N.P. (hereinafter, Applicant), of Mount Airy, North Carolina. Administrative Law Judge Exhibit (hereinafter, ALJX) 1 (Order to Show Cause (hereinafter, OSC)), at 1. The OSC proposed the denial of Applicant's application (Application No. W19018692M) for a DEA certificate of registration (hereinafter, North Carolina-based registration application) and ''any other applications for any other DEA registrations'' on the ground that she ''materially falsified'' her application ''in violation of 21 U.S.C. 824(a)(1) and 823(f).'' *Id.*

The substantive ground for the proceeding, as more specifically alleged in the OSC, is that Applicant's ''failure to disclose the disciplinary actions taken against . . . [her] nursing licenses (viz., the denial of . . . [her] application in Illinois and the fact that . . . [her] Tennessee and Iowa nursing licenses were placed on probation) constitutes material falsification of . . . [her] application for a DEA Certificate of Registration.'' *Id.* at 4.

The OSC notified Applicant of her right to request a hearing on the allegations or to submit a written statement while waiving her right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 4 (citing 21 CFR 1301.43). The OSC also notified Applicant of the opportunity to file a corrective action plan. OSC, at 5 (citing 21 U.S.C. 824(c)(2)(C)). Applicant requested a hearing. ALJX 2 (Request for Hearing dated July 22, 2019), ALJX 4 (Order for Prehearing Statements dated July 23, 2019), at 1 (stating that counsel for Applicant filed a hearing request on July 22, 2019).[1]

The matter was placed on the docket of the Office of Administrative Law Judges and assigned to the Chief Administrative Law Judge (hereinafter, ALJ), John J. Mulrooney, II. The Chief ALJ noted thirteen stipulations agreed upon by the parties and ''conclusively accepted as fact in these proceedings.'' Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge dated November 21, 2019 (hereinafter, RD), at 4–5. The second and third stipulations state that Applicant ''is currently licensed in the State of North Carolina as a Nurse Practitioner under Approval No. 5011528'' and that her ''North Carolina Approval (license) expires by its own terms on May 31, 2020.'' *Id.* at 4.

[1] The Request for Hearing is stamped received on July 30, 2019.

The hearing in this matter took place at the DEA Hearing Facility on September 17, 2019. The RD is dated November 21, 2019. The Government filed exceptions to the RD. The Government's Exceptions to the Chief Administrative Law Judge's Recommended Decision, dated December 11, 2019 (hereinafter, Govt Exceptions).

Having considered the record in its entirety, I find that the Government has failed to establish by clear, unequivocal, and convincing evidence that Applicant violated 21 U.S.C. 824(a)(1) as to the North Carolina-based registration application. Due to the current ''inactive'' status of Applicant's North Carolina nurse practitioner license, however, I am precluded by statute from ordering that the North Carolina-based registration application be granted. 21 U.S.C. 823(f) (''The Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which [s]he practices.''). *Infra* section II.B.

I make the following findings.

II. Findings of Fact

A. The Material Falsification Allegations

According to the OSC's allegations, Applicant submitted an application for a DEA Certificate of Registration as a mid-level practitioner in Schedules II through V with a registered address in North Carolina on or about March 1, 2019. OSC, at 2. The North Carolina-based registration application, the OSC further alleges, was assigned control number W19018692M. *Id.* Applicant allegedly answered ''yes'' to Liability Question 2. *Id.* (''Has the applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending?''). Also according to the OSC, for ''nature of incident,'' Applicant submitted the following material: ''Failed to read directions/instructions correctly, I misread the part of state licensure being restricted.'' *Id.* Regarding ''incident result,'' Applicant allegedly wrote: ''Surrendered to DEA Agent on/about date stated above,'' meaning January 31, 2019. *Id.*

According to the OSC, Applicant also answered ''yes'' to Liability Question 3. *Id.* (''Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation or is any such action pending?''). Regarding the ''nature of the incident,'' Applicant allegedly stated: ''I misread the application, I failed to read the part about state licensure being placed on probation.'' *Id.* For ''incident result,'' according to the OSC, Applicant again submitted: ''Surrendered to DEA Agent on/about date stated above,'' meaning January 31, 2019. *Id.*

There is factual agreement among the witnesses on a number of matters. When there is factual disagreement, I apply my credibility determinations and the credibility recommendations of the Chief ALJ. *Infra* sections II.D. and II.E.

B. Applicant's Current Licensure

In the course of adjudicating this matter, it came to my predecessor's attention that the North Carolina Board of Nursing (hereinafter, NCBON) website listed the status of Applicant's North Carolina nurse practitioner license as ''inactive.'' *https://www.ncbon.com/licensure-listing-verify-a-license.* Further, Applicant was not listed on the North Carolina Board of Pharmacy website as being registered to dispense controlled substances in North Carolina. *https://portal.ncbop.org/verification/search.aspx.*

My predecessor issued Applicant an (unpublished) Interim Order on May 21, 2021 (hereinafter, Interim Order).[2] In the Interim Order, the then-Acting Administrator explained that the ''inactive'' status of Applicant's nurse practitioner license impacts the status of Applicant's North Carolina authority to dispense controlled substances.[3] Interim Order, at 1. He explicitly stated that the status of Applicant's North Carolina nurse practitioner license ''is essential to . . . [his] decision about the OSC because Applicant must have North Carolina authority to dispense controlled substances to be eligible for a DEA registration in North Carolina.'' *Id.* My predecessor ordered Applicant to address the status of her North Carolina authority to dispense controlled substances. *Id.* at 2. Applicant's response was due over a month ago, yet the Agency has not received any response, let alone the information ordered, from Applicant to date. As of the date of this Decision/Order, I find that the NCBON website continues to show Applicant's nurse practitioner license as ''inactive.'' *https://www.ncbon.com/licensure-listing-verify-a-license.* Accordingly, as my predecessor advised Applicant in the Interim Order, I am crediting and using the current ''inactive'' information on the NCBON website and denying the North Carolina-based registration application. 21 U.S.C. 823(f); 21 U.S.C. 802(21). I shall also adjudicate the OSC's allegations in the event Applicant submits a registration application in the future.

C. The Investigation of Applicant

I find that Applicant submitted an online application for a DEA registration with a registered address in North Carolina on or about March 1, 2019. GX 1 (Certification of Non-Registration), at 1. I find that her application was assigned DEA control number W19018692M. *Id.* I find that Applicant answered ''yes'' to two of the ''Background Information,'' or Liability, questions. *Id.* at 1–2; *infra* II.F. I find that, when an application contains a ''yes'' response to a Liability question, it is referred for investigation. Transcript (hereinafter, Tr.) 38.

D. The Government's Case

The Government called one witness, the DEA Diversion Investigator assigned to investigate Applicant's North Carolina-based registration application (hereinafter, DI), and offered eight exhibits. The eight Government exhibits are either DEA documents showing Applicant's DEA registration status and history, or documents from states showing Applicant's license status and history. At the beginning of the hearing, Applicant's attorney stipulated to the admission of all of the Government's eight noticed exhibits. *Id.* at 25–26.

DI testified about her DEA employment, training, and duties as a DI at DEA's office in Greensboro, North Carolina. *Id.* at 24, 26–28. She testified that her first meeting with Applicant stemmed from a telephone call she received from the DEA Roanoke office in January 2019. *Id.* at 28–35. From that telephone call, she stated, she learned that a Special Agent (hereinafter, SA) and a Task Force Officer (hereinafter, TFO) from the Roanoke office were traveling to North Carolina to interview Applicant and that DI's presence was requested at the meeting. *Id.* at 28, 31.

DI explained that the Roanoke office found that Applicant had answered Liability questions inaccurately on the application she had submitted for the controlled substance registration under which Applicant was practicing in Virginia at the time. *Id.* at 28. DI described ''liability questions'' as questions about matters that ''we consider liabilities for that registrant'' or ''things that we would consider as to

[2] Applicant's attorney during the Hearing, on whom the Interim Order was served, orally confirmed that she received the Interim Order and forwarded it to Applicant.

[3] The Interim Order attached a copy of the website of the North Carolina Board of Nursing showing the status of Applicant's nurse practitioner license as ''inactive.''

whether or not there's a public interest reason why that individual should be perhaps their registration [sic] rejected for some reason.''[4] *Id.* at 29. Specifically, regarding Applicant, DI testified that Applicant ''had answered negative to all of those questions, but later investigation found that she did in fact have some past issues with her state licensing.''[5] *Id.* at 30.

DI testified that, at the meeting on January 31, 2019, Applicant acknowledged that she completed and digitally signed an application for a DEA registration in September 2018, the registration under which she practiced in Virginia. *Id.* at 32–33. DI stated that SA ''then presented her with a copy of it and pointed to the liability questions and asked her to read those.'' *Id.* at 33. DI explained that, after Applicant read them once, responded affirmatively to SA's question about whether ''she had had any past state issues regarding her license,'' and re-read them, Applicant ''acknowledged that she had incorrectly answered those questions'' in September 2018. *Id.* According to DI, Applicant stated that she ''misunderstood'' the question. *Id.* at 67. DI also testified that, ''[t]o be honest, I recall . . . [Applicant] reviewing the paperwork, there actually kind of seemed to be a sense of, like, she was realizing what had happened as she read it. And then, she did admit at that point.'' *Id.* Indeed, according to DI, the probationary actions on Applicant's licenses by Tennessee and Iowa came up during the meeting. *Id.* at 79.

According to DI, after Applicant acknowledged her incorrect responses, SA ''basically presented her with the option to sign a voluntary surrender form'' or go to a hearing. *Id.* at 35, 65. DI testified that Applicant ''read over it, . . . [SA] explained it to her, and she signed that voluntary surrender'' of her Virginia registration with TFO and DI as witnesses. *Id.* at 35, 68. DI identified GX 7 as a copy of the voluntary surrender that Applicant executed on January 31, 2019. *Id.* at 36.

DI described the conversation that ensued after Applicant surrendered her Virginia registration. According to DI, Applicant ''acknowledged that she did not plan to work in Virginia any longer and would be working in North Carolina.'' *Id.* at 68–69, 72. DI testified that someone from the DEA investigative team explained that, ''under the circumstances of her surrendering that prior registration,'' Applicant ''would need to reapply for a registration in the state of North Carolina.'' *Id.* at 73. DI recalled that SA told Applicant that ''she would need to answer in the affirmative to the liability questions.'' *Id.* at 74; *see also id.* at 97–98 (DI testifying that ''I don't necessarily recall exactly if . . . [SA] said for 2 and 3, you need to be in the affirmative. I believe that his instruction was, assuming you provide the DEA with a complete and correct application, there won't be any issues regarding getting a new registration. I do recall him essentially explaining that, for Question 2, because he was taking a voluntary surrender, there would need to be an affirmative to that particular question regarding the details of that date. I don't necessarily remember there being any more on Question 3 . . .—other than a general, you will need to explain the situation.''). DI also testified that SA told Applicant that the voluntary surrender ''would not affect her state licensing.'' *Id.* at 74–75.

DI testified that DEA received Applicant's North Carolina-based registration application. *Id.* at 37; *see also* RX 12 (showing the North Carolina-based registration application's submission date as February 28, 2019). Initially, the North Carolina-based registration application was assigned to ''one of the brand new investigators in the office who was still in our training program,'' DI stated. Tr. 37. DI explained that the new investigator's field training officer saw Applicant's name, the name ''sounded familiar to him,'' so ''he kind of yelled over the cubicle'' to DI asking if she was familiar with the name. *Id.* DI testified that she responded in the affirmative, stating that Applicant ''was the one . . . [she] recently had a meeting with [in] Roanoke.'' *Id.* at 37–38. DI explained how the matter was then assigned to her. *Id.* at 38.

DI testified about Applicant's specific answers to two of the Liability questions on the North Carolina-based registration application. *Id.* at 83–89. First, regarding the second Liability question, DI confirmed that Applicant responded ''yes'' to that question: ''Has the applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending?'' *Id.* at 83; *see also* GX 1, at 1. DI stated her ''understanding'' that Applicant's ''yes'' answer would have caused the electronic application to drop down a blank box. Tr. 83. Concerning Applicant's submission for ''incident nature'' regarding the second Liability question, ''failed to read directions/instructions correctly, I misread the part of state licensure being restricted,'' DI testified about what that response meant to her. GX 1, at 1. DI stated that ''[i]n this situation, it tells me that she has surrendered for-cause a federal controlled substance registration and that the explanation that she has given is that essentially, she misunderstood the instructions on how she was supposed to respond to that . . . particular question.'' Tr. 84; *see also id.* at 86. DI further testified that Applicant's submission told her that ''there is a state licensure being restricted'' and ''that is why she surrendered her DEA registration.'' *Id.* at 84. DI confirmed that Applicant's submission put DI on notice and gave DI ''some information regarding the potential'' that Applicant has a state licensure restriction. *Id.* at 85–86; *see also id.* at 103.

Second, regarding the third Liability question, DI confirmed that Applicant responded ''yes'' to that question: ''Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?'' *Id.* at 87; *see also* GX 1, at 2. DI consistently testified that she is ''not aware that there's any instruction'' about how to fill out the drop-down box that would appear when there is a ''yes'' answer to the third Liability question. Tr. 87, *see also id.* at 93–94. Concerning Applicant's submission for ''incident nature'' regarding the third Liability question, ''I misread application. I failed to read the part about state licensure being placed on probation,'' DI testified about what that response meant to her.[6] GX 1, at 2. DI agreed that Applicant's response indicated that Applicant's state licensure was placed on probation and that she previously surrendered her

[4] When asked for details about completing the DEA registration application form, DI responded that she is ''not an expert when it comes to the actual application process'' and that she has ''not actually completed one as a registrant.'' Tr. 80, 83. Regarding instructions for completing the form and resources to help someone who is unsure about how to answer a question on the form, DI testified that she is ''not aware that there's any [instruction] form, it's just a ask a question, answer the question, ask a question, answer the question'' and that ''[t]here is a telephone number . . . to basically the Registration Program Specialist within the DEA . . .—there's kind of a help 800 number that they can contact.'' *Id.* at 81–82; *see also id.* at 83.

[5] Neither the Government nor Applicant offered for admission documentary evidence supporting or refuting the findings of the investigation DI referenced concerning Applicant's Virginia registration under which she was practicing in January 2019 and that she voluntarily surrendered at the January 31, 2019 meeting. This is consistent with the sole charge in the OSC—denial of Applicant's North Carolina-based registration application due to material falsification.

[6] DI also testified that ''[i]n my reading of that, I'm not sure exactly what she's telling me there.'' Tr. 88.

DEA registration because she failed to report the probation. Tr. 88–89.

DI testified that, after she received Applicant's North Carolina-based registration application, she ''started searching under licensing'' for Applicant and contacted SA and TFO. *Id.* at 85–86. Due to those contacts, DI testified that SA provided her ''with some documentation regarding the original surrender'' on January 31, 2019.[7] *Id.* at 86.

DI testified about the extent of her knowledge of Applicant's state licensing history at the time Applicant's North Carolina-based registration application was assigned to her. *Id.* at 89–92. From her attendance at the meeting on January 31, 2019, DI stated she was aware that Applicant's licenses in Tennessee and Iowa were put on probation. *Id.* at 90–92. She also testified about her investigative work after being assigned Applicant's North Carolina-based registration application. DI stated that she ''went online and . . . actually just started searching the nursing boards for the states for which . . . [she] knew . . . [Applicant] had licensing.'' *Id.* at 39. From this online research, DI testified that she learned about Applicant's Illinois license status ''based on information given in consent orders that were public information on their websites.'' *Id.* at 39–40; *see also id.* at 41 (DI testimony that the Iowa documentation mentioned that ''there was a refusal to renew in Illinois . . . [a]nd so that led me to check Illinois as well.'').

DI testified that her investigative work moved beyond conducting online research and included contacting Tennessee to ''find out the underlying facts, because all of them kind of pointed to Tennessee as sister state disciplinary action.'' *Id.* at 40. DI described three individuals and the assistance they gave her investigation. The first was an attorney involved in the Tennessee action against Applicant, the second was an individual in the Air Force Surgeon General's office whose name DI obtained from the Tennessee attorney, and the third was an individual from the Illinois Department of Professional Regulation who explained the meaning of ''refuse to renew'' status in Illinois. *Id.* at 47–63. From Tennessee, Iowa, and Illinois, DI obtained consent decrees, settlement agreements, and other records. *Id.* at 104. From the Air Force, DI obtained a ''59-page report'' and ''a packet that included the review of . . . [Applicant's] patient encounters.'' [8] *Id.* DI testified that she found nothing in the states' and Air Force's records that ''went after her licensing.'' *Id.* at 106. Instead, she testified, ''it was actually kind of a chain reaction.'' *Id.* DI explained that ''after the Air Force took action and Tennessee took action, because of the action in Tennessee, then Illinois and Iowa took action.'' *Id.* DI specifically addressed the Air Force report, GX 2, and the Air Force's action concerning Applicant, testifying that there is ''not anything [in GX 2] that specifically says [that Applicant committed] a controlled substance violation.'' *Id.* at 105; *compare id.* at 111–128, RD, at 24–32, and Govt Exceptions, at 4–18.

When asked what made her decide that Applicant made false statements in the North Carolina-based registration application, DI initially responded that her reading of Applicant's answer to the third Liability question ''did not actually answer the question being asked'' in her opinion. Tr. 94. ''The information that . . . [Applicant] provided seems to be an answer to Question 2 and not the answer to Question 3,'' she elaborated. *Id.* at 95. When asked whether her testimony was that ''the words state licensure being placed on probation'' are false, DI responded that ''I'm not saying that that is false, I'm saying that the information provided does not answer the question being asked.'' *Id.; see also id.* at 104 (''No, I wouldn't say that it was false.''). DI's testimony was that Applicant's words were ''inadequate.'' *Id.* at 95. She also stated that ''the details . . . seem in conflict with one another'' because Applicant never had ''any state licensure that's been placed on probation in the state of North Carolina,'' yet Applicant listed ''Winston-Salem, North Carolina'' as the ''incident location.'' *Id.* at 95–96; *see also id.* at 109–111 (DI testifying that, to her knowledge, no action was taken against Applicant's state professional license on January 31, 2019, no action was taken against Applicant's professional license in North Carolina, Applicant's professional license in North Carolina was never disciplined for misreading or falsifying an application, and Applicant never surrendered a state professional license to any DEA agent).[9] DI acknowledged that, if she had been in the place of the ''initial Diversion Investigator'' to whom the matter was assigned, she would have looked for every state in which Applicant was licensed. *Id.* at 102. She characterized such an effort as ''due diligence.'' *Id.* at 104.

I agree with the RD that DI presented as ''an objective, dispassionate regulator whose testimony was sufficiently detailed, internally consistent, and plausible to be afforded full credibility.'' RD, at 11.

E. Applicant's Case

At the hearing, Applicant testified and succeeded in having seven of her exhibits admitted into evidence. Tr. 131–261.

Applicant testified about her experience using the online registration application submission process for her North Carolina-based registration application. *Id.* at 132–40, 141–45; RX 12, at 1. She stated that, when she responded ''yes'' to a Liability question, ''a blank box pops up'' and ''[t]here is no instructions [sic] as to what information to put in there.'' [10] Tr. 133. During her testimony, she surmised that ''it would have solved the problem if

[7] DI also indicated that SA provided her the documentation regarding Applicant's January 2019 surrender ''because there were some concerns regarding if . . . [Applicant's] answer was complete.'' Tr. 86.

[8] DI authenticated the six non-DEA Government exhibits, all of which she obtained through her investigative work: GX 2 (United States Department of the Air Force Professional Staffing Record), GX 3 (Tennessee Board of Nursing Consent Order), GX 4 (Illinois Department of Financial and Professional Regulation, License Lookup Information), GX 5 (Iowa Board of Nursing Notice of Hearing and Statement of Charges), GX 6 (Iowa Board of Nursing Settlement Agreement and Final Order), and GX 8 (State of Illinois Department of Financial and Professional Regulation Consent Order dated June 8, 2015). Tr. 41–63.

[9] *See also* Tr. 98–99 (DI testifying that ''My understanding of what she has written, her answer to Question 3 does not answer the question. The facts may be true that are listed there, but it's not answering the question that has been asked. Question 3 is specifically asking about state licensure and she is telling me about a surrender of her DEA registration, which would be a federal registration. And as I said, so she's listing the date she surrendered her federal registration, she lists the incident result as the surrender of her DEA registration, and the location is when she did that. When it comes to—she does mention her misreading the—basically, she gives an explanation of why she surrendered her DEA registration. The information that she has provided there . . . I have some background knowledge on this only because I was at that meeting. The initial Diversion Investigator who received this information would not have had that information at his fingertips and reading that, I don't believe he would have been able to come to the information quite as easily or have already had some background knowledge of what had happened regarding her state registration.'').

[10] Applicant testified consistently that only a blank box appeared when she responded ''yes'' to Liability questions two and three. Tr. 239; *see also id.* at 239–42, 249 (Applicant testifying that she consulted Google for instructions and, when responding to questions about RX 12, at 67 showing three categories of information (location, nature, and disposition) under the heading of ''Answers to Liability Questions,'' testified that, as she recalls, she ''independently determined that the relevant categories of information were location, nature, and disposition''); *cf. id.* at 241–42 (Applicant testifying that ''it's possible'' there were prompts asking for date, nature of incident, location, and disposition).

. . . [the online registration application submission process] would have said what State licensure, what State, what license, was it revoked, suspended, denied, restricted.'' *Id.* at 144–45. Applicant's testimony continued with her stating that she ''think[s] that would have solved the problem because . . . [she] could have answered Tennessee, probation, Iowa, probation.'' *Id.* at 145.

In the context of her testimony about her suboptimal experience attempting to complete the online DEA registration application, Applicant testified that she ''took it upon . . . [herself] to answer the questions based on what . . . [she] was instructed to from the January 31st meeting as far as the yesses that needed to be in there.'' *Id.* She similarly testified in response to questioning by the Chief ALJ about the ''confusion . . . because it asks you if you had a State professional license action, essentially, against you, and the answer was yes and you start talking about Winston-Salem, North Carolina, and that really had nothing to do with the State. . . . That's what a lot of this comes down to.'' *Id.* at 136. Applicant responded that she ''put that down there because when . . . [she] was in the meeting on January 31st with the three DEA agents . . . [she] was informed that . . . [DI] would be the investigating officer and it was already disclosed that . . . [she] already had . . . [her] license placed on probation, the two States.'' *Id.* at 137. After the Chief ALJ restated the question as ''why would you answer a question dealing with State licenses with that date and that place,'' Applicant responded that, ''I guess that's how I read it, sir.'' *Id.* at 138–39. She elaborated that ''the DEA agents already knew that . . . [her] license had been placed on probation in the State of Tennessee and Iowa for nurse practitioner, so they already knew the information from . . . [the] meeting.'' *Id.* at 139; *see also id.* at 140 (Applicant responding ''no'' to whether she thought it was necessary to explain each state because DEA ''already knew about . . . [her] two nurse practitioner licenses already being placed on probation''); *id.* at 142 (Applicant testifying that she ''read over the State licensure . . . [and] immediately went to controlled substance registration revocation. . . . [she] just didn't grab that State licensure wording in there.''); *id.* at 142–43 (Applicant responding to why she thought the second and third Liability questions asked about the same thing, stating she ''blew past the State professional license words. . . . just blew through them.'').

Applicant also testified about the meeting with the DEA investigative team on January 31, 2019. *Id.* at 140–41, 152–56. She stated that the meeting took place in the evening from about 6:00 to 8:00. *Id.* at 152. Applicant testified that SA told her that her boss, a provider at the Woodlawn Pain Care Clinic where she was working at the time, ''was under investigation and they wanted to speak to . . . [her] about . . . [him].'' [11] *Id.* at 152–55. She stated that ''[i]t was a lot of questions.'' *Id.* at 156.

Applicant testified that, at the conclusion of the meeting, SA ''showed . . . [her] the questionnaire [application that she had submitted for her Virginia-based DEA registration], . . . [she] read it once, and then he had . . . [her] re-read it again and then . . . [she] realized . . . [she] had made a mistake, that . . . [she] had put a no when it should have been a yes that . . . [her] license was placed on probation.'' *Id.* at 140; *see also id.* at 156–57. She testified that SA ''didn't say anything about . . . [her] licensure being placed on probation.'' *Id.* at 141. She added that SA ''didn't disclose that information to . . . [her, she] disclosed it to him.'' *Id.* She testified that she ''told him [SA], yes, that . . . [she] read it wrong, that . . . [her] license in Tennessee and Iowa had been placed on probation.'' *Id.* Applicant added that she then ''noticed under his [SA's] left arm he had a copy of . . . [her] Tennessee licensure probation information because . . . [she] saw . . . [her] signature on there and . . . [she] had already known what the information was.'' *Id.*

According to Applicant's testimony, SA told her that she ''could either go in front of a judge, or . . . [she] could sign the surrender for cause certificate that they had already made up for . . . [her].'' *Id.* at 157–58. She testified that she signed the surrender certificate ''[b]ecause . . . [she] realized . . . [she] had made an error.'' *Id.* at 159. Applicant stated that she asked about reapplying for ''another DEA number'' and that SA said she could ''but . . . [she] needed to make sure that . . . [she] answered yes to . . . the ones . . . [she] had previously answered wrong.'' *Id.* at 157–58. She testified that SA said nothing more about how to answer the second and third Liability questions and that SA told her it would take two to three weeks for her to get a new registration. *Id.* at 158–59. She testified that SA told her DI ''would be handling . . . [her] application when . . . [she] reapplied'' and that, at the time, DI said nothing pertaining to reapplication. *Id.* at 157, 159.

I agree with the Chief ALJ that, ''where . . . [Applicant's] testimony conflicts with other objective evidence and testimony received during the proceedings, it must be scrutinized with great caution.'' RD, at 17.

F. Allegation That Applicant Submitted a Materially False Registration Application

Having read and analyzed all of the record evidence, I find from clear, unequivocal, convincing, and unrebutted record evidence that Applicant answered ''yes'' to Liability questions two and three. GX 1, at 1–2. I further find from clear, unequivocal, convincing, and unrebutted record evidence that Applicant's ''yes'' answers to Liability questions two and three are true. *See, e.g.,* GX 3, GX 6, and GX 7.

Concerning Applicant's responses to the follow-up required due to her affirmative answer to the second Liability question, having read and analyzed all of the record evidence, I find from clear, unequivocal, convincing, and unrebutted record evidence that those responses told DI that Applicant ''surrendered for-cause a federal controlled substance registration,'' that Applicant's explanation was, ''essentially, she misunderstood the instructions on how she was supposed to respond to that . . . particular question,'' and that ''there is a state licensure being restricted'' and ''that is why she surrendered her DEA registration.'' Tr. 84, 86. I further find from clear, unequivocal, convincing, and unrebutted record evidence that Applicant's submission put DI on notice and gave DI ''some information regarding the potential'' that Applicant had a state licensure restriction. *Id.* at 85–86, 103. Having read and analyzed all of the record evidence, I also find from clear, unequivocal, convincing, and unrebutted record evidence that DI was one of the witnesses to Applicant's voluntary surrender of her Virginia-based registration on January 31, 2019. *Id.* at 35–36, 68.

Concerning Applicant's responses to the follow-up required due to her affirmative answer to the third Liability question, having read and analyzed all of the record evidence, I find from clear, unequivocal, convincing, and unrebutted record evidence that DI did not consider those responses false; DI considered that the information Applicant provided ''does not answer the question being asked.'' *Id.* at 94. I further find from clear, unequivocal, convincing, and unrebutted record

[11] Applicant testified that she was working as a nurse practitioner for this same provider at the North Carolina practice he opened after DEA investigated him in Virginia. Tr. 252–53.

evidence that DI ''started searching under licensing'' for Applicant after receiving Applicant's North Carolina-based registration application. *Id.* at 85–86. Having read and analyzed all of the record evidence, I also find from clear, unequivocal, convincing, and unrebutted record evidence that DI learned about the Tennessee and Iowa probationary actions on Applicant's licenses from her attendance at the meeting on January 31, 2019. *Id.* at 79, 90–92.

Having read and analyzed all of the record evidence, I find from clear, unequivocal, and convincing record evidence that Applicant met with a DEA investigative team on January 31, 2019. *See, e.g., id.* at 32–37 (DI's corrected testimony), GX 7. I also find from clear, unequivocal, convincing, and unrebutted record evidence that the DEA investigative team's meeting with Applicant took place in Winston-Salem, North Carolina in a hotel lobby in the evening from about 6:00 until 8:00. Tr. 71 (DI's testimony); *id.* at 151–52, 155 (Applicant's testimony). I further find from clear, unequivocal, convincing, and unrebutted record evidence that the outcomes of the Winston-Salem meeting included Applicant's voluntary surrender of her Virginia-based registration and the DEA investigative team's provision of input and instructions to Applicant about the next DEA registration application she might submit. *See, e.g., id.* at 35–36, 65–75 (DI's testimony); *id.* at 156–159 (Applicant's testimony); GX 7. I also find from unrebutted record evidence that the DEA investigative team advised Applicant at the Winston-Salem meeting that she may apply for a DEA registration at a registered location in North Carolina, cautioned Applicant, in the event she reapplies, to answer ''yes'' to the Liability questions she previously incorrectly answered in the negative, told Applicant that DI would handle any application she submitted for registration in North Carolina, and predicted that it would take two to three weeks for Applicant to get a new registration if she were to submit a complete and correct application. Tr. 71–75 (DI's testimony); *id.* at 157–59 (Applicant's testimony).

I already found that Applicant submitted an online application for a DEA registration with a registered address in North Carolina on or about March 1, 2019. *Supra* section II.C. Having read and analyzed all of the record evidence, I find that the unrebutted record evidence is that Applicant's North Carolina-based registration application was initially assigned to ''one of the brand new investigators in the office who was still in . . . [the] training program,'' that the new investigator's field training officer recognized Applicant's name and confirmed DI's familiarity with Applicant, and that Applicant's North Carolina-based registration application was reassigned to DI. Tr. 37–38 (DI's testimony). I find that the unrebutted record evidence is that the investigation into Applicant's North Carolina-based registration application remained DI's responsibility and that Applicant's North Carolina-based registration application was not assigned away from DI. *See, e.g., id.* at 28. I find that the Government did not submit clear, unequivocal, and convincing evidence about the online registration application process, including what information the online application elicits after an applicant responds ''yes'' to a Liability question. *See, e.g., id.* at 87, 93 (DI's testimony).

Having read and analyzed all of the record evidence, I do not find clear, unequivocal, and convincing record evidence that Applicant's North Carolina-based registration application was false. Having read and analyzed all of the record evidence, I do not find any record evidence rebutting Applicant's testimony that her responses to the second and third Liability questions' follow-up reflected the input and instructions she received from the DEA investigative team on January 31, 2019.[12]

III. Discussion

A. The Controlled Substances Act and the Public Interest Factors

Pursuant to the Controlled Substances Act (hereinafter, CSA), ''[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). The CSA further provides that an application for a practitioner's registration may be denied upon a determination that ''the issuance of such registration . . . would be inconsistent with the public interest.'' *Id.* In making the public interest determination, the CSA requires consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether . . . an application for registration [should be] denied.'' *Id.* Moreover, while I am required to consider each factor, I '' 'need not make explicit findings as to each one,' '' and I '' 'can give each factor the weight . . . [I] determine[ ] is appropriate.' '' *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (quoting *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016)); *see also MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011) (quoting *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009) (quoting *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005))). In other words, the public interest determination ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Peter A. Ahles, M.D.,* 71 FR 50097, 50098–99 (2006).

In this matter, as already discussed, the OSC calls for my adjudication of the North Carolina-based registration application based on the charge that Applicant submitted materially false responses to its second and third Liability questions. OSC, at 1–4; *supra* sections II.A and II.D. Material falsification, of course, is a basis for revocation or suspension. 21 U.S.C. 824(a)(1). While the OSC references 21 U.S.C. 823(f), it does not specifically allege that granting Applicant's North Carolina-based registration application would be inconsistent with the public interest based on consideration of the factors in 21 U.S.C. 823(f)(1) through (5). *Supra* section III.A. In addition, while the Government presented some evidence and argument that the North Carolina-based registration application should be denied due to concerns about

[12] The Government neither cross-examined Applicant concerning her testimony about the input and instructions she stated the DEA investigative team gave her during the Winston-Salem meeting, nor put on a rebuttal case after Applicant's testimony.

Applicant's controlled substance prescribing, Government counsel confirmed that material falsification is the exclusive basis for the application denial sought by the Government. Tr. 214–16. Given the allegations noticed in this matter, no other conclusion is legally supportable. Accordingly, the sole, specific substantive basis for proposing the denial of Applicant's North Carolina-based registration application is material falsification under 21 U.S.C. 824(a)(1). OSC, at 1–4; *see also* Tr. 211–218.

Prior Agency decisions have addressed whether it is appropriate to consider a provision of 21 U.S.C. 824(a) when determining whether or not to grant a practitioner registration application. For over forty-five years, and as recently as a few months ago, Agency decisions have concluded that it is. *See, e.g., Robert Wayne Locklear,* 86 FR 33738 (2021) (collecting Agency decisions). Those decisions have offered multiple bases and analyses for that conclusion. 86 FR at 33744–45. I agree with my predecessors' conclusions that a provision of 21 U.S.C. 824 may be the basis for the denial of a practitioner registration application, and that the 21 U.S.C. 823 factors remain relevant to the adjudication of a practitioner registration application when a provision of 21 U.S.C. 824 is involved. *Id.*

B. The Material Falsification Allegations

Regarding 21 U.S.C. 824(a)(1), the Agency recently addressed the elements of a material falsification concluding, among other things, that *Kungys* v. *United States,* 485 U.S. 759 (1988), and its recent progeny remain consistent with the CSA. *Frank Joseph Stirlacci, M.D.,* 85 FR 45229, 45238 (2020). According to the Supreme Court, material means having 'a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed.'' *Id.* (citing *Kungys,* 485 U.S. at 771).

The Government argues that, although Applicant correctly responded ''yes'' to the third Liability question, ''when called upon to provide a 'complete' explanation for her answer, she provided substantive information that was false . . . and concealed information that was true.'' Government's Proposed Findings of Fact, Conclusions of Law, and Argument, dated November 1, 2019, at 1. According to the Government, the ''substantive information that was false'' was that ''her state license had been subject to action in North Carolina in 2019,'' and the ''concealed information that was true'' was that ''her state licenses had been subject to various disciplinary actions in Tennessee, Iowa, and Illinois in 2015.'' *Id.* In other words, the Government argues that Applicant's responses to the follow up engendered due to her ''yes'' response were false, on the one hand, and did not disclose responsive information that was true, on the other hand. *Id.* Consequently, I now address whether the North Carolina-based registration application was materially false according to the *Kungys* definition of ''material.''

As already discussed, I find from clear, unequivocal, convincing, and unrebutted record evidence that Applicant answered ''yes'' to Liability questions two and three. *Supra* section II.F. In addition, as already discussed, I find from clear, unequivocal, convincing, and unrebutted record evidence that Applicant's ''yes'' answers to Liability questions two and three are true. *Id.* According to the record evidence that the Government submitted regarding Applicant's responses to the follow-up required due to her ''yes'' answers, I also find clear, unequivocal, convincing, and unrebutted record evidence that DI did not consider those responses false, but that DI considered that the information Applicant provided ''does not answer the question being asked.'' *Id.* I further find the Government did not submit clear, unequivocal, and convincing evidence about the online registration application process, including what information the online application elicits after an applicant responds ''yes'' to a Liability question. *Id.*

As already discussed, I find from clear, unequivocal, convincing, and unrebutted record evidence that the DEA investigative team provided input and instructions to Applicant about the next DEA registration application she might submit during their meeting on January 31, 2019. *Supra* section II.F. In addition, as already discussed, I find from unrebutted record evidence that the DEA investigative team advised Applicant at that time that she may apply for a DEA registration at a registered location in North Carolina, cautioned Applicant, in the event she reapplies, to answer ''yes'' to the Liability questions she previously incorrectly answered in the negative, told Applicant that DI would handle any application she submitted for registration in North Carolina, and predicted that it would take two to three weeks for Applicant to get a new registration if she were to submit a complete and correct application.[13] *Id.* Also, as already discussed, I do not find any record evidence rebutting Applicant's testimony that her responses to the second and third Liability questions' follow-up reflected the input and instructions she received from the DEA investigative team on January 31, 2019. *Id.* According to the arguments made by Applicant's counsel during the hearing, Applicant admits that her responses to the follow-up were incomplete and inadequate. Tr. 199. Applicant's counsel argued that Applicant did her best and what she thought she was supposed to do based on what she had been told in January. *Id.*

As already mentioned, the found facts of this case are unique and not likely ever to recur. Based on those facts, Applicant's responses to the follow-up that ensued from her ''yes'' responses to two Liability questions did not have a ''natural tendency to influence'' and were not ''capable of influencing'' the Agency's decision regarding Applicant's North Carolina-based registration application because the responses stemmed from Applicant's meeting with the DEA investigative team on January 31, 2019. In addition, the Government did not submit evidence rebutting Applicant's evidence about what transpired during her meeting with the DEA investigative team on January 31, 2019. For these reasons, I credit Applicant's evidence about what the DEA investigative team told her during that meeting and what impact that had on the content of the North Carolina-based registration application. It would, therefore, be inappropriate for me to find a material falsification violation when the Government submitted no evidence rebutting Applicant's rendition of what the DEA investigative team told her that impacted the content of the North Carolina-based registration application.[14] *Supra* section II.F.

Accordingly, on the unique and unlikely ever to recur record evidence before me, I find that the follow-up

[13] Applicant submitted the North Carolina-based registration application on or about March 1, 2019, about a month after she met with the DEA investigative team. GX 1, at 1.

[14] Given the unique found facts in this matter, my findings and conclusions do not impact prior Agency decisions stating, for example, that misinterpretation of the application does not relieve an applicant of the responsibility to read the question carefully and answer all parts of it honestly, or that negligence and carelessness in completing an application could be a sufficient reason to revoke a registration. *See, e.g., Martha Hernandez, M.D.,* 62 FR 61,145, 61,147 (1997) (finding that respondent submitted material falsifications that are grounds for revocation, but concluding that revocation is not an appropriate sanction in light of the facts and circumstances).

responses Applicant provided in her North Carolina-based registration application were not ''predictably capable of affecting, that is, had a natural tendency to affect, the official decision'' of DEA given Applicant's unrebutted record evidence of the input and instructions she said she received during her meeting with the DEA investigative team on January 31, 2019.

The Government has the burden of proof in this proceeding. 21 CFR 1301.44. For the above-stated reasons, I find that the Government has failed to meet its burden. The record evidence does not include clear, unequivocal, and convincing evidence that Applicant materially falsified her North Carolina-based registration application. 21 U.S.C. 824(a)(1); *Frank Joseph Stirlacci, M.D.,* 85 FR 45,229 (2020). Accordingly, I am dismissing the OSC.

However, as explained *supra* section II.B., Applicant is not currently ''authorized to dispense controlled substances under the laws of the State'' of North Carolina, I have no statutory authority to grant Applicant's North Carolina-based registration application. 21 U.S.C. 823(f); 21 U.S.C. 802(21); *supra* section II.B.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f) and 824(a), I hereby dismiss the Order to Show Cause issued to Lisa Mae Jones, N.P. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), in conjunction with 21 U.S.C. 802(21), I deny Application No. W19018692M. This Order is effective October 20, 2021.

Anne Milgram,

Administrator.

[FR Doc. 2021–20241 Filed 9–17–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Humberto A. Florian, M.D.; Decision and Order

On March 24, 2021, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Humberto A. Florian, M.D. (hereinafter, Registrant) of Anaheim, California. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. FF0235451. *Id.* It alleged that Registrant is ''without authority to handle controlled substances in California, the state in which [he is] registered with DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that the Medical Board of California, Department of Consumer Affairs (hereinafter, the Board) issued a Decision on November 21, 2018, to revoke Registrant's medical license. *Id.* at 2. On December 21, 2018, the Board issued an Order denying Registrant's Petition for Reconsideration of the Decision and Registrant's medical license was revoked. *Id.* The California Medical Board revoked Registrant's medical license following its findings, *inter alia,* that Registrant was grossly negligent, committed repeated negligent acts, failed to maintain accurate and adequate medical records, and violated the California Medical Practice Act. *Id.*

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration, dated August 11, 2021, a Diversion Investigator (hereinafter, the DI) assigned to the Riverside District Office, Los Angeles Field Division, attempted to contact Registrant, including at his registered address in Anaheim, California, ''to determine if he would voluntarily surrender his [DEA registration] in light of his lack of state authority to prescribe controlled substances.'' Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 3 (DI's Declaration), at 1–2. The DI stated that a receptionist at the registered address said that ''[Registrant] had retired, but [the] office still forwarded mail to him.'' *Id.* at 2. Following the issuance of the OSC, the DI traveled with another DI on April 2, 2021, to ''the last known residence'' of Registrant to attempt to serve Registrant with the OSC, but service was unsuccessful as ''no one appeared to be at the residence at that time.'' *Id.* On April 12, 2021, the Riverside District Office, Los Angeles Field Division mailed a copy of the OSC to Registrant's last know residence via first-class mail and the mailing was not returned as undeliverable. *Id.* On May 14, 2021, the Los Angeles Field Division mailed a copy of the OSC to Registrant's registered address via first-class mail with return receipt requested, to which the DEA received ''an unsigned return receipt on May 24, 2021, indicating that the [OSC] had been delivered.'' *Id.; see also* RFAAX 3, Appendix (hereinafter, App.) B. Finally, on May 20, 2021, the DI sent a copy of the [OSC] to Registrant via his registered email address and did not receive any error message that indicated that the email was not delivered. RFAAX 3, at 2.; *see also* RFAAX 3, App. C (copy of email). The DI also stated that a review of the email system showed that the email had been delivered. RFAAX 3, at 2. The DI concluded that, ''[t]o date, neither [Registrant] nor any attorney representing [Registrant] has requested a hearing. Neither has [Registrant] nor any attorney for [Registrant] submitted a written statement.'' *Id.* at 3.

The Government forwarded its RFAA, along with the evidentiary record, to this office on August 12, 2021. In its RFAA, the Government represents that ''[Registrant] has not submitted a timely request for a hearing in this matter.'' RFAA, at 1. The Government ''seeks to revoke the [DEA registration] of [Registrant] because he lacks authority to handle controlled substances in the State of California, the state where he is registered with DEA.'' *Id.*

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on or before May 20, 2021. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the DI's Declaration and the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FF0235451 at the registered address of 2090 S Euclid St. Ste. 104, Anaheim, CA 92802. RFAAX 1 (DEA Certificate of Registration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules III through V as a practitioner.

Id. Registrant's registration expires on September 30, 2021. *Id.*

The Status of Registrant's State License

On June 22, 2018, Administrative Law Judge Abraham M. Levy of the Office of Administrative Hearings, State of California (hereinafter, CA ALJ), issued a Proposed Decision (hereinafter, CA ALJ Decision). RFAAX 3, App. A, at 17 and 30. According to the CA ALJ Decision, Registrant ''committed gross negligence and repeated negligent acts, he failed to maintain adequate and accurate records relating to his treatment of Patient A, and he, in turn, violated the Medical Practice Act.'' *Id.* at 18. The CA ALJ Decision summarizes that Registrant ''saw Patient A five times between March 2014 and July 2014, ordered a chest x-ray and a lab work-up, and despite abnormal findings on the x-ray indicating further follow-up was needed, [Registrant] failed to follow up on the x-ray findings or clinically assess Patient A's lung condition.'' *Id.* at 17. According to the CA ALJ Decision summary, ''[o]n August 14, 2014, Patient A died from respiratory failure and interstitial lung disease due to Chronic Obstructive Pulmonary Disease (COPD), pulmonary hypertension, and small cell lung cancer.'' *Id.* Further, according to the ALJ Decision, ''[Registrant] failed to present any evidence of rehabilitation, or evidence showing he is amenable to probation, to justify placing him on probation.'' *Id.* at 18. The CA ALJ Decision concluded that ''public protection requires that [Registrant's] license be revoked.'' *Id.*

On July 31, 2018, the Board issued an Order of Non-Adoption of Proposed Decision, which ordered that the ALJ Decision was not adopted and that a panel of the Board would decide the case upon the record. *Id.* at 16. On November 21, 2018, the Board issued a Decision after Non-Adoption (hereinafter, Board Decision). *Id.* at 2 and 15. The Board Decision incorporated the factual findings of the CA ALJ. *Id.* at 2–4. The Board Decision ordered that Registrant's medical license be revoked effective December 21, 2018. *Id.* at 15. On December 21, 2018, the Board issued an Order Denying Petition for Reconsideration that denied the Petition filed by Registrant for the reconsideration of the Board Decision. *Id.* at 1.

According to California's online records, of which I take official notice, Registrant's license is still revoked.[1] Medical Board of California License Verification, *https://www.mbc.ca.gov/License-Verification* (last visited date of signature of this Order). California's online records show that Registrant's medical license remains revoked and that Registrant is not authorized in California to practice medicine. *Id.*

Accordingly, I find that Registrant is not licensed to engage in the practice of medicine in California, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

According to California statute, ''dispense'' means ''to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, furnishing, packaging, labeling, or compounding necessary to prepare the substance for that delivery.'' Cal. Health & Safety Code § 11010 (West, current with urgency legislation through Ch. 115 of 2021 Reg. Sess). Further, a ''practitioner'' means a person ''licensed, registered, or otherwise permitted, to distribute, dispense, conduct research with respect to, or administer, a controlled substance in the course of professional practice or research in this state.'' *Id.* at § 11026(c). Because Registrant is not currently licensed as a physician, or otherwise licensed in California, he is not authorized to dispense controlled substances in California.

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in California. As already discussed, a physician must be a licensed practitioner to dispense a controlled substance in California. Thus, because Registrant lacks authority to practice medicine in California and, therefore, is not authorized to handle controlled substances in California, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FF0235451 issued to Humberto A. Florian, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Humberto A. Florian to renew or modify this registration, as

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

well as any other pending application of Humberto A. Florian, for additional registration in California. This Order is effective October 20, 2021.

Anne Milgram,

Administrator.

[FR Doc. 2021–20246 Filed 9–17–21; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Steven P. French, M.D.; Decision and Order

On February 11, 2021, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to Steven P. French, M.D. (hereinafter, Registrant) of Jackson, Wyoming. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. FF5659505. *Id.* It alleged that Registrant is ''without authority to handle controlled substances in Wyoming, the state in which [he is] registered with DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that the Wyoming Board of Medicine (hereinafter, the Board) issued a Findings of Fact, Conclusions of Law, and Order on April 17, 2020. *Id.* at 1. According to the OSC, the Board accepted Registrant's voluntary relinquishment of his Wyoming medical license following its finding, *inter alia,* that Registrant was convicted of driving under the influence. *Id.* at 1–2. The Board further found that during Registrant's arrest for driving under the influence, Wyoming authorities ''discovered in [Registrant's] possession a prescription bottle of lorazepam 0.5 mg pills belonging to one of [his] patients, but with one pill missing.'' *Id.* at 2.

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a Declaration, dated July 21, 2021, a Diversion Investigator (hereinafter, the DI) assigned to the Cheyenne Resident Office of the Denver Field Division, stated that on September 21, 2020, prior to the issuance of the OSC, he had communicated via email with Registrant regarding Registrant's DEA registration. Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 3 (DI's Declaration), at 1. The DI stated that the following day, ''[Registrant] responded to the email [the DI] had sent him and indicated that he had moved to Alaska and that for any future communications [the DI] should contact him via email.'' *Id.; see also* RFAAX 3, Appendix (hereinafter, App.) A (email exchange with Registrant). On February 12, 2021, the DI sent a copy of the OSC to Registrant via email. *Id.* at 1. The DI stated that later that day, Registrant ''responded to [the] email and indicated that he received a copy of the [OSC].'' *Id.* at 1–2; *see also* RFAAX 3, App. B (email from Registrant). The DI stated that, as of July 21, 2021, ''DEA has not received any correspondence from [Registrant] or any attorney acting on his behalf concerning the [OSC].'' RFAAX 3, at 2.

The Government forwarded its RFAA, along with the evidentiary record, to me on August 10, 2021. In its RFAA, the Government represents that ''[Registrant] has not submitted a timely request for a hearing in this matter.'' RFAA, at 1. The Government seeks to revoke Registrant's DEA registration because ''[Registrant] lacks authority to handle controlled substances in the State of Wyoming, the state where he is registered with DEA.'' *Id.*

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on February 12, 2021. I also find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the DI's Declaration and the Government's written representations, I find that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FF5659505 at the registered address of 6605 N Snake River Woods Dr., Jackson, WY 83001. RFAAX 1 (Certificate of Registration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration expires on September 30, 2021. *Id.*

The Status of Registrant's State License

On January 16, 2020, Registrant submitted a letter to the Board informing it that he was voluntarily relinquishing his Wyoming medical license. RFAAX 3, App. C, at 19. On March 19, 2020, a member of the Board petitioned the Board to accept Registrant's voluntary relinquishment of his Wyoming Physician License. *Id.* at 13. On April 17, 2020, the Board issued its Findings of Fact, Conclusions of Law, and Order Accepting Voluntary Relinquishment of the Wyoming Physician License of Steven P. French, M.D., Wyoming Physician License No. 3068A (hereinafter, Board Order). *Id.* at 1.

According to the Board Order, in September 2018, Registrant's clinical privileges were permanently revoked by Crook County Medical Services District in Sundance, Wyoming based upon an incident in August 2018 where Registrant was allegedly intoxicated and exhibited ''disruptive, abusive, and threatening behavior'' at the hospital while he was off-duty. *Id.* at 3. When the Wyoming Medicine Board opened a complaint on the matter, Registrant denied any inappropriate behavior and ''asserted that he had unilaterally resigned his clinical privileges as opposed to them being revoked.'' *Id.* On July 2, 2019, while the first complaint was still pending, Registrant applied to renew his Wyoming medical license and indicated on his application that he ''was convicted of driving under the influence on November 26, 2018, related to an arrest incident that occurred on July 12, 2018.'' *Id.*

The Board opened an additional complaint concerning the arrest incident. *Id.* The Board Order states that Registrant was arrested for a DUI at a gas station, and ''[d]uring the arrest, sheriff deputies also located a prescription bottle of [l]orazepam 0.5 mg for 30 pills, of which one pill was missing.'' *Id.* at 4. Further, ''[t]he label indicated the prescription was written by [Registrant] for one of his patients'' and ''[i]t was determined that the prescription was

filled in Sundance, Wyoming, on the same day [Registrant] was arrested.'' *Id.* The Board Order states that according to the sheriff's report, Registrant refused intoximeter breath testing for alcohol, the sheriff deputies obtained a search warrant, and Registrant's blood was drawn that evening indicating that Registrant had an ethyl alcohol concentration of 0.190. *Id.* Further investigation by the Board found that Registrant had three additional DUI convictions from 2008, 2012, and 2018. *Id.*

The Board ordered a Clinical Professional Fitness to Practice Evaluation of Registrant on September 26, 2019, and Registrant was evaluated the week of November 4–7, 2019. *Id.* at 5. The evaluation recommended that Registrant enter into a residential treatment program for addiction, engage in a monitoring contract with the Wyoming Professionals Assistance Program for the remainder of his career, abstain from controlled substances, follow up with local outpatient care following his treatment program, attend addiction recovery support meetings, and explore the option of using medication with a treating psychiatrist. *Id.* at 6.

According to the Board Order, on December 30, 2019, Registrant agreed to voluntarily refrain from the practice of medicine until the disciplinary matter was resolved. *Id.* However, Registrant ''refused and/or failed to comply'' with any of the recommendations from the evaluation. *Id.* Following the letter that Registrant submitted on January 16, 2020, Registrant also emailed the Board on February 14, 2020, and wrote that he was, ''no longer a member of [the] organization thus [the] rules and regulations no longer [applied] to [him].'' *Id.* at 6–7. In lieu of further disciplinary proceedings, the Wyoming Medicine Board sought to accept Registrant's offer to voluntarily relinquish his Wyoming medical license. *Id.* at 7. The Board Order accepted Registrant's voluntary relinquishment of his Wyoming medical license and thus ordered his authority and ability to practice medicine in Wyoming to be relinquished. *Id.* at 11.

According to Wyoming's online records, of which I take official notice, Registrant's medical license remains relinquished and Registrant is not authorized in Wyoming to practice medicine.[1] Wyoming Board of Medicine Physician License Search, *wyomedboard.wyo.gov/physicians/physician-license-look-up* (last visited date of signature of this Order). *Id.* Further, Wyoming's online records, of which I take official notice, show that Registrant's Wyoming individual controlled substance registration is not currently active.[2] Wyoming State Board of Pharmacy Licensing, *https://pharmacyboard.wyo.gov/licensing/controlled-substance-reg* (last visited date of signature of this Order).

Accordingly, I find that Registrant is not currently licensed to engage in the practice of medicine nor to handle controlled substances in Wyoming, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27616, 27617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51104, 51105 (1993); *Bobby Watts, M.D.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27617.

Under Wyoming law, ''dispense'' means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.'' Wyo. Stat. Ann. § 35–7–1002(a)(vii) (West, current through Chs. 1 to 169 of the 2021 Regular Session of the Wyoming Legislature). Further, ''practitioner'' means . . . [a] physician . . . or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or administer a controlled substance in the course of professional practice or research in this state.'' *Id.* at § 35–7–1002(a)(xx)(A). Because Registrant is not currently licensed as a physician, or otherwise licensed, in Wyoming, he is not authorized to dispense controlled substances in Wyoming.[3]

Here, the undisputed evidence in the record is that Registrant currently does not have authority to practice medicine nor to handle controlled substances in Wyoming. As already discussed, only a licensed practitioner is authorized to dispense controlled substances in Wyoming. Additionally, Registrant is not actively registered to dispense controlled substances in Wyoming. Thus, because Registrant is not

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

[2] *See supra* n.1 regarding official notice.

[3] Furthermore, Wyoming law requires ''[e]very person who . . . dispenses any controlled substance within this state . . . [to] obtain every two (2) years, on or before July 1, a registration issued by the board in accordance with its rules.'' Wyo. Stat. Ann. § 35–7–1024(a) (West, current through Chs. 1 to 169 of the 2021 Regular Session of the Wyoming Legislature). As found above, Registrant's Wyoming controlled substances registration is not active.

currently licensed to practice medicine nor to handle controlled substances in Wyoming, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FF5659505 issued to Steven P. French, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Steven P. French to renew or modify this registration, as well as any other pending application of Steven P. French, for additional registration in Wyoming. This Order is effective October 20, 2021.

Anne Milgram,

Administrator.

[FR Doc. 2021–20245 Filed 9–17–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0111]

Agency Information Collection Activities: Proposed eCollection eComments Requested; Extension of a Currently Approved Collection; Comments Requested: National Crime Victimization Survey (NCVS)

AGENCY: Office of Justice Programs, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Justice Statistics, Office of Justice Programs, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** allowing a 60-day comment period. Following publication of the 60-day notice, the Bureau of Justice Statistics received two requests for the survey instrument, one communication indicating a suggestion for collection of data and indications support for the continued administration of the survey and two communications indicating support for the continued administration of the survey, which are addressed in Supporting Statement A.

DATES: Comments are encouraged and will be accepted for 30 days until October 20, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Erika Harrell, Statistician, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531 (email: *Erika.Harrell@usdoj.gov;* telephone: 202–307–0758).

SUPPLEMENTARY INFORMATION: 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. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *The Title of the Form/Collection:* National Crime Victimization Survey.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form numbers for the questionnaire are NCVS–1 and NCVS–2. The applicable component within the Department of Justice is the Bureau of Justice Statistics, in the Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

The National Crime Victimization Survey (NCVS) is administered to persons 12 years or older living in sampled households located throughout the United States. The NCVS collects, analyzes, publishes, and disseminates statistics on the criminal victimization in the U.S. BJS plans to publish information from the NCVS in reports and reference it when responding to queries from the U.S. Congress, Executive Office of the President, the U.S. Supreme Court, state officials, international organizations, researchers, students, the media, and others interested in criminal justice statistics.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated annual number of respondents is 124,663. It will take the average interviewed respondent an estimated 25 minutes to respond; the average non-interviewed respondent an estimated 7 minutes to respond; the average follow-up interview is estimated at 15 minutes, and the average follow-up for a non-interview is estimated at 1 minute.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 117,545 annual burden hours associated with this collection.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: September 15, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–20261 Filed 9–17–21; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0065]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Currently Approved Collection: National Corrections Reporting Program

AGENCY: Office of Justice Programs, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information

collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The Department of Justice encourages public comment and will accept input until October 20, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Danielle Kaeble, Statistician, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531 (email: *Danielle.Kaeble@usdoj.gov;* telephone: 202–598–1024).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a Currently Approved Collection.

(2) *The Title of the Form/Collection:* National Corrections Reporting Program. The collection includes the following parts: Prisoner Admission Report, Prisoner Release Report, Prisoners in Custody at Year-end Report, Post-Custody Community Supervision Entry Report, Post-Custody Community Supervision Exit Report.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number(s): NCRP–1A, NCRP–1B, NCRP–1D, NCRP–1E, NCRP–1F. The applicable component within the Department of Justice is the Bureau of Justice Statistics (Corrections Unit), in the Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: 50 state departments of corrections (DOCs) and 7 parole supervising agencies (in six states and the District of Columbia). The National Corrections Reporting Program (NCRP) is the only national data collection furnishing annual individual-level information for state prisoners at five points in the incarceration process: Prison admission, prison release, annual year-end prison custody census, entry to post-custody community corrections supervision, and exits from post-custody community corrections supervision. BJS, the U.S. Congress, researchers, and criminal justice practitioners use these data to describe annual movements of adult offenders through state correctional systems, as well as to examine long-term trends in time served in prison, demographic and offense characteristics of inmates, sentencing practices in the states that submit data, transitions between incarceration and community corrections, and recidivism. Providers of the data are personnel in the states' Departments of Corrections and Parole, and all data are submitted on a voluntary basis. The NCRP collects the following administrative data on each inmate in participating states' custody:

- County of sentencing
- State and federal inmate identification numbers
- Dates of: Birth, prison admission, prison release, projected prison release, mandatory prison release, eligibility hearing for post-custody community corrections supervision, post-custody community corrections supervision entry, post-custody community corrections supervision exit
- First, middle, and last names
- Demographic information: Sex, race, Hispanic origin, education level, prior military service, date and type of last discharge from military
- Offense type and number of counts per inmate for a maximum of three convicted offenses per inmate
- Total sentence length imposed
- Type of facility where inmate is serving sentence (for year-end custody census records only, the name of the facility is also requested)
- Type of prison admission
- Type of prison release
- Location of post-custody community supervision exit or post-custody community supervision office (post-custody community supervision records only)
- Social security number
- Address of last residence prior to incarceration
- Prison security level at which the inmate is held

BJS is not proposing making additions or deletions from the previously approved collection.

BJS uses the information gathered in NCRP in published reports and statistics. The reports will be made available to the U.S. Congress, Executive Office of the President, practitioners, researchers, students, the media, others interested in criminal justice statistics, and the general public via the BJS website.

BJS received zero comments to its 60-day **Federal Register** Notice (*https://www.federalregister.gov/documents/2021/07/13/2021-14831/agency-information-collection-activities-proposed-ecollection-ecomments-requested-extension-of-a*). Responses to these comments will be included in the final clearance package submitted to OMB and available at the NCRP page on *www.reginfo.gov* (*https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1121-0065*).

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: BJS anticipates 57 respondents to NCRP by 2022: 50 state DOC respondents and seven separate parole supervising agencies (in six states and the District of Columbia). All 50 DOCs have recently submitted NCRP prison data, and 40 DOCs or parole boards have submitted PCCS data in the last four years.

Burden hours for prison records (NCRP–1A, NCRP–1B, NCRP–1D): All 50 DOCs have recently submitted NCRP prison data, so the average time needed to continue providing prison data is expected to be 8 hours per respondent for prisoner admissions and releases (NCRP–1A and NCRP–1B) and 8 hours for data on persons in prison at year-end (NCRP–1D), based on conversations with data providers during follow-up calls. The average of 8 hours per respondent considers that some respondents need just 2 hours to make a copy of a research database, while others may need to do additional work, including modifying computer programs, preparing input data, and documenting the record layout.

In 2022–2024, BJS expects to have all 50 DOCs providing NCRP prison data.

The burden for provision of the NCRP data will remain at the 2021 level of 14 hours per respondent due to the fact that the survey is not changing for this approval, for a total of 700 hours annually for the 50 DOCs in 2022, 2023 and 2024.

Burden hours for PCCS records (NCRP–1E, NCRP–1F): There are currently 40 jurisdictions submitting PCCS data (35 DOCs and 5 parole supervising agencies), and BJS estimates that extraction and submission of both the PCCS entries and exits takes an average of 8 hours per jurisdiction. In 2022–2024, BJS hope to recruit an additional 5 jurisdictions to submit NCRP PCCS data. For those 40 supervising agencies currently responding, provision of the PCCS data in 2022–2024 will total 320 hours (8 hours * 40 = 320 hours) annually. The total estimate for submission of PCCS for new jurisdictions in 2022–2024 is 120 hours (24 hours * 5 = 120 hours). For new agencies, BJS assumes the initial submission will take about three times longer than established reporters to account for programming, questions, and submission. The total amount of time for all PCCS submissions annually is 440 hours.

Burden hours for data review/follow-up consultations: Follow-up consultations with respondents are usually necessary while processing the data to obtain further information regarding the definition, completeness and accuracy of their report. The duration of these follow-up consultations will vary based on the number of record types submitted, so BJS has estimated an average of 3 hours per jurisdiction to cover all of the records (prison and/or PCCS) submitted. In 2022, BJS anticipates that one of the two parole supervising agencies not currently submitting PCCS data will begin to submit, so the number of jurisdictions requiring follow-up consultations is 51 (50 DOCs submitting at least the prison data, and one parole supervising agency submitting only PCCS data). This yields a total of 153 hours of follow-up consultation after submission. This total estimate of 153 hours for data review/follow-up consultations remains the same for 2023 and 2024.

Total burden hours for submitting NCRP data: BJS anticipates that the total annual burden for provision of all NCRP data across the jurisdictions will participate in 2022–2024 is anticipated to be 1,293 hours (700 hours for prison records, 440 hours for PCCS records, and 153 hours for follow-up consultation), or 25 hours per respondent.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1,293 total burden hours associated with this collection in 2022, 2023, and 2024.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405B, Washington, DC 20530.

Dated: September 15, 2021.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2021–20260 Filed 9–17–21; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). If granted, these proposed exemptions allow designated parties to engage in transactions that would otherwise be prohibited provided the conditions stated there in are met. This notice includes the following proposed exemptions: L–12008, Phillips 66 Company; L–12021, Comcast Corporation.

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, by November 4, 2021.

ADDRESSES: All written comments and requests for a hearing should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. D–12003 via email to *e-OED@dol.gov* or online through the Federal eRulemaking Portal: *http://www.regulations.gov* by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1515, 200 Constitution Avenue, NW, Washington, DC 20210. See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

SUPPLEMENTARY INFORMATION:

Comments

In light of the current circumstances surrounding the COVID–19 pandemic caused by the novel coronavirus which may result in disruption to the receipt of comments by U.S. Mail or hand delivery/courier, persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments should state the nature of the person's interest in the proposed exemption and the manner in which the person would be adversely affected by the exemption, if granted. A request for a hearing can be requested by any interested person who may be adversely affected by an exemption. A request for a hearing must state: (1) The name, address, telephone number, and email address of the person making the request; (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the **Federal Register**. The Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

Warning: All comments received will be included in the public record without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact

information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the *http://www.regulations.gov* website is an ''anonymous access'' system, which means EBSA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EBSA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department, unless otherwise stated in the Notice of Proposed Exemption, within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[1] Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Phillips 66 Company

Located in Houston, TX

[Application No. L–12008]

Proposed Exemption

The Department is considering granting an exemption under the authority of Section 408(a) of the Employee Retirement Security Act of 1974, as amended (ERISA or the Act) to the Phillips 66 Group Life Insurance Plan (the Plan). As described in more detail below, under the proposed exemption, the Plan would enter into an insurance contract with an unrelated A-rated insurance company (the Fronting Insurer) that would, in turn, enter into a reinsurance contract with Spirit Insurance Company (Spirit), an affiliate of Phillips 66 (the Reinsurance Arrangement). Under the Reinsurance Arrangement, Spirit would reinsure the Plan's risks. Importantly, the Fronting Insurer would remain fully responsible for the Plan's risks in the event that Spirit does not fulfill its contractual obligations to the Fronting Insurer.

Phillips 66, through its ownership of Spirit, is expected to receive a net income increase from the Reinsurance Arrangement.[2] To ensure that the majority of Spirit's additional net income is passed through to the Plan and its participants and beneficiaries, this proposed exemption requires Phillips 66 to fund certain new Plan benefit enhancements (the Benefit Enhancements). Specifically, for every dollar increase in net income that Spirit (and indirectly, Phillips 66) receives from the Reinsurance Arrangement, Phillips 66 must pay at least $0.51 to fund Benefit Enhancements.

This proposed exemption also would require Phillips 66 to delegate fiduciary oversight of the Plan to a qualified fiduciary that is independent of Phillips 66 and its affiliates (the Independent Fiduciary). The exemption conditions require the Independent Fiduciary to approve the Reinsurance Arrangement in advance, ensure that the Reinsurance Arrangement is in the interest and protective of the Plan and its participants and beneficiaries, and submit annual and five-year ''look-back'' reports to the Department.[3]

[2] This proposed exemption requires a qualified independent fiduciary to review the Reinsurance Arrangement to determine if Phillips 66 is deriving any benefits other than an increase in Spirit's net income, such as a benefit from a further diversification of Spirit's risks. Any such benefit(s) must be quantified to the extent possible, and the majority of all benefits to Phillips 66 from the Reinsurance Arrangement must ultimately be paid to fund Benefit Enhancements in the manner described below.

Summary of Facts and Representations[4]

The Parties

1. *Phillips 66.* Phillips 66 is a multinational energy company headquartered in Houston, Texas that processes, transports, stores and markets fuel products.

2. *The Plan.* The Plan is sponsored by Phillips 66 and provides life insurance, travel assistance, occupational accidental death, and accidental death and dismemberment benefits. As of December 31, 2019, the Plan covered more than 12,500 participants.

3. *Zurich Life Insurance Company.* The Plan's benefits are insured by Zurich American Life Insurance Company (hereinafter, either Zurich or the Fronting Insurer), which has received an ''A'' financial strength rating from A.M. Best Company (A.M. Best). Zurich is unrelated to Phillips 66 and, per the conditions of the exemption, must remain so throughout the duration of the Reinsurance Arrangement.

4. *Spirit Insurance Company.* Spirit is an insurance company that is 100 percent owned by Phillips 66. Spirit currently writes Property Damage, Business Interruption, Excess Casualty, and Terrorism insurance policies for Phillips 66 and several of Phillips 66's joint ventures. Spirit has received an ''A'' financial strength rating from A.M. Best since its formation in 2012.[5] For the fiscal year ending December 31,

[3] The Department notes that the Independent Fiduciary's annual written report is essential to the Department's tentative finding that this proposed exemption is, and will continue to be, in the interest and protective of the Plan and its participants and beneficiaries. The Independent Fiduciary must clearly, prudently and loyally determine whether Phillips 66 and its affiliates have complied with each term and condition of the exemption and include its finding in the report. The relief provided in this proposed exemption is conditioned upon the independent fiduciary's compliance with this requirement.

[4] The Department notes that availability of this exemption is subject to the express condition that the material facts and representations contained in application L–12008 are true and complete, and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply as of the date of such change.

[5] On March 7, 2012, Vermont issued Spirit a license to transact business as a single-parent captive insurance company. Vermont captive insurance law allows captive insurance companies to conduct reinsurance operations. In 2017, Spirit converted from a pure captive insurance company to a sponsored captive insurance company and formed 3P Capital Insurance Company IC, an incorporated protected cell of Spirit.

2018, Spirit reported earned premiums of $33.0 million and total assets of $285.2 million.

The Prohibited Transaction Arrangement

4. Phillips 66 intends to use Spirit to reinsure the Plan's benefit claims under the Reinsurance Arrangement. The Reinsurance Arrangement would be structured as follows: (a) The Plan would enter into an insurance arrangement with Zurich to insure the Plan's risks; and (b) Zurich would enter into a reinsurance agreement with Spirit, whereby Spirit would reinsure up to 100 percent of the Plan's risks.

In general terms, the Plan would make premium payments to Zurich, and Zurich would make corresponding payments to Spirit in an amount less than the premiums it is paid by the Plan. The difference between the premiums the Plan pays Zurich and the amounts Zurich pays Spirit comprises Zurich's fee to Spirit. In return, Spirit would be responsible for administering the Plan participants' benefit claims filed with Zurich. The Reinsurance Agreement between Zurich and Spirit would be ''indemnity only,'' which means that Zurich, as the Fronting Insurer, would maintain the responsibility to pay benefit claims to participants and beneficiaries in the event Spirit does not satisfy any of its contractual obligations to Zurich for any reason.

Benefit to Phillips 66

5. As noted in the Independent Fiduciary discussion below, Spirit (and Phillips 66 indirectly) expects to receive a $1,484,000 increase to its net income in the first year of the Reinsurance Arrangement.

Department's Note: The Department developed this proposed exemption based on the Applicant's representation that Phillips 66 is not expected to receive any benefit from the Reinsurance Arrangement other than the net income increase described herein, which must be verified annually by the Independent Fiduciary. If Phillips 66 or a related party directly or indirectly receives any other benefit from the captive reinsurance arrangement, the benefit must be quantified by the Independent Fiduciary and included in the Primary Benefit Test described below.[6] Consistent with this condition, the proposed exemption expressly prohibits Phillips 66 (or a related entity) from, among other things: (1) Using any participant-related data or information that is generated by (or derived from) the Reinsurance Arrangement in any manner that benefits Phillips 66 or a related entity; or (2) transferring any portion of Spirit's reserves that are attributable to Plan participants' contributions to Phillips 66 or a related entity.

Benefit to the Plan

6. As discussed in further detail below, Phillips 66 must pay all costs associated with providing the Benefit Enhancements in an amount that exceeds one-half of the sum of all direct or indirect benefits that Phillips 66 and any related party derives from the Reinsurance Arrangement. In other words, for every dollar that Phillips 66 or a related party directly or indirectly benefits from the Reinsurance Arrangement, Phillips 66 must pay at least $0.51 toward Benefit Enhancements (the Primary Benefit Test).

Department's Note: Both the benefit to Phillips 66 and the cost to Phillips 66 from the Reinsurance Arrangement are based on projections. Therefore, this proposed exemption requires an Independent Fiduciary to look back over successive five-year periods to determine whether the Primary Benefit Test has been met based on actual results. If the Independent Fiduciary finds that the Primary Benefit Test has not been met during a prior five-year period, Phillips 66 must immediately implement a prospective reduction to the participants' portion of the Plan premiums in an amount that is sufficient to make up for the shortfall. The amount of the prospective reduction must include an additional payment of interest on the shortfall, at the Code's federal underpayment rate set forth in Code section 6621(b). Further, Phillips 66 may not offset or reduce any benefits provided to Plan participants and beneficiaries in connection with its implementation of the captive reinsurance arrangement.

Exemptive Relief and Analysis

7. *ERISA Analysis.* Phillips 66 is a party in interest with respect to the Plan pursuant to ERISA section 3(14) (C), because it is an employer whose employees are covered by the Plan. In addition, the captive reinsurer, Spirit, is a party in interest with respect to the Plan pursuant to ERISA section 3(14)(G) because it is wholly owned by Phillips 66.

8. ERISA section 406(a) prohibits a wide variety of transactions between plans and parties in interest. For example, ERISA section 406(a)(l)(D) prohibits a plan fiduciary from causing a plan to engage in a transaction that results in the transfer of plan assets to a party in interest. The Reinsurance Arrangement would violate ERISA section 406(a)(1)(D), because it would result in Plan premium payments (which are plan assets) being indirectly transferred to Spirit who is a party in interest with respect to the Plan.

9. ERISA section 406(b)(1) prohibits a fiduciary from dealing with plan assets for its own interest or own account, and ERISA section 406(b)(3) prohibits a fiduciary from receiving any consideration for the fiduciary's personal account from any party dealing with the plan in connection with a transaction involving the plan's assets. The Reinsurance Arrangement would violate ERISA sections 406(b)(1) and 406(b)(3), because the plan fiduciary would cause Plan premiums to be paid to Zurich with knowledge that the premiums ultimately would be paid to Spirit.

Description of Plan Benefit Enhancements

10. In order to satisfy the Primary Benefit Test, Phillips 66 must fund the following Plan Benefit Enhancements:

a. *The New Care Advocacy Service Benefit.* Participants and beneficiaries of the Plan must receive a New Care Advocacy Service Benefit at no additional cost. The Applicant represents that under the New Care Advocacy Service, master's degree-level licensed social workers would seek out participants and beneficiaries in need of medical assistance, including those who have been diagnosed with a terminal or chronic illness and those managing a chronic condition that has confined them to their home or a rehabilitation center. Care Advocacy support services include providing participants with education and assistance regarding available community resources, scheduling and navigating doctor's appointments, completing forms, and coordinating care between doctors and specialists.

b. *The Enhanced Funeral Concierge Service Benefit.* The Plan currently provides a Funeral Concierge Service Benefit to participants. Under the conditions of the exemption, Phillips 66 would extend the Funeral Concierge Service Benefit to cover participants' and beneficiaries' family members at no additional cost. The Applicant represents that participants and beneficiaries could use the Funeral Concierge Service Benefit to compare prices among funeral homes through the use of a nationwide database of funeral

[6] This includes any benefit to Phillips 66 or a related party arising from a further diversification of Spirit's risks in connection with the addition of the Plan's employee benefit insurable risks to One Belmont's other insurable risks.

home prices. Additionally, participants or their family members can receive assistance from licensed funeral home directors when negotiating funeral service pricing.

c. *The Enhanced Accelerated Death Benefit.* The Plan currently provides an Accelerated Death Benefit that allows a terminally-ill participant with a life expectancy of 24 months or less to receive an accelerated life insurance benefit payment before death in an amount up to 50 percent of his or her total life insurance benefit amount. If this exemption is granted, the amount of the Plan's Accelerated Death Benefit would increase from 50 percent to 80 percent of a participant's life insurance benefit amount.

d. *The Enhanced Accidental Death & Dismemberment Benefit.* Under the Plan currently, if a participant suffers an injury resulting in Hemiplegia, the Plan will pay a benefit equal to 66 percent of the participant's incurred losses from such injury. If the exemption is granted, the Plan would increase this payment from 66 percent to 75 percent of the participant's incurred losses from such injury.

e. *The New Accidental Death & Dismemberment Benefit.* Currently, the Plan does not provide an additional benefit to a participant's beneficiary if the participant dies in an automobile accident while seated in an air bag-protected position after the air bag system deploys during an accident. If the exemption is granted, the Plan would pay an additional ten percent of the death benefit upon the occurrence of this event up to a maximum amount of $25,000.

Further, the Plan currently does not cover costs associated with transporting a participant's body from his or her place of death to a mortuary near the participant's primary residence if the participant dies 100 miles or more from such residence. If this exemption is granted, the Plan would pay five percent of the AD&D policy coverage amount to cover the costs associated with transporting a deceased participant's body to a mortuary near his or her primary residence up to a maximum benefit amount of $5,000.

Finally, the Plan currently does not cover medical costs incurred by a participant who suffers third degree burns. If this exemption is granted, the Plan would pay a percentage of the principal sum based on the body area(s) and the percentage of the body surface affected.

The Independent Fiduciary

11. Kathleen Ely, FSA, MAAA, a Consulting Actuary with Milliman of Windsor, Connecticut will serve as the Plan's Independent Fiduciary with respect to the Reinsurance Arrangement. Ms. Ely represents that she and Milliman are independent of all parties associated with the Reinsurance Arrangement, including Phillips 66, Spirit, and the Plan. In this regard, Ms. Ely represents that she and Milliman do not have: (a) An interest in any party involved in the Reinsurance Arrangement; (b) an ownership interest in Phillips 66, Spirit, or the Plan, nor are they directly or indirectly, controlled by, or under common control with them; and (c) any economic stake or financial interest that is contingent upon the implementation of the Reinsurance Arrangement. This exemption requires that no party related to this exemption request has, or will, indemnify Ms. Ely or Milliman, in whole or in part, for negligence and/or for any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties under the captive reinsurance arrangement. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

Ms. Ely represents that Milliman's gross income received from Phillips 66, Spirit, and the Plan is less than 0.1 percent of Milliman's gross annual income from all sources. Further, as a condition of the exemption, neither Ms. Ely nor Milliman would enter into any agreement or instrument that violates ERISA section 410 or section 2509.75–4 of the Department's regulations.[7]

12. *Independent Fiduciary Analysis.* In the course of conducting a preliminary assessment of the merits of the Reinsurance Arrangement, Ms. Ely reviewed the following documents: (a) A draft application to the Department requesting exemptive relief; [8] (b) a memo dated July 11, 2019, from the Applicant's representative, Spring Consulting Group, LLC (Spring Consulting), describing the Benefit Enhancements, including the funding of the Benefit Enhancements and the expected costs Phillips 66 would incur to provide the Benefit Enhancements; (c) a draft Employee Benefits Study prepared by Spring Consulting that details projected 2020 financial statement results for Spirit; (d) a Certificate of Authority from the Vermont Department of Banking, Insurance, Securities and Health Care Administration authorizing Spirit to transact business as a captive insurance company in Vermont; (e) a copy of Phillips 66's Life and AD&D insurance certificates; (f) a draft of the Reinsurance Arrangement contract between Spirit and Zurich; (g) documentation of the pricing of the subject coverages, expense charges, and related underwriting information; (h) 2018 audited financial statements for Spirit; (i) a 2018 Actuarial Opinion for Spirit; and (j) a declaration by Phillips 66 that the Plan would pay no commissions with respect to the Reinsurance Arrangement.

Based on the foregoing, Ms. Ely completed two Independent Fiduciary Reports, dated November 15, 2019 and October 22, 2020. In the first report, Ms. Ely provided a preliminary assessment that, among other things, the Plan Benefit Enhancements would represent an immediate and objectively determined benefit to the Plan's participants and beneficiaries. In the second Independent Fiduciary Report, Ms. Ely provided preliminary estimates with regard to the costs that Phillips 66 would incur to fund the Benefit Enhancements, which are discussed below.

(a) *Care Advocacy Service.* Ms. Ely estimated high-end and low-end potential ranges of costs for Phillips 66 to provide the Care Advocacy Service. Ms. Ely relied upon information obtained from Zurich's total book of business and experience for the high-end estimate. Based upon its book of business, Zurich estimated that the cost to provide the Care Advocacy Service ranged from $200–$500 per hour and that, on average, a care advocate would spend 25 hours on a case. Zurich further estimated that two percent of Plan participants would use the service.[9]

[7] ERISA section 410 provides, in part, that ''except as provided in ERISA sections 405(b)(1) and 405(d), any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [meaning Part 4 of Title I of ERISA] shall be void as against public policy.''

[8] Given that, among other things, some of the documents reviewed by the Independent Fiduciary were draft documents and/or documents that are no longer current, this proposed exemption requires the Independent Fiduciary to: Review the terms of the exemption; obtain and review all current objective, reliable, third-party documentation necessary to make the determinations required of the Independent Fiduciary under the exemption; and confirm in writing that all of the exemption terms and conditions have been met (or, due to timing requirements, can reasonably be expected to be met consistent with the terms of this proposed exemption). The Independent Fiduciary must send this written confirmation to the Department's Office of Exemption Determinations at least 30 days before Phillips 66 engages in the Reinsurance Arrangement. The confirmation must include: Copies of each document relied on by the Independent Fiduciary; and the steps the Independent Fiduciary took to make its confirmation.

[9] Zurich's book of business indicates the take up is assessed through a pro-active review of claims

Based on the foregoing, Ms. Ely estimates that, assuming a cost of $200 per hour for 25 hours, the annual estimated cost for Phillips 66 to provide the Care Advocacy Service would be $1.3 million ($200 * 25 * 2% * 13,000 employees).

Ms. Ely also researched non-Zurich data.[10] Based on this data, Ms. Ely concluded that it would be reasonable to reduce the average number of hours spent on a case to 10 hours at a cost of $200 per hour. Under this formula, Ms. Ely estimates that the annual cost incurred by Phillips 66 to provide the Care Advocacy Service would be $520,000 ($2,000 * 2% * 13,000). Based on the foregoing, Ms. Ely concluded that $520,000 represents a reasonable low-end estimate for the cost to provide the Care Advocacy Service.

(b) *Funeral Concierge Services.* Ms. Ely relied on information from Zurich's book of business to estimate the cost for Phillips 66 to fund the additional Funeral Concierge Services to the Plan. Ms. Ely notes that Zurich estimated the cost to provide the Funeral Concierge Services would be $995 per use and that two percent of employees would use the service. Ms. Ely notes that, while Phillips 66 already provides the Funeral Concierge Benefit to Plan participants, it does not provide the benefit to participants' family members. Therefore, Ms. Ely's estimate only includes the additional costs that Phillips 66 would incur based on participants' family members' use of the benefit. Ms. Ely represents that a reasonable additional utilization estimate for participants' family members would be two percent, which is in line with Zurich's estimate. Assuming this two percent utilization rate, Ms. Ely estimated that the annual cost for Phillips 66 to provide the Funeral Concierge Benefit would be $258,700 ($995 * 2% * 13,000).

(c) *AD&D.* Ms. Ely relied on data provided by Zurich to estimate the annual cost for Phillips 66 to provide the increased accelerated AD&D benefits and the new AD&D benefit. Ms. Ely notes that Zurich estimated that the aggregate cost of the increased accelerated death benefits would be $4.50 per employee per year, and the cost of the new AD&D benefit enhancement would be $6.11 per employee per year. Ms. Ely states that, assuming 13,000 eligible employees, the total estimated cost for Phillips 66 to fund these benefit enhancements would be $137,930 per year ($4.5 + $6.11 * 13,000).

13. *The Primary Benefit Test:* Ms. Ely states that a reasonable low-end estimate of the expected annual costs for Phillips 66 to fund the Benefit Enhancements would be $916,630. This includes $137,930 for accidental death benefit enhancements, $520,000 for Care Advocacy Service, and $258,700 for additional Funeral Concierge Services. Given that Spirit expects to realize a net income increase of $1,484,000 from the Reinsurance Arrangement, the estimated cost to fund the Benefit Enhancements represents 62 percent of the projected benefit that would inure to Phillips 66 ($916,630/$1,484,000). Thus, Ms. Ely preliminarily estimated that the Primary Benefit Test would be met in the initial year of the Reinsurance Arrangement.

Department's Note. Even though Ms. Ely's prior findings suggest the conditions of this exemption will be met, those findings would not be current as of the effective date of this proposed exemption. Therefore, Ms. Ely must again engage in a prudent/loyal analysis in accordance with ERISA Section 404(a)(1)(A) and (B), to verify that she has reviewed the terms of the exemption and all of the necessary documents and evidence, and has concluded that: The majority of the net benefits from the proposed captive reinsurance arrangement can reasonably be expected to inure to the Plan; and all of the exemption's other terms and conditions have been met (or, due to timing requirements, can reasonably be expected to be met consistent with the terms and conditions of the proposed exemption). This confirmation must be submitted to the Department's Office of Exemption Determinations at least 30 days before the Plan engages in the captive reinsurance arrangement. The confirmation must include copies of each document relied on by Milliman and the steps it took to make its confirmation.

Further, the exemption requires the Independent Fiduciary to ''look back'' over successive five-year periods to determine whether the Primary Benefit Test has been met based on actual financial results and actual cost incurred by Phillips 66 to provide the Plan Benefit Enhancements rather than projections. The Independent Fiduciary must provide the Department with a written report of the actual costs and benefits, along with the underlying sources for such data. The Department notes that this information would be included in the public record. The Department is proposing this exemption based on its understanding that the Independent Fiduciary would be able to quantify the necessary information based on reliable and verifiable information, including audited financials and information obtained from the unrelated Fronting Insurer. The Department retains the right to propose a revocation or amendment to this exemption if it is unable to confirm the reliability of the underlying financial data supporting the Independent Fiduciary's ''look-back'' findings. Any failure by the Department to propose a revocation or amendment to the exemption is not an endorsement or conclusion by the Department that the conditions of the exemption were, in fact, met.

14. *Benefit Enhancements Adjustment.* Before the end of a five-year period, Phillips 66 may change Benefit Enhancements at its own expense to ensure that the Primary Benefit Test would be satisfied. The exemption requires any new Benefit Enhancement to be: (a) Widely available to Plan participants on an equal basis; and (b) approved, in advance, by the Independent Fiduciary, after the Independent Fiduciary has determined that each Benefit Enhancement is in the interest of the Plan's participants and beneficiaries and widely available to them on an equal basis.[11] A complete description of any new Benefit Enhancement and the Independent Fiduciary's prior determination regarding why the new enhancement is in the interest of the Plan's participants and beneficiaries must be included in the next annual Independent Fiduciary report submitted to the Department.

Department's Note. Notwithstanding a determination by the Independent Fiduciary that a Benefit Enhancement meets the terms of this exemption, the Department may propose to revoke or amend the exemption to the extent that, among other things, the Department determines that a Benefit Enhancement is not sufficiently protective or in the

reports to identify those individuals who may require assistance. Zurich then connects with those individuals to assess what types of service may be required. In addition, the employer's HR department may bring employees in need of such assistance to Zurich's attention. The service also is advertised at Phillips 66 benefits fairs and employee meetings whenever possible.

[10] This research included data taken from: *https://www.hopkinsmedicine.org/health/wellness-and-prevention/the-power-of-a-health-care-advocate;* and *https://www.verywellhealth.com/how-much-does-a-private-patient-advocate-cost-2614909.*

[11] If the Primary Benefit Test has not been met and Phillips 66 seeks to terminate the captive reinsurance arrangement, the relief in the exemption will terminate at the end of the year in which the Primary Benefit Test was not met, as long as Plan participants receive a reduction in their portion of the Plan premium. The premium reduction amount must be at least equal to the amount by which the prior five-year Primary Benefit Test was not met, as verified by the Independent Fiduciary and reported to the Department as part of the Independent Fiduciary's annual report.

interest of the Plan and its participants and beneficiaries. Any failure by the Department to propose to modify or revoke the exemption is not an endorsement or conclusion by the Department that the conditions of the exemption were, in fact, met.

The Department's Findings

15. The Department has the authority under ERISA section 408(a) ERISA to grant exemptions from the prohibition transaction provisions of ERISA section 406 if the Department finds that the transaction is in the interest and protective of the rights of the affected plan and its participants and beneficiaries, and is administratively feasible.[12] The Department's findings required under ERISA section 408(a) are discussed below.

16. *The Proposed Exemption is ''Protective of the Plan.''* The Department has tentatively determined that the proposed exemption is protective of the rights of Plan participants and beneficiaries. In addition to the requirements described above, no commissions would be paid by the Plan with respect to the sale of any third party insurance contract and/or any reinsurance contract, and Phillips 66 would only contract with insurers with a financial strength rating of ''A'' or better from A.M. Best Company or an equivalent rating from another rating company, in the year the contract is entered into. Further, for each taxable year, the gross premiums received by Spirit for benefit insurance provided to Phillips 66 and its employees with respect to which Spirit is a party in interest by reason of the relationship to Phillips 66 described in ERISA sections 3(14)(G), would not exceed 50 percent of the gross premiums received for all lines of its insurance business (*i.e.,* benefit insurance and non-benefit insurance) in that taxable year.

Ms. Ely, the Independent Fiduciary must review the Reinsurance Arrangement and confirm and determine: (a) The total economic benefit derived by Phillips 66 and its related parties from the Reinsurance Arrangement; (b) that the majority of the economic benefits derived by Phillips 66 and related parties from the Reinsurance Arrangement were transferred to the Plan in the form of Benefit Enhancements and/or reduced premiums; (c) the Reinsurance Arrangement created real and substantial additional benefits for the Plan and its participants; (d) the Reinsurance Arrangement did not result in an offset or reduction in participants' other benefits and was otherwise consistent with ERISA. Ms. Ely has confirmed that: (i) She has the requisite knowledge regarding the Reinsurance Arrangement to fulfill her duties under ERISA section 404 as a prudent and independent plan fiduciary; (ii) she will monitor the Reinsurance Arrangement throughout the duration of the exemption; and (iii) the Reinsurance Arrangement is consistent with ERISA, including the prudence and loyalty provisions of ERISA section 404.

The exemption would require Ms. Ely to file annual certified reports to the Department, under penalty of perjury, confirming whether all terms and conditions of the exemption have been met. She must complete each report within six months from the end of the 12-month period to which it relates (the first 12-month period begins on the effective date of the exemption).

20. *The Proposed Exemption is ''In the Interest of the Plan.''* The Department has tentatively determined that the proposed exemption would be in the Plan's interest. Among other things, the Plan must receive the majority of the total benefit generated from the Reinsurance Arrangement, as verified by the Independent Fiduciary and reported to the Department.

21. *The Proposed Exemption is ''Administratively Feasible.''* The Department has tentatively determined that the proposed exemption would be administratively feasible, because the proposed reinsurance arrangement is subject to robust annual reviews by Ms. Ely that must be filed with the Department's Office of Exemption Determinations.

22. Based on the conditions that are included in this proposed exemption, the Department has tentatively determined that the relief sought by the Applicant would satisfy the statutory requirements for an individual exemption under ERISA section 408(a).

Proposed Exemption

Section I. Definitions

(a) An ''affiliate'' of Phillips 66 or Spirit includes: (1) Any person or entity who controls Phillips 66 or Spirit or is controlled by or under common control with Phillips 66 or Spirit; (2) Any officer, director, employee, relative, or partner with respect to Phillips 66 or Spirit; and (3) Any corporation or partnership of which the person in (2) of this paragraph is an officer, director, partner, or employee;

(b) The term Benefit Enhancements means the following benefits, unless adjusted consistent with the terms of this proposed exemption:

(i) *The New Care Advocacy Service Benefit.* Under this new benefit, master's degree-level licensed social workers would proactively find participants needing specialized assistance, including those diagnosed with a terminal or chronic illness or who are managing a chronic condition that has confined them to their home or a rehabilitation center. Care Advocacy support service includes participant education and assistance with respect to available community resources, and assistance with scheduling and navigating doctor's appointments, completing forms, and coordinating care with doctors and specialists.

(ii) *The Enhanced Funeral Concierge Service Benefit.* Under this enhancement, the Plan would extend its existing Funeral Concierge Service Benefit to provide coverage for Plan participants' family members.

(iii) *The Enhanced Accelerated Death Benefit.* The Plan currently provides an Accelerated Death Benefit for a terminally-ill participants with life expectancy of 24 months or less to receive an accelerated life insurance benefit payment in advance of her death of up to 50 percent of the participant's total life insurance benefit amount. Under this enhancement, the amount of the Accelerated Death Benefit would increase to 80 percent of a participant's life insurance benefit.

(iv) *The Enhanced Accidental Death & Dismemberment Benefit.* The Plan currently provides that if a participant suffers an injury resulting in Hemiplegia, the Plan would pay such participant a benefit equal to 66 percent of the participant's incurred losses from such injury. Under this enhancement, the payment would increase to 75 percent of the participant's incurred losses from such injury.

(v) *The New Accidental Death & Dismemberment Benefit.* Under the current terms of the Plan, if a participant dies in an automobile accident while seated in an air bag-protected position and such air bag system deployed during the accident, the Plan would not pay any additional benefit to the participant. Under this enhancement, the Plan would provide a new benefit that pays ten percent of the principal sum, up to $25,000, upon the occurrence of this event.

Further, under the current terms of the Plan, if a participant dies 100 miles away from his or her primary place of

[12] Specifically, ERISA section 408(a) provides that the Department may not grant an exemption unless it finds that the exemption is administratively feasible, in the interests of the plan and it participants and beneficiaries, and protective of the rights of the plan participants and beneficiaries.

residence, the Plan would not cover costs incurred to transport the participant's body from the place of death to a mortuary near the participant's primary residence. Under this enhancement, the Plan would provide a new benefit to participants covering up to five percent of the AD&D policy amount, up to a maximum of $5,000, of the cost associated with transporting the deceased participant's body to a mortuary near her primary residence. Finally, the Plan currently does not cover medical costs incurred by a participant who suffers third degree burns. If this exemption is granted, the Plan would enhance the AD&D benefit by paying a percentage of the principal sum based on the body area(s) and the percentage of the body surface affected.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual; and

(d) The term ''Independent Fiduciary'' means a person who:

(1) Is not Phillips 66 or an affiliate of Phillips 66 or Spirit and does not hold an ownership interest in Phillips 66, Spirit or their affiliates;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that:

(i) It is a fiduciary and has agreed not to participate in any decision with respect to any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year if the gross income received by such organization or individual from Phillips 66, Spirit, or their affiliates for that fiscal year exceeds two percent of such organization's or individual's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department;

(5) No organization or individual that is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director or ten percent or more partner or shareholder may acquire any property from, sell any property to, or borrow any funds from Phillips 66, Spirit, or their affiliates while the individual serves as an Independent Fiduciary. This prohibition would continue for a period of six months after either (1) the party ceases to be an Independent Fiduciary or (2) the Independent Fiduciary negotiates on behalf of the Plan during the period that such organization or the individual serves as an Independent Fiduciary; and

(6) In the event a successor Independent Fiduciary is appointed to represent the interests of the Plan with respect to the subject transaction, no time should elapse between the resignation or termination of the former Independent Fiduciary and the appointment of the successor Independent Fiduciary.

Section II. Proposed Transactions

The exemption would provide relief from the prohibited transactions provisions of ERISA sections 406(a)(1)(A), (D), and 406(b)(1) and (b)(3), and the excise tax imposed by Code section 4975(a) and (b) (due to the operation of parallel prohibited transaction provisions contained in Code section 4975(c)(1)(A), (D), (E), and (F)) with respect to: (1) The reinsurance of risks; and (2) the receipt of premiums by Spirit in connection with insurance contracts sold by Zurich (or any successor Fronting Insurer) to provide Group Term Life and Accidental Death and Dismemberment benefits to Plan participants. In order to receive such relief, the conditions in Section III must be met in conformance with the definitions set forth in Section I.

Section III. Conditions

(a) Phillips 66 must improve the Plan with Benefit Enhancements that are funded solely by Phillips 66 in compliance with (b) through (e) below;

(b) For every dollar that Phillips 66 and its related parties directly and indirectly benefit from the Captive Reinsurance arrangement, Phillips 66 must pay at least $0.51 towards the Benefit Enhancements, as may be adjusted under condition (e) below (the Primary Benefit Test);

(c) The Independent Fiduciary must determine whether the Primary Benefit Test has been met with respect to each successive five-year period covered by the exemption. The Independent Fiduciary must report its determinations as part of the Independent Fiduciary's next annual report. For purposes of the initial five-year period, the Independent Fiduciary may test only the costs and benefits that inure to Phillips 66 during years two through five of the initial five-year period.

(d)(1) If the Primary Benefit Test has not been met with respect to a five-year period, Phillips 66 must reduce the participants' portion of the Plan's premium in the next consecutive year by an amount that is at least equal to the amount by which the prior five-year Primary Benefit Test was not met, plus an additional payment of interest on the shortfall, at the Code's federal underpayment rate set forth in Code section 6621(b). The premium reduction must benefit all plan participants equally, be fully implemented during the course of the year following the last year of the five-year period to which it relates, and be verified by the Independent Fiduciary; (2) If the captive reinsurance arrangement is terminated before the end of a five-year period (a Shorter Term), and if the Primary Benefit Test has not been met during the Shorter Term, Phillips 66 must reduce the participants' portion of the Plan's premium in the following year by an amount at least equal to the amount by which the Shorter Term Primary Benefit Test was not met. The premium reduction must benefit all plan participants equally, be fully implemented during the course of the year following the last year of the Shorter Term, and be verified by the Independent Fiduciary. Relief in this proposed exemption does not extend to prohibited transactions described in this proposed exemption that occur during the Shorter Term unless the requirements in this subsection (d)(2) have been met. The Independent Fiduciary must ensure the premium reduction was properly implemented, notwithstanding that the captive reinsurance arrangement has already been terminated;

(e) Phillips 66 may adjust the Benefit Enhancements to the Plan at any time, if such adjustment is approved in advance by the Independent Fiduciary after the Independent Fiduciary first determines that each adjusted Benefit Enhancement is in the interest of the Plan's participants and beneficiaries and available to them on an equal basis. The cost incurred by Phillips 66 to fund the Benefit Enhancement may be used to determine whether the Primary Benefit Test has been met. A complete description of any new Benefit Enhancements and the Independent Fiduciary's rationale and determinations regarding such enhancements must be included in the next Independent Fiduciary report submitted to the Department.

(f) Spirit must:

(1) Be a party in interest with respect to the Plan based on its affiliation with

Phillips 66 that is described in ERISA Section 3(14)(G); [13]

(2) Be licensed to sell insurance or conduct reinsurance operations in the Vermont;

(3) Have obtained a Certificate of Authority from the insurance commissioner of Vermont to transact business as a captive insurance company. Such certificate must not have been revoked or suspended;

(4) Have undergone a financial examination (within the meaning of the law of its domiciliary State, Vermont) by the Insurance Commissioner of Vermont within five years before the end of the year preceding the year in which the reinsurance transaction occurred;

(4) Have undergone, and continue to undergo, an examination by an independent certified public accountant for its last completed taxable year immediately before the taxable year of the Reinsurance Arrangement covered by this exemption; and

(5) Be licensed to conduct reinsurance transactions by a state whose law requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority;

(g) In each year of coverage provided by a Fronting Insurer, the formulae used by the Fronting Insurer to calculate premiums will be similar to formulae used by other insurers providing comparable life insurance coverage under similar programs. Furthermore, the premium charges calculated in accordance with the formulae will be reasonable and comparable to the premiums charged by the Fronting Insurer and its competitors with the same or a better financial strength rating providing the same coverage under comparable programs;

(h) The Plan must pay no commissions with respect to the sale of such contracts or the Reinsurance Arrangement;

(i) The Fronting Insurer must have a financial strength rating of ''A'' or better from A.M. Best Company (A.M. Best) or an equivalent rating from another rating agency;

(j) The Reinsurance Arrangement between Spirit and Zurich or any successor Fronting Insurer must be indemnity insurance only. The arrangement must not relieve a Fronting Insurer from any responsibility or liability to the Plan, including liability that would result if Spirit fails to meet any of its contractual obligations to Zurich or any successor Fronting Insurer under the Reinsurance Arrangement;

(k) Phillips 66 will not offset or reduce any benefits provided to Plan participants and beneficiaries in relation to its implementation of the Proposed Benefit Enhancements;

(l) The Independent Fiduciary must:

(1) In compliance with the fiduciary obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B) (i) review the Reinsurance Arrangement and the terms of the exemption; (ii) obtain and review all current objective, reliable, third-party documentation necessary to make the determinations required of the Independent Fiduciary by the exemption; and (iii) confirm in writing that all of the exemption's terms and conditions have been met (or, due to timing requirements, can reasonably be expected to be met consistent with the terms of this proposed exemption) and send this confirmation to the Department's Office of Exemption Determinations at least 30 days before Phillips 66 engages in the Reinsurance Arrangement. The confirmation must include: Copies of each document relied on by the Independent Fiduciary and the steps the Independent Fiduciary took to make its confirmation;

(2) Monitor, enforce and ensure compliance with all conditions of this exemption, in accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), including all conditions and obligations imposed on any party dealing with the Plan, throughout the period during which Spirit's assets are directly or indirectly used in connection with a transaction covered by this exemption.

(3) Report any instance of non-compliance immediately to the Department's Office of Exemption Determinations;

(4) Take all appropriate actions to safeguard the interests of the Plan;

(5) Review all contracts pertaining to the Reinsurance Arrangement, and any renewals of such contracts, to determine whether the requirements of this proposed exemption and the terms of Benefit Enhancements continue to be satisfied;

(6) Submit an annual Independent Fiduciary Report to the Department certifying under penalty of perjury whether each term and condition of the proposed exemption is met over the applicable period. Each report must be: (i) Completed within six months after the end of the twelve-month period to which it relates (the first twelve-month period would begin on the effective date of the exemption grant); and (ii) submitted to the Department within 60 days thereafter. The relevant report must include all of the objective data necessary to demonstrate that the Primary Benefit Test has been met;

(o) Neither Phillips 66 nor any related entity may use participant-related data or information generated by or derived from the Reinsurance Arrangement in a manner that benefits Phillips 66 or a related entity;

(p) No amount of Spirit's reserves that are attributable to the Plan participants' contributions may be transferred to Phillips 66 or a related party;

(q) All the facts and representations set forth in the Summary of Facts and Representation must be true and accurate; and

(r) No party related to this exemption request has or will, indemnify the Independent Fiduciary, in whole or in part, for negligence and/or for any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties under the captive reinsurance arrangement. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violations.

Effective Date: This proposed exemption would become effective on the date the Department publishes a grant notice in the **Federal Register**.

Notice to Interested Persons

Persons who may be interested in the publication of this notice in the **Federal Register** include Plan participants and beneficiaries. The Applicant will provide notification to such interested persons by electronic and first-class mail within fifteen (15) calendar days after the publication date of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice as it appears in the **Federal Register** on the date of publication and a copy of the Supplemental Statement required, by 29 CFR 2570.43(b)(2), which will advise interested persons of their right to comment on the proposed exemption and request a hearing.

The Department must receive all written comments and requests for a hearing no later than forty-five (45) days after the date the Notice is published in the **Federal Register**.

All comments will be made available to the public.

Warning: Please do not include any personally identifiable information (such as your name, address, or other

[13] Under ERISA section 3(14)(G), a corporation is a ''party in interest'' with respect to an employee benefit plan if 50 percent or more of the combined voting power of all classes of the corporation's stock entitled to vote, or the total value of shares of all classes of stock of the corporation, is owned by an employer any of whose employees are covered by the employee benefit plan.

contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and are retrievable by most internet search engines.

Further Information Contact: Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

Comcast Corporation (Comcast)

Located in Philadelphia, PA

[Application No. L–12021]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). As more fully explained below, this proposed exemption would allow an affiliate of Comcast, One Belmont Insurance Company, to reinsure the life insurance risks of the Comcast Corporation Comprehensive Health and Welfare Benefit Plan. Comcast expects to benefit by approximately $375,000 per year from the proposed arrangement, and participants in the Plan's Dental Component will receive at least a $375,000 yearly reduction in their portion of the premium payments. If Comcast benefits by more than $375,000 in a particular year (*e.g.,* $500,000), participants in the Plan's Dental Component will receive that same reduction ($500,000) in their premium payments in the subsequent plan year. This exemption requires, among other things, annual reports by a qualified, independent fiduciary, submitted to the Department of Labor confirming whether the requirements of the exemption have been met.[14]

Summary of Facts and Representations [15]

The Applicants

1. Comcast is an American telecommunications conglomerate headquartered in Philadelphia, Pennsylvania. Comcast wholly owns One Belmont Insurance Company (One Belmont), a captive insurance and reinsurance corporation regulated by the State of Vermont. One Belmont currently provides the following insurance coverage to Comcast and its subsidiaries: Workers compensation, general liability, automobile liability deductible reimbursement, production insurance, and international employee health & welfare benefits. As of December 31, 2019, One Belmont had total assets of $271,114,394 and gross written premiums of $50.0 million.

2. Comcast sponsors the Comcast Corporation Comprehensive Health and Welfare Benefit Plan (the Plan), which provides eligible employees with medical, life insurance, dental, disability, death benefits and other welfare benefits. As of December 31, 2020, the Plan provided benefits to approximately 110,657 active participants. Comcast provides life insurance and death benefits to eligible employees through the Life Insurance and Death Benefit Plan, which is a component of the Plan (the Life Insurance Component). Benefits of the Life Insurance Component include basic life insurance, for which Comcast pays one hundred percent (100%) of the premium cost, and optional (supplemental) group term life insurance benefits, for which employees pay one hundred percent (100%) of the premium cost. The Plan also has a dental component (the Dental Component), for which Comcast pays 60% of the premium cost.

3. The basic and optional (supplemental) life insurance benefits provided under the Life Insurance Component are insured by the Prudential Insurance Company (Prudential), which is unrelated to Comcast and its affiliates. Prudential recently received an ''A+'' financial strength rating from A.M. Best Company.

4. The Applicants are requesting an exemption that would permit One Belmont to reinsure the basic and optional (supplemental) life insurance provided under the Plan's Life Insurance Component. As described below, the proposed exemption is subject to a number of conditions, each of which must be verified by a qualified, independent fiduciary (the Independent Fiduciary). Among other things, the Independent Fiduciary must submit an annual report in which, in accordance with ERISA Sections 404(a)(1)(A) and (B), it prudently and loyally determines that the Applicants have met the terms of the exemption, including the requirement that the Plan's Dental Component has received all the financial benefits and cost savings associated with the reinsurance arrangement that would otherwise have gone to the Applicants.

5. The arrangement is expected to generate an annual financial benefit to Comcast. In particular, Comcast currently anticipates that the arrangement will result in $375,000 annual cost savings, as compared to the current benefit structure.[16] Therefore, the proposed exemption requires Comcast to provide participants in the Plan's Dental Component with at least an annual aggregate $375,000 reduction in their portion of the premium for the Plan's Dental Component, without any offsetting change or reduction in employee benefits.[17]

6. Comcast states that reducing the premiums of the Plan's Dental Component would benefit a higher percentage of Plan participants than would benefit from reducing the premiums paid by Plan participants for supplemental life insurance. Comcast states that 85% of Plan participants participate in the Plan's Dental Component, while only 35% of Plan participants who contribute towards the supplemental life insurance offered by the Plan.

7. In no event may the reduction in the participants' portion of the Dental Component's premium be less than the amount that Comcast or any of its affiliates ultimately benefits from the captive reinsurance arrangement. Further, Comcast must continue to contribute no less than 60% of the Dental Component's premiums after the captive reinsurance arrangement takes effect.

8. If this proposed exemption is granted, Prudential will continue to be the ''fronting'' insurer for the basic and optional (supplemental) group term life insurance. Prudential will contract with One Belmont for One Belmont to

[14] The Department notes that the independent fiduciary's annual written report is essential to the Department's tentative finding that this proposed exemption is, and will continue to be, in the interest and protective of the Plan and its participants and beneficiaries. Each report must clearly, prudently, and loyally determine whether Comcast and its affiliates have complied with each term and condition of the exemption. The exemption's relief is conditioned on the independent fiduciary's compliance with this requirement.

[15] The Department notes that availability of this exemption, is subject to the express condition that the material facts and representations contained in application L–12021 are true and complete, and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply to the covered transactions as of the date of such change.

[16] According to the Applicants, Prudential has agreed to reduce the Plan's basic life insurance premiums by $375,000 in return for transferring the Plan's basic life insurance risks to One Belmont. The result is a cost savings to Comcast, since Comcast pays 100% of these premiums.

[17] Based on the number of participants currently enrolled in the Plan's Dental Component, that amount currently translates to $3.84 per participant per year in employee premium savings.

provide reinsurance coverage for 90% of the risks insured with Prudential (up to $1,500,000 in coverage for each individual employee under the Plan). This captive reinsurance agreement between Prudential and One Belmont will be ''indemnity only,'' which means that Prudential will not be relieved of any of its liabilities with respect to benefits provided under the Plan's Life Insurance Component, even if One Belmont is unable or unwilling in any way to satisfy its contractual obligations to Prudential.

9. Comcast and its affiliates, including One Belmont, may not retain any profit, tax or other benefit from the captive reinsurance arrangement. If Comcast or any of its affiliates ultimately receive a tax, profit or other benefit in connection with the captive reinsurance arrangement, including any benefit arising from a further diversification of One Belmont's risks in connection with adding the Insurance Component's risks to One Belmont's other risks Comcast must ensure, and the Independent Fiduciary must verify, that participants in the Plan's Dental Component receive a corresponding dollar-for-dollar additional reduction to their portion of the premiums. For example, if Comcast's savings from the captive reinsurance arrangement for a year is $375,000, and One Belmont realizes a $25,000 net income increase from the captive reinsurance arrangement in that same year, the Plan's participants must receive a $400,000 reduction in their portion of the Plan's Dental Component premium in the following year. Comcast may not offset or reduce any employee benefits in connection with this premium reduction.

ERISA Analysis

11. Comcast is a party in interest with respect to the Plan pursuant to ERISA section 3(14)(C), because it is an employer whose employees are covered by the Plan. In addition, the captive reinsurer, One Belmont, is a party in interest with respect to the Plan pursuant to ERISA section 3(14)(G) because it is 100% owned by the Comcast.[18]

12. ERISA section 406(a) prohibits a wide variety of transactions between plans and parties in interest. For example, ERISA section 406(a)(l)(D) prohibits a plan fiduciary from causing a plan to engage in a transaction that results in the transfer of plan assets to a party in interest. The proposed captive reinsurance arrangement would violate ERISA section 406(a)(1)(D), because it would result in the Plan's premium payments (which are plan assets) being indirectly transferred to One Belmont, which is a party in interest with respect to the Plan.

13. ERISA section 406(b)(1) prohibits a fiduciary from dealing with plan assets for its own interest or own account. The proposed captive reinsurance arrangement would violate ERISA section 406(b)(1), because the plan fiduciary would cause the Life Insurance Component's premiums to be paid to Prudential with knowledge that corresponding payments ultimately would be paid to One Belmont, and Comcast may benefit from a diversification of One Belmont's risks.

14. Comcast must fund the reserves that will be established by One Belmont for the reinsurance arrangement. This amount is estimated to be $180,000 for the first year. Comcast will be fully and solely responsible for funding any future reserves required in connection with the captive reinsurance arrangement. In this respect, Comcast may not pass along the cost of funding the reserves to the Plan or its participants.

15. In connection with this exemption request, the Applicants engaged Milliman Actuarial Services (Milliman) to act as the independent fiduciary (the Independent Fiduciary) on behalf of the Plan to evaluate, and if appropriate, approve or reject the subject transactions. Milliman is responsible for the prudent and loyal review and analysis of the proposed transactions on the Plan's behalf and for providing a written opinion as to whether the arrangement complies with the Department's requirements for an administrative exemption. Milliman must have access to the captive insurance company's financial statements, which will show premiums, claims, reserves and other relevant financial items, and Milliman must use this information to determine ongoing savings and any other benefits to the Applicants that result from the reinsurance transaction. In addition, Milliman must: (1) Review all contracts (and any renewal of such contracts) of the reinsurance of risks and the receipt of premiums therefrom by One Belmont and determine that the requirements of the exemption continue to be satisfied; and (2) quantify (in dollars) all savings and other benefits that Comcast receives from the proposed captive reinsurance arrangement, and ensure that the Plan's participants receive a corresponding benefit, at Comcast's expense, in the manner described above.

16. Milliman represents that it has extensive experience overseeing captive reinsurance arrangements. Milliman represents that it does not have, and has not previously had, any relationship with any party in interest (including any affiliates thereof) engaging in the proposed transactions. Milliman does not have any financial interest with respect to their work as an independent fiduciary regarding this proposed transaction, or the captive reinsurance arrangement, apart from the express fees paid for their work as an independent fiduciary for the Plan. Gross income received by Milliman from Comcast, One Belmont, or Prudential for this fiscal year is less than 0.1% of Milliman's gross annual income from all sources. Under this exemption, the gross income Milliman receives from Comcast, One Belmont and Prudential in a fiscal year must not exceed two percent of Milliman's gross annual income from all sources for that year. As a condition of the exemption, neither Milliman nor any of its representatives will enter into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA section 410 or the Department's regulation relating to indemnification of fiduciaries at 29 CFR 2509.75–4.[19] Finally, Comcast and its related parties have not, and will not, indemnify Milliman, in whole or in part, for negligence and/or for any violations of state or federal law that may be attributable to Milliman performing its duties under the captive reinsurance arrangement. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violations.

17. In connection with the transactions that are the subject of this proposed exemption, Milliman represents that it has, among other things, in full accordance with its prudence and loyalty obligations under ERISA sections 404(a)(1)(A) and (B): (a) Reviewed a draft of Comcast's application for an administrative exemption that was submitted to the Department; (b) conferred with Comcast's representative to discuss the transactions involved in the reinsurance arrangement; (c) conducted such other

[18] Under ERISA section 3(14)(G), a corporation is a ''party in interest'' with respect to an employee benefit plan if 50% or more of the combined voting power of all classes of the corporation's stock entitled to vote, or the total value of shares of all classes of stock of the corporation, is owned by an employer any of whose employees are covered by the employee benefit plan.

[19] ERISA section 410 provides, in relevant part, that ''except as provided in [ERISA] sections 405(b)(1) and 405(d), any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [meaning Part 4 of Title I of ERISA] shall be void as against public policy.''

due diligence reviews as were prudent to determine that the conditions of the proposed exemption would be met, including the premiums to be paid by the Life Insurance Component for the proposed coverage.

Department's Note. If the Department grants an exemption, Milliman's findings would not be current as of the exemption's effective date. Therefore, as a condition of the exemption, Milliman must engage in another analysis of the proposed transactions in full accordance with ERISA Section 404(a)(1)(A) and (B). As part of this analysis, Milliman must review the terms of the exemption and verify that it has concluded based on its review of all of the relevant documents and evidence that all of the exemption's terms and conditions have been met (or, due to timing requirements, can reasonably expected to be met consistent with the time requirements set forth in this proposed exemption)). Milliman must document the basis for its conclusions in a written report submitted to the Department's Office of Exemption Determinations at least 30 days before the Plan engages in the reinsurance arrangement. The report must include copies of all documents and evidence Milliman relied on when conducting its review.

18. For the duration of the captive reinsurance arrangement, Milliman must: (a) Monitor, enforce and ensure compliance with all conditions of the exemption, including all conditions and obligations imposed on any party dealing with the Plan, throughout the period during which One Belmont's assets are directly or indirectly used in connection with a transaction covered by this exemption; (b) report any instance of non-compliance immediately to the Department's Office of Exemption Determinations; (c) monitor the transactions covered by the exemption on a continuing basis, to ensure the transactions remain in the interest of the Plan; and (d) take all appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries. Milliman must also review all contracts and agreements (and any renewal of such contracts) relevant to the captive reinsurance arrangement and exemption.

19. Additionally, Milliman must file annual certified reports to the Department, under penalty of perjury, confirming that all of the terms and conditions of the exemption have been met and explaining the bases for that conclusion.

20. In the initial year of this proposed transaction, there will be an immediate and objectively determined benefit in the form of reduced employee contributions for the Dental Component of the Plan in the amount of $375,000. Milliman must ensure that all participants in the Plan's Dental Component will receive: The premium savings they are entitled to under the exemption; and the full amount of any other benefit Comcast receives from the proposed arrangement. The Department retains the right to propose a revocation or amendment to this exemption if it is unable to confirm the reliability of the underlying financial data supporting the Independent Fiduciary's ''look-back'' findings. The Department notes that its failure to revoke an exemption is not an endorsement or conclusion that the conditions of the exemption are, in fact, met.

21. In addition to the protections and conditions discussed above, this proposed exemption requires, and Milliman must verify that: (a) Neither the Plan nor any plan participant pays any commissions with respect to the direct insurance agreement between Comcast and Prudential and the reinsurance agreement between Prudential and One Belmont; (b) the formula used by Prudential, or any successor insurer, to calculate premiums will be similar to the formula used by other insurers providing comparable coverage under similar programs that are not captive reinsured; (c) the premium charged to the Life Insurance Component will be reasonable and comparable to the premiums charged by the insurer and its competitors with the same or a better financial strength rating providing the same coverage under comparable insurance programs that are not captive reinsured; (d) the Life Insurance Component will only contract with insurers with a financial strength rating of ''A'' or better from A. M. Best; (e) the Plan pays no more than adequate consideration with respect to insurance that is part of the captive reinsurance arrangement covered by the proposed exemption and (f) the captive reinsurance arrangement between the insurer and One Belmont will be indemnity reinsurance only (*i.e.,* the Fronting Insurer will not be relieved of any liability to the Plan should the reinsurer be unable or unwilling for any reason to cover any liability arising from the reinsurance arrangement).

22. This proposed exemption expressly prohibits Comcast (or a related entity) from using any participant-related data or information that is generated by (or derived from) the proposed captive reinsurance arrangement in any manner that benefits Comcast or a related entity. Comcast may not reduce or offset any benefits provided to Plan participants and beneficiaries in connection with its implementation of the proposed captive reinsurance arrangement. Further, all expenses associated with the exemption and the exemption application, including any payment to the Independent Fiduciary, must be paid by Comcast and not the Plan.

The Department's Findings

23. The Department has the authority under ERISA section 408(a) to grant an exemption from the prohibition transaction provisions of ERISA section 406 if the Department finds that the transaction is in the interest and protective of the rights of the affected plan and its participants and beneficiaries, and is administratively feasible.[20] The Department's findings required under ERISA section 408(a) with respect the proposed captive reinsurance arrangement are discussed below.

24. *The Proposed Exemption is ''Administratively Feasible.''* The Department has tentatively determined that the proposed exemption would be administratively feasible, because the proposed captive reinsurance arrangement is subject to robust annual reviews by Milliman that must be filed with the Department's Office of Exemption Determinations.

25. *The Proposed Exemption is ''In the Interests of the Plan.''* The Department has tentatively determined that the proposed exemption would be in the interest of the Plan because, among other things, 100% of the benefit to Comcast from the proposed captive reinsurance arrangement must be transferred to participants in the Plan's Dental Component by reducing their premiums in an amount equal to any and all cost savings and benefits Comcast derives from the proposed captive reinsurance arrangement. At no point during the proposed captive reinsurance arrangement will the aggregate benefit to the Plan's participants in the Dental Component be less than $375,000 per year, and Comcast may not contribute less than 60% towards the premium for the Plan's Dental Component after entering into the proposed reinsurance arrangement.

26. *The Proposed Exemption is ''Protective of the Plan.''* The Department has tentatively determined that the proposed exemption is

[20] Specifically, ERISA section 408(a) provides that the Secretary of Labor may not grant an exemption unless the Secretary finds that the exemption is administratively feasible, in the interests of the plan and it participants and beneficiaries, and protective of the rights of the plan participants and beneficiaries of such plan.

protective of the rights of the Plan participants and beneficiaries because, among other things: (a) The premium charged to the Life Insurance Component will be reasonable and comparable to the premiums charged by the insurer and its competitors with the same or a better financial strength rating providing the same coverage under comparable insurance programs that are not captive reinsured; (b) the Life Insurance Component will only contract with insurers with a financial strength rating of ''A'' or better from A. M. Best; (c) the Plan pays no more than adequate consideration with respect to insurance that is part of the captive reinsurance arrangement covered by the proposed exemption; and (d) the reinsurance arrangement between the insurer and One Belmont will be indemnity reinsurance only (*i.e.,* the Fronting Insurer will not be relieved of any liability to the Plan should the reinsurer become unable or unwilling for any reason to cover any liability arising from the reinsurance arrangement).

Summary

27. Based on Comcast satisfying the conditions described above, the Department has tentatively determined that the relief sought by Comcast satisfies the statutory requirements for an exemption under ERISA section 408(a).

Proposed Exemption

The relief described in Section II of this proposed exemption is conditioned upon adherence to the material facts and representations described herein and as presented to the Department by Comcast, as well as satisfaction of the Definitions in Section I and the Conditions in Section III.

Section I. Definitions

(a) An ''affiliate'' of Comcast or One Belmont includes: (1) Any person who controls the person or is controlled by or under common control with Comcast or One Belmont; (2) Any officer, director, employee, relative, or partner in Comcast or One Belmont; and (3) Any corporation or partnership of which the person in (2) of this paragraph is an officer, director, partner, or employee;

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term ''Independent Fiduciary'' means a person who:

(1) Is not an affiliate of Comcast or One Belmont and does not hold an ownership interest in Comcast or One Belmont or their affiliates;

(2) Is not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) Is a fiduciary with respect to the plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA section 410 or the Department's regulation relating to indemnification of fiduciaries at 29 CFR 2509.75–4.

(5) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year if the gross income received by such organization or individual from Comcast, One Belmont or their affiliates for that fiscal year exceeds two percent (2%) of such organization's or individual's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which such organization or individual is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director or ten percent (10%) or more partner or shareholder may acquire any property from, sell any property to, or borrow any funds from Comcast or One Belmont or their affiliates while serving as an Independent Fiduciary. This prohibition will continue for a period of six months after: The party ceases to be an Independent Fiduciary; and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

Section II: Covered Transactions

If this proposed exemption is granted, the restrictions of ERISA sections 406(a)(1)(D) and 406(b)(1) will not apply to the reinsurance of risks and the receipt of premiums therefrom by One Belmont Insurance Company, an affiliate of Comcast Corporation (Comcast), in connection with insurance contracts sold by Prudential Insurance Company (Prudential), or any successor fronting insurer meeting the requirements of this proposed exemption (a Fronting Insurer), to provide group term life insurance benefits to participants in the life insurance component (the Life Insurance Component) of the Comcast Corporation Comprehensive Health and Welfare Benefit Plan (the Plan).

Section III. Conditions

(a) In the initial year and each subsequent year of the captive reinsurance arrangement, the participants' portion of the premium for the dental component of the Plan (the Dental Component) must be reduced by at least $375,000. If Comcast's savings from the captive reinsurance arrangement are greater than $375,000 in any year, Comcast must reduce the participants' portion of the Dental Component's premium by that greater amount in the next subsequent year. If Comcast or any of its affiliates ultimately receive some other benefit in connection with *the* captive insurance arrangement, such as a tax reduction or a profit or any benefit arising from a further diversification of One Belmont's risks in connection with adding the Insurance Component's risks to One Belmont's other risks, participants in the Dental Component must receive an additional corresponding dollar-for-dollar reduction to their portion of the Dental Component's premiums in the subsequent year.

(b) No commissions are paid by the Plan with respect to the direct sale of such contracts or the reinsurance thereof;

(c) In the initial year and in subsequent years of coverage provided by a Fronting Insurer, the formulae used by the Fronting Insurer to calculate premiums will be similar to formulae used by other insurers providing comparable life insurance coverage under similar programs that are not captive reinsured. Furthermore, the premium charges calculated in accordance with the formulae will be reasonable and will be comparable to the premiums charged by the Fronting Insurer and its competitors with the same or a better financial strength rating providing the same coverage under comparable programs that are not captive reinsured;

(d) Comcast is solely and fully responsible for funding One Belmont's reserves with respect to the reinsurance arrangement covered by this proposed exemption;

(e) One Belmont:

(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with Comcast that is described in ERISA section 3(14)(E) or (G);

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as such term is defined in ERISA section 3(10);

(3) Has obtained a Certificate of Authority from the state of Vermont, its domiciliary state, that has neither been revoked nor suspended;

(4) (A) Has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year immediately before the taxable year of the reinsurance transaction covered by this exemption; or

(B) Has undergone a financial examination (within the meaning of the law of Vermont) by the Commissioner of Banking, Insurance, Securities and Health Care Administration of the State of Vermont within five (5) years before the end of the year preceding the year in which the reinsurance transaction occurred; and

(5) Is licensed to conduct reinsurance transactions under Vermont law, which requires an actuarial review of reserves to be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority;

(f) The Plan retained and will continue to retain an independent, qualified fiduciary or successor to such fiduciary, as defined in Section I(c), (the Independent Fiduciary) to analyze the transactions covered by this proposed exemption, and render an opinion that the requirements of this exemption have been satisfied;

(g) The Independent Fiduciary must, in full accordance with its obligations of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B), review the terms of the exemption, engage in a prudent and loyal analysis of the covered transactions, and verify that based on its review of all relevant documents and evidence, it has concluded that all of the exemption's terms and conditions have been met (or can be reasonably be expected to be met consistent with the time requirements set forth in this proposed exemption). This conclusion must be documented in a written report submitted to the Department's Office of Exemption Determinations at least 30 days before the Plan engages in a transaction covered by the exemption. The report must include copies of each document relied on by the Independent Fiduciary and discuss the bases for its conclusion;

(3) Monitor, enforce and ensure compliance with all conditions of this exemption, including all conditions and obligations imposed on any party dealing with the Plan, throughout the period during which One Belmont's assets are directly or indirectly used in connection with a transaction covered by this exemption;

(4) Report any instance of non-compliance immediately to the Department's Office of Exemption Determinations;

(5) Monitor the transactions described in the exemption on a continuing basis, to ensure the transactions remain in the interest of the Plan;

(6) Take all appropriate actions to safeguard the interests of the Plan;

(7) Review all contracts pertaining to the Reinsurance Arrangement, and any renewals of such contracts, to determine whether the requirements of this proposed exemption continue to be satisfied;

(8) Determine that the Reinsurance Arrangement is in no way detrimental to the Plan and its participants and beneficiaries;

(9) Confirm that the Plan's Dental Component has received all the financial benefits and cost savings associated with the proposed captive reinsurance arrangement that otherwise would have been retained by Comcast or a party related to Comcast;

(10) Provide an annual report to the Department, under penalty of perjury, certifying that each term and condition of this exemption is satisfied and setting forth the bases for the certification. Each report must be: (i) Completed within six months after the end of the twelve month period to which it relates (the first twelve month period begins on the first day of the implementation of the captive reinsurance arrangement covered by this proposed exemption); and (ii) submitted to the Department within six months thereafter;

(h) Comcast and its related parties have not, and will not, indemnify the Independent Fiduciary, in whole or in part, for negligence and/or for any violations of state or federal law that may be attributable to the Independent Fiduciary in performing its duties under the captive reinsurance arrangement. In addition, no contract or instrument will purport to waive any liability under state or federal law for any such violations.

(i) Neither Comcast nor a related entity may use participant-related data or information generated by, or derived from, the Reinsurance Arrangement, in a manner that benefits Comcast or a related entity;

(j) All the facts and representations set forth in the Summary of Facts and Representation are true and accurate;

(k) Comcast will not offset or reduce any benefits provided to Plan participants and beneficiaries in connection with its implementation of the captive reinsurance arrangement;

(l) The Plan will only contract with a Fronting Insurer with a financial strength rating of ''A'' or better from A.M. Best;

(m) The Plan pays no more than adequate consideration with respect to insurance that is part of the captive reinsurance arrangement covered by the proposed exemption;

(n) In the event a successor Independent Fiduciary is appointed to represent the interests of the Plan with respect to the subject transaction, no time shall elapse between the resignation or termination of the former Independent Fiduciary and the appointment of the successor Independent Fiduciary; and

(o) All expenses associated with the exemption and the exemption application, including any payment to the Independent Fiduciary, must be paid by Comcast and not the Plan.

Effective Date: The proposed exemption is effective as of the date a final exemption is published in the **Federal Register**.

Notice to Interested Persons

Persons who may be interested in the publication of this notice in the **Federal Register** include Plan participants and beneficiaries. The Applicants will provide notification to such interested persons by electronic and first-class mail within fifteen (15) calendar days after the date the Notice is published in the **Federal Register**. Such mailing will contain a copy of the Notice as it appears in the **Federal Register** on the publication date and a copy of the Supplemental Statement required by 29 CFR 2570.43(b)(2) that advises interested persons of their right to comment on the proposed exemption and request a hearing.

The Department must receive all written comments and requests for a hearing no later than forty-five (45) days after publication date of the date of the Notice in the **Federal Register**.

All comments will be made available to the public.

Warning: Please do not include any personally identifiable information (such as your name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and are

retrievable by most internet search engines.

Further Information Contact: Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567 (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC.

G. Christopher Cosby,

Acting Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2021–20237 Filed 9–17–21; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of the Extended Benefit (EB) Program for New Mexico

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

This notice announces a change in benefit period eligibility under the EB program that has occurred since the publication of the last notice regarding the States' EB status:

• The beginning date for New Mexico's High Unemployment Period (HUP) was July 4, 2021, and statutorily once a state begins a HUP it must remain ''on'' for 13-weeks. During the mandatory 13-week ''on'' period, the Bureau of Labor Statistics released data which showed the seasonally-adjusted total unemployment rate for New Mexico falling below the 8.0 percent threshold necessary to remain ''on'' a HUP in EB. As such, the HUP for New Mexico will end on October 2, 2021 and beginning October 3, 2021, the maximum potential entitlement for claimants in EB in New Mexico will decrease from 20 weeks to 13 weeks.

The trigger notice covering state eligibility for the EB program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.as*.

Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13 (c) (1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202) 693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov.*

Signed in Washington, DC.

Lenita Jacobs-Simmons,

Acting Assistant Secretary, Labor.

[FR Doc. 2021–20238 Filed 9–17–21; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of the Extended Benefit (EB) Program for the District of Columbia

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

This notice announces a change in benefit period eligibility under the EB program that has occurred since the publication of the last notice regarding the District of Columbia's EB status:

• Based in the language in the District's law which conditioned the applicability of the Total Unemployment Rate (TUR) trigger on full Federal funding resulted in an ''off'' indicator for the District of Columbia for the week ending August 21, 2021. This will end any payable period associated with the TUR trigger for the District of Columbia on September 11, 2021.

The trigger notice covering state eligibility for the EB program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.as.*

Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program,

should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202) 693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov.*

Signed in Washington, DC.

Lenita Jacobs-Simmons,

Acting Assistant Secretary, Labor.

[FR Doc. 2021–20239 Filed 9–17–21; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Definition and Requirements for a Nationally Recognized Testing Laboratory

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety and Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 20, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie by telephone at 202–693–0456 or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: A number of standards issued by the OSHA contain requirements for equipment, products, or materials. These standards often specify that employers use only equipment, products, or material tested or approved by a Nationally Recognized Testing Laboratory. This requirement ensures that employers use safe equipment, products, or materials in complying with the standards. Accordingly, OSHA promulgated the regulation 29 CFR 1910.7, ''definition and requirements for a nationally recognized testing laboratory.'' The Regulation specifies procedures that organizations must follow to apply for, and to maintain, OSHA's recognition to test and certify equipment, products, or material for this purpose. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 28, 2021 (86 FR 28913).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Definition and Requirements for a Nationally Recognized Testing Laboratory.

OMB Control Number: 1218–0147.

Affected Public: Private Sector: Businesses or other for-profits.

Total Estimated Number of Respondents: 23.

Total Estimated Number of Responses: 146.

Total Estimated Annual Time Burden: 1,572 hours.

Total Estimated Annual Other Costs Burden: $757,440.

Authority: 44 U.S.C. 3507(a)(1)(D).

Crystal Rennie,

Senior PRA Analyst.

[FR Doc. 2021–20235 Filed 9–17–21; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

Meeting of Humanities Panel

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: The National Endowment for the Humanities (NEH) will hold sixteen meetings, by videoconference, of the Humanities Panel, a federal advisory committee, during October 2021. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates. The meetings will open at 8:30 a.m. and will adjourn by 5:00 p.m. on the dates specified below.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given of the following meetings:

1. Date: October 5, 2021

This video meeting will discuss applications on the topic of Literary Studies, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

2. Date: October 7, 2021

This video meeting will discuss applications on the topics of Film and Media Studies, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

3. Date: October 12, 2021

This video meeting will discuss applications on the topic of World

Studies, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

4. Date: October 14, 2021

This video meeting will discuss applications on the topics of Music and Performing Arts, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

5. Date: October 19, 2021

This video meeting will discuss applications on the topic of Indigenous Studies, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

6. Date: October 19, 2021

This video meeting will discuss applications on the topic of U.S. History, for the Public Humanities Projects: Exhibitions (Implementation) grant program, submitted to the Division of Public Programs.

7. Date: October 20, 2021

This video meeting will discuss applications on the topics of Arts and Music, for the Media Projects: Production Grants, submitted to the Division of Public Programs.

8. Date: October 21, 2021

This video meeting will discuss applications for the Public Humanities Projects: Humanities Discussions Grants, submitted to the Division of Public Programs.

9. Date: October 21, 2021

This video meeting will discuss applications on the topic of Art History, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

10. Date: October 22, 2021

This video meeting will discuss applications on the topic of American Studies, for the Media Projects: Production Grants, submitted to the Division of Public Programs.

11. Date: October 26, 2021

This video meeting will discuss applications on the topics of Native American and Western History, for the Public Humanities Projects: Exhibitions (Implementation) grant program, submitted to the Division of Public Programs.

12. Date: October 26, 2021

This video meeting will discuss applications on the topic of Indigenous Studies, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

13. Date: October 27, 2021

This video meeting will discuss applications on the topic of U.S. History, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

14. Date: October 27, 2021

This video meeting will discuss applications on the topic of Podcasts, for the Media Projects: Production Grants, submitted to the Division of Public Programs.

15. Date: October 28, 2021

This video meeting will discuss applications on the topic of U.S. History, for the Public Humanities Projects: Exhibitions (Implementation) grant program, submitted to the Division of Public Programs.

16. Date: October 28, 2021

This video meeting will discuss applications on the topic of American Studies, for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: September 14, 2021.

Samuel Roth,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2021–20228 Filed 9–17–21; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting

The National Science Board's Committee on Oversight hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: Tuesday, September 21, 2021, from 2:00–3:00 p.m. EDT.

PLACE: This meeting will be held by teleconference through the National Science Foundation.

STATUS: Open.

MATTERS TO BE CONSIDERED: The agenda of the teleconference is: Chair's opening remarks; review draft NSB Overview of Merit Review Digest; review questions and data requests applicable to future Merit Review Digests; discuss priorities for Committee on Oversight efforts for the rest of 2021; and discuss CO oversight of the new TIP directorate.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: Ann Bushmiller, *abushmil@nsf.gov,* 703/292–7000. To listen to this teleconference, members of the public must send an email to *nationalsciencebrd@nsf.gov* at least 24 hours prior to the teleconference. The National Science Board Office will send requesters a toll-free dial-in number. Meeting information and updates may be found at the National Science Board website at *www.nsf.gov/nsb.*

Chris Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2021–20342 Filed 9–16–21; 11:15 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Geosciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

NAME AND COMMITTEE CODE: Advisory Committee for Geosciences (1755).

DATE AND TIME: October 13–14, 2021; 11:00 a.m.–4:30 p.m. EDT.

PLACE: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314/Virtual Meeting registration information is available on the GEO Advisory Committee website at *https://www.nsf.gov/geo/advisory.jsp.*

TYPE OF MEETING: Open.

CONTACT PERSON: Melissa Lane, National Science Foundation, Room C 8000, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; Phone 703–292–8500

MINUTES: May be obtained from the contact person listed above.

PURPOSE OF MEETING: To provide advice, recommendations, and oversight on support for geoscience research and education including atmospheric, geospace, earth, ocean and polar sciences.

Agenda

October 13, 2021

- Directorate and NSF activities and plans
- Discussion of the Administration and NSF Focus Area on Climate Change
- Discussion of the Recently Released NASEM Earth System Science Study
- Briefing on the Future TIP Directorate

October 14, 2021

- Report outs from Division Meetings
- Update on OPP Activities
- Report on the EAR Committee of Visitors Meeting
- Report on the GEO Education & Diversity Committee of Visitors Meeting
- Meeting with the NSF Director and Chief Operating Officer
- Action Items/Planning for Spring 2022 Meeting

Dated: September 15, 2021.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2021–20289 Filed 9–17–21; 8:45 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92982; File No. SR–NYSEARCA–2021–80]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Order Audit Trail System Rules in the Rule 6.7400–E Series

September 14, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on September 7, 2021, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the Order Audit Trail System (''OATS'') rules in the Rule 6.7400–E Series as these Rules provide for the collection of information that is duplicative of the data collection requirements of the CAT. Further, the Financial Industry Regulatory Authority (''FINRA'') has determined to eliminate its OATS rules. 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

Rule 613 of Regulation NMS requires national securities exchanges and FINRA to create, implement, and maintain a consolidated audit trail to capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,[4] and approved by the Commission, as modified, on November 15, 2016.[5]

On August 14, 2020, FINRA filed with the Commission a proposed rule change to delete the OATS rules once Industry Members are effectively reporting to the CAT (the ''OATS Retirement Filing'').[6] On October 29, 2020, FINRA filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'') and a response to the comments that were submitted on the original filing (''Response to Comments'').[7] On November 30, 2020, the Commission approved the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[8] On June 17, 2021, FINRA filed a proposed rule change setting forth the basis for its determination that the accuracy and reliability of the CAT meet the standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS rules.[9] The FINRA proposal stated that FINRA would retire OATS effective September 1, 2021.

After conducting an analysis of its rules in accordance with the CAT NMS Plan, the Exchange has determined that the information collected pursuant to the OATS rules is intended to be collected by CAT. Further, the Exchange believes that the Rule 6.7400–E Series will no longer be necessary and proposes to delete such rules from the Exchange's rulebook. Discussed below is a description of the duplicative rule requirements as well as the timeline for eliminating the duplicative rules followed by a discussion on the OATS Retirement Filing that formed the basis for retiring OATS.

Duplicative OATS Requirements

The Rule 6.7400–E Series consists of Rules 6.7410–E through 6.7470–E and sets forth the recording and reporting requirements of the OATS Rules. The OATS Rules require all Exchange members and associated persons to record in electronic form and report to FINRA, on a daily basis, certain information with respect to orders originated, received, transmitted, modified, canceled, or executed by members in all NMS stocks, as that term is defined in Rule 600(b)(47) of Regulation NMS,[10] traded on the Exchange. The Exchange relies on the information reported to OATS either to conduct surveillance or to facilitate surveillance conducted by FINRA

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

[5] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (''Order Approving the National Market System Plan Governing the Consolidated Audit Trail'') (''Approval Order'').

[6] *See* Securities Exchange Act Release No. 89679 (August 26, 2020), 85 FR 54461 (September 1, 2020) (Notice of Filing of File No. SR–FINRA–2020–024).

[7] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 29, 2020.

[8] *See* Securities Exchange Act Release No. 90535 (November 30, 2020), 85 FR 78395 (December 4, 2020) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of SR–FINRA–2020–024).

[9] *See* Securities Exchange Act Release No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021) (SR–FINRA–2021–017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Retirement of FINRA's Order Audit Trail System).

[10] 17 CFR 242.600(B)(47).

pursuant to a regulatory services agreement (''RSA''). This information is used by Exchange and FINRA staff to conduct surveillance and investigations of member firms for violations of Exchange and FINRA rules and federal securities laws. The Exchange believes it is appropriate to retire OATS because the requirements of the Rule 6.7400–E Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational.

Timeline for Elimination of Duplicative Rules

The CAT NMS Plan states that the elimination of rules that are duplicative of the requirements of the CAT and the retirement of the related systems should be effective at such time as CAT Data meets minimum standards of accuracy and reliability.[11] As discussed in more detail in the OATS Retirement Filing, FINRA believes that OATS may be retired effective September 1, 2021 given the error rate thresholds have been met, and FINRA has determined that its usage of the CAT Data has not revealed material issues that have not been corrected and further confirmed that the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations.

OATS Retirement Filing

In the OATS Retirement Filing, FINRA proposed to eliminate the OATS rules once Industry Members are effectively reporting to the CAT and the CAT's accuracy and reliability meet certain standards. Specifically, FINRA proposed that before OATS could be retired, the CAT generally must achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower on a pre-correction basis, and 2% or lower on a post-correction basis (measured at T+5). In addition to the maximum error rates and matching thresholds, FINRA's use of CAT Data must confirm that (i) there are no material issues that have not been corrected, (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Industry Member Data.

In the OATS Retirement Filing, FINRA explained that its review of CAT Data and error rates would be based on data and linkages in the initial phase of reporting (or ''Phase 2a''), which replicate the data in OATS today and thus are most relevant for OATS retirement purposes. Phase 2a Data includes all events and scenarios covered by OATS and applies only to equities. FINRA did not consider options order events or Phase 2c data and validations, which are not in OATS today, for purposes of OATS retirement.

As described below, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing.

(1) Maximum Error Rates

As discussed in the OATS Retirement Filing, FINRA believes that relevant error rates are the primary, but not the sole, metric by which to determine the CAT's accuracy and reliability and will serve as the baseline requirement needed before OATS can be retired. FINRA proposed that, before OATS could be retired, the CAT would generally need to achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower, measured on a pre-correction or as-submitted basis, and 2% or lower on a post-correction basis (measured at T+5).[12] FINRA proposed to average the error rates across the period, rather than require a 5% pre-correction and 2% post-correction maximum each day for 180 consecutive days. FINRA also proposed to measure the error rates in the aggregate, rather than on a firm-by-firm basis. Finally, FINRA proposed to measure the error rates separately for each of the five categories, rather than evaluate all categories in the aggregate. As noted above, FINRA's assessment of the error rates for Industry Member reporting is based solely on Phase 2a CAT reporting for equity events since options orders are not included in OATS today.

As discussed in the OATS Retirement Filing, FINRA measured the error rates in each of the five categories discussed below during the period from October 26, 2020 through April 26, 2021 (the ''applicable period''). FINRA commenced this period on October 26, 2020, which was the date that Industry Members were required to begin correcting all errors for inter-firm linkages and exchange/TRF/ORF match validations. As discussed in the Response to Comments, although the production environment for inter-firm linkage and exchange/TRF/ORF match validations was open for testing as of September 28, 2020, FINRA did not believe it would be appropriate for the 180-day period to commence prior to the October 26, 2020 compliance date.[13]

Rejection Rates and Data Validations. As described in the OATS Retirement Filing, the Plan Processor must perform certain basic data validations,[14] and if a record does not pass these basic data validations, it must be rejected and returned to the CAT Reporter to be corrected and resubmitted. FINRA proposed that over the 180-day period, aggregate rejection rates must be no more than 5% pre-correction or 2% post-correction across all Industry Member Reporters. FINRA has determined that, over the applicable period, aggregate rejection rates across all Industry Member Reporters were 0.03% pre-correction and 0.01% post-correction.

Intra-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum, this requirement includes the creation of an order lifecycle between all order events handled within an individual CAT Reporter, including orders routed to internal desks or departments with different functions (*e.g.,* an internal ATS). FINRA proposed that aggregate intra-firm linkage rates across all Industry Member Reporters must be at least 95% pre-correction and 98% post-correction. FINRA has determined that, over the applicable period, aggregate intra-firm linkage rates across all Industry Member Reporters were 99.97% pre-correction and 99.99% post-correction.

Inter-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to create the lifecycle between orders routed between broker-dealers. FINRA proposed that at least a 95% pre-correction and 98% post-correction aggregate match rate be achieved for orders routed between two Industry Member Reporters. FINRA has determined that during the applicable

[11] Appendix C of CAT NMS Plan, Approval Order at 85010.

[12] As clarified in the OATS Retirement Filing, although FINRA does not believe that post-correction errors need to be de minimis before OATS can be retired, FINRA was not suggesting, with the proposal, that 2% would meet the ultimate objective of de minimis error rates for CAT. *See* CAT NMS Plan, Appendix C, note 102 (error rates after reprocessing of error corrections are ultimately expected to be de minimis for the CAT). *See also* Approval Order.

[13] *See* FINRA's Response to Comments, *supra* note 8.

[14] Appendix D of the CAT NMS Plan, Section 7.2, for example, requires that certain file validations (*e.g.,* file transmission and receipt are in the correct formats, confirmation of a valid SRO-Assigned Market Participant Identifier, etc.), and syntax and context checks (*e.g.,* format checks, data type checks, consistency checks, etc.) be performed on all submitted records.

period there was a 99.08% pre-correction and 99.84% post-correction aggregate match rate for orders routed between two Industry Member Reporters.

Order Linkage Rates. As described in the OATS Retirement Filing, in addition to creating linkages within and between broker-dealers, the Plan Processor must be able to create lifecycles to link various pieces of related orders. For example, the Plan requires linkages of order information to create an order lifecycle from origination or receipt to cancellation or execution. This category essentially combines all of the order-related linkages to capture an overall snapshot of order linkages in the CAT.[15] FINRA proposed that there be at least a 95% pre-correction and 98% post-correction rate for order linkages that are required in Phase 2a. FINRA has determined that during the applicable period there was a 99.66% pre-correction and 99.93% post-correction rate for order linkages required in Phase 2a.[16]

Exchange and TRF/ORF Match Rates. As described in the OATS Retirement Filing, an order lifecycle must be created to link orders routed from broker-dealers to exchanges and executed orders and trade reports. FINRA proposed at least a 95% precorrection and 98% post-correction aggregate match rate across all equity exchanges[17] for orders routed from Industry Members to an exchange and, for over-the-counter executions, the same match rate for orders linked to trade reports. FINRA determined that, during the applicable period, there was a 99.51% pre-correction and 99.87% post-correction aggregate match rate across all equity exchanges for orders routed from Industry Members to an exchange and, for over-the-counter executions, there was a 99.34% pre-correction and 99.53% post-correction rate for orders linked to trade reports submitted to the FINRA Trade Reporting Facilities and OTC Reporting Facility.

As set forth above, the error rates for Industry Member reporting over the applicable period were well below the maximum rates established in the OATS Retirement Filing. FINRA also noted that the overall post-correction error rate for Phase 2a Industry Member reporting of 1.01% is comparable to the current overall OATS post-correction error rate, which generally is at or slightly below 1%. Therefore, FINRA has determined that, based on the error rates for Industry Member reporting, the CAT Data meets the accuracy and reliability baseline standards required for OATS retirement.

(2) FINRA's Use of CAT Data

In the OATS Retirement Filing, FINRA stated that while error rates are a key standardized measure in determining whether OATS retirement is appropriate, FINRA's use of the data in the CAT also must confirm that (i) there are no material issues that have not been corrected (*e.g.,* delays in the processing of data, issues with query functions, etc.), (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data.

In the OATS Retirement Filing, FINRA stated that it has been planning for OATS retirement for several years and the necessary development work has been underway for some time. FINRA also has been analyzing and testing production CAT Data for purposes of transitioning its automated equity surveillance patterns since the commencement of Phase 2a Industry Member reporting in June 2020 and through subsequent CAT milestone releases. For example, in addition to quantitative reviews, such as the error rate statistics discussed above, FINRA has conducted a series of qualitative reviews of Industry Member CAT Data. Such reviews include, among other things, comparing the count and distribution of Industry Member event reporting through CAT versus OATS (*e.g.,* new order and execution events, and data elements such as buy/sell/sell short codes), and reviewing results of examinations, alert reviews, and investigations relating to the timeliness and accuracy of Industry Member reporting. Based on such qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

As discussed in the OATS Retirement Filing, today, FINRA's surveillance patterns rely on the cross-market data model (''CMDM''), which comprises linked OATS data, equity exchange data feeds from each of the exchanges with which FINRA has entered into a RSA, and transactions reported to FINRA's equity trade reporting facilities. The CMDM will be retired and replaced by a newly created surveillance data mart, the Pattern Optimized Datamart (''POD''), which incorporates both equities and options data. At that point, FINRA's patterns will rely on CAT Data in POD, *i.e.,* Plan Participant and Industry Member data reported in CAT format and linked by CAT.[18] FINRA notes that the Plan Participants transitioned to reporting via the CAT technical specification as of April 26, 2021, and full Plan Participant equities reporting and linkage validations in accordance with the CAT specification commenced on June 1, 2021.[19] Successful completion of the transition to the CAT specification for Plan Participants is a prerequisite for FINRA to retire the CMDM and leverage CAT Data and linkages in POD for its surveillance patterns. As of the date of this filing, FINRA has completed all planned activities on schedule, including substantially completing the process of integrating CAT Data into POD and successfully running large

[15] *See* FINRA's Response to Comments, *supra* note 8.

[16] FINRA noted that in Phase 2a, linkage is required between the representative street side order and the order being represented when the representative order was originated specifically to represent a single order (received either from a customer or another broker-dealer) and there is: (1) An existing direct electronic link in the firm's system between the order being represented and the representative order, and (2) any resulting executions are immediately and automatically applied to the represented order in the firm's system. As set forth in the OATS Retirement Filing, while such linkages are not required in OATS, FINRA believes that it is appropriate to evaluate them for purposes of retiring OATS because they represent a significant enhancement to the data currently available in OATS and will enhance the quality of the equity audit trail. However, FINRA also explained in the Response to Comments that if all other proposed criteria have been met, FINRA would not anticipate delaying OATS retirement based on Phase 2a representative order linkage error rates alone.

In evaluating whether the standards for OATS retirement have been met, FINRA determined that the error rates for the Phase 2a representative order linkages did not have a significant negative impact on the overall error rates for order linkages. Accordingly, FINRA did not need to separately evaluate or exclude Phase 2a representative order linkage rates in measuring the error rates over the applicable period. For example, if the intra-firm linkage error rate had been above 5% over the applicable period, FINRA would have evaluated whether the error rate was the result of unlinked representative orders to create an apples-to-apples comparison to OATS.

[17] *See* Amendment No. 1.

[18] FINRA's Response to Comments noted this dependency, stating that the process of transitioning FINRA's surveillance patterns to CAT Data necessarily includes, among other things, ingestion of all Industry Member and Plan Participant data and linkages in CAT format. *See* Response to Comments, *supra* note 8, at 4[sic]. The Response to Comments further noted that the Plan Participants would be reporting to CAT via another mechanism until April 2021.

[19] For example, according to the CAT Reporting Technical Specification for Plan Participants (version 4.0.0–r4 dated April 20, 2021), additional linkage error feedback for off-exchange trade reports was effective as of June 1, 2021. The Technical Specifications can be found on the CAT NMS Plan website at *www.catnmsplan.com/sites/default/files/2021-04/04.20.2021-CAT-ReportingTechnical-Specifications-for-Participants-4.0.0-r4.pdf.*

amounts of production CAT Data for the month of May through POD.[20] FINRA anticipates completing additional activities before the proposed OATS retirement date, including, *e.g.,* planned user acceptance testing.[21]

As discussed in the OATS Retirement Filing, FINRA has performed broad analysis of its equity surveillance patterns and has determined that all of the data required to support the transition is available in CAT. By mapping OATS data to Industry Member CAT Data in POD, FINRA has confirmed that CAT Data has equivalent analogs to all data elements in OATS. In that regard, FINRA notes that, as a Plan Participant, FINRA has been involved in CAT development efforts to ensure that the scope and features of Industry Member data and processed output are sufficient for FINRA's surveillance program. These efforts include, for example, developing and updating the Industry Member Technical Specifications and Reporting Scenarios, conducting OATS–CAT gap analyses and validating that all such gaps have been properly addressed, and performing OATS-to-CAT field-level mappings.

With respect to Plan Participant data, FINRA notes in the OATS Retirement Filing that the test environment for Plan Participant reporting in accordance with the CAT specification opened on February 15, 2021.[22] Plan Participant equity reporting in accordance with the CAT specification in the test environment had a very high compliance rate for data ingestion and validation, and compliance in the production environment is comparable. In addition, starting on April 26, 2021, CAT began linking copies of Industry Member and Plan Participant data reported via the CAT specification in a test environment, and at that point, FINRA began its evaluation of the quality of these linkages. Based on this review and evaluation, in the OATS Retirement Filing, FINRA stated that it believes that the linkages between Plan Participant data and Industry Member data in CAT are comparable to the linkages between RSA exchange data and OATS data in the CMDM today.[23] FINRA CAT and the Plan Participants have now met the necessary criteria for a full cutover from the RSA specification to the CAT specification, including, *e.g.,* achieving comparable data ingestion validation and inter-venue linkage rates (within a variance of under one percent) between RSA and CAT specification submissions. Accordingly, the Operating Committee approved the cutover from the RSA specification to the CAT specification as the official source of Plan Participant data as of June 1, 2021, and today, all Industry Member and Plan Participant equities data reported via the CAT specification is linked in the CAT production environment.

As discussed in the OATS Retirement Filing, FINRA continues to evaluate CAT Data quality, and in particular, linkages between Industry Member and Plan Participant data, and to test its surveillance patterns to run on CAT Data in POD. In that regard, FINRA notes that it has followed established and time-tested processes and protocols throughout the development process to ensure that its patterns will perform as expected and produce the necessary output using CAT Data following the retirement of OATS. For example, FINRA's Software Development Lifecycle (''SDLC'') procedures govern systems design, changes, testing and controls. The SDLC procedures are an essential component of FINRA's operations and have been developed to serve FINRA's unique regulatory needs and structure. Additionally, consistent with SEC Regulation SCI, FINRA procedures include a plan of coordination and communication with regulatory staff. By relying on these established processes and protocols, FINRA has confidence that the CAT Data and linkages are reliable and sufficient to run FINRA's surveillance patterns.

Based on these results, as well as the results of its quantitative and qualitative reviews of CAT Data and successful efforts integrating CAT Data into POD, in the OATS Retirement Filing, FINRA stated that it believes that the complete portfolio of equity surveillance patterns will be capable of consuming CAT Data and achieving comparable (or better) output results.

Thus, FINRA proposes to retire OATS in accordance with the schedule set forth herein. FINRA will run its surveillance patterns for review periods through the end of the second quarter of 2021 using OATS data and begin using—and be fully reliant on—CAT Data for its surveillance patterns for review periods beginning in the third quarter of 2021. Following the retirement of OATS, FINRA expects to maintain the current established cadence of its monthly, quarterly and semi-annual surveillance patterns. In addition, FINRA's analytics platforms will have access to CAT Data as soon as such data is made available to regulators. Thus, outside of regularly scheduled surveillance pattern runs, FINRA can perform expedited analytics, as required by market events.

As discussed in the OATS Retirement Filing, FINRA is finalizing the development and certification of its surveillance patterns to run on CAT Data on a rolling basis and, in accordance with its existing SDLC procedures, will run a month's worth of data and compare the output before certifying each pattern. For those equity patterns that will be subject to certification after OATS retirement, FINRA anticipates that there would be sufficient time to identify and remediate any issues prior to running the patterns in accordance with the current established cadence. FINRA does not anticipate significant issues arising from additional scheduled POD releases or in the final stages of its pattern development and certification efforts.

As discussed in the OATS Retirement Filing, on an ongoing basis following the retirement of OATS, FINRA will conduct regular reviews to ensure confidence in the completeness and accuracy of Industry Member reporting, along with the ability to remediate any issues in a timely manner. Among other things, FINRA has a robust mechanism for detecting data issues, determining which issues are material for purposes of its surveillance program, and requesting resubmission and/or reprocessing of data, as necessary. FINRA also (1) performs a suite of data quality checks against data sourced from CAT to POD and against data processed by POD for use in surveillance patterns; (2) oversees a robust surveillance and examination compliance program that evaluates Industry Member reporting timeliness, data quality, and other issues and trends; (3) reviews CAT compliance program alerts using a rapid remediation process and formal reviews, as necessary; and (4) reviews Industry Member self-reporting and error correction trends. FINRA believes that these practices are sufficient for identification and timely resolution of Industry Member reporting and data issues after OATS has been retired.

[20] FINRA notes that additional POD releases are scheduled; however, these releases introduce minor enhancements to POD, as opposed to significant changes that would impact the way data is ingested or processed in POD.

[21] FINRA notes that user acceptance testing is the final stage of any software development life cycle and enables actual users to test the system to confirm that it is able to carry out the required tasks it was designed to address in real-world situations.

[22] *See, e.g.,* CAT Q1 2021 Quarterly Progress Report dated April 30, 2021, available at *www.catnmsplan.com/sites/default/files/2021-05/CAT-Q1-2021-QPR.pdf.*

[23] FINRA notes that the CAT uses the same code in both the test and production environments. Thus, FINRA believes that linkages in the test environment are reliable indicators of linkages in the production environment.

Specifically, with regard to the additional standards approved in the OATS Retirement Filing, through its use of CAT Data to date, as described above, FINRA believes that these standards have been satisfied. With respect to the first factor, FINRA does not believe that there are any material issues that have not been corrected (or could not be corrected in the course of operation of CAT, as approved by the Operating Committee) [24] that would impact FINRA's ability to incorporate and use CAT Data in FINRA's surveillance program. For example, the Plan requires that raw unprocessed data that has been ingested by the Plan Processor must be available to Participant regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1, and access to all iterations of processed data must be available to Participant regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5.[25] The Plan Processor also must ensure that regulators have access to corrected and linked order data by 8:00 a.m. Eastern Time on T+5.[26] Additionally, after ingestion by the Central Repository, the raw unprocessed data must be transformed into a format appropriate for data querying and regulatory output.[27] The user-defined direct queries and bulk extracts must provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.[28] FINRA's use of the CAT Data has not uncovered any processing delays or other material issues impacting the availability of, and FINRA's access to, the data.

With respect to the second factor, FINRA stated in the OATS Retirement Filing that it believes that the CAT includes all data necessary for FINRA to meet its surveillance obligations after the retirement of OATS. FINRA must ensure that the CAT, as the single source of order and trade data, can enable FINRA to conduct accurate and effective market surveillance in accordance with its regulatory obligations.[29] As noted above, Phase 2a Data includes all events and scenarios covered by OATS and is the most relevant for OATS retirement purposes. FINRA Rule 7440 describes the OATS requirements for recording information, which includes information related to the receipt or origination of orders, order transmittal, and order modifications, cancellations and executions. Large Industry Members and Small Industry Members that currently are reporting to OATS were required to submit data to the CAT for these same events and scenarios commencing in Phase 2a. FINRA's testing, analysis and use of the CAT Data (including integration into POD), as described above, has confirmed that the CAT includes all data necessary for FINRA to meet its surveillance obligations and that CAT is a reliable substitute for OATS. In addition, based on its qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

With respect to the third factor, FINRA stated in the OATS Retirement Filing that it believes that the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data. As detailed in the Implementation Plan and Quarterly Progress Reports submitted by the Plan Participants, the Plan Processor has met its targeted completion dates for the milestones for Phase 2a, including, for example, production Go-Live for Equities 2a file submission and data integrity validation (Large Industry Members and Small OATS Reporters) on June 22, 2020; Production Go-Live for Equities 2a Intrafirm Linkage validations on July 27, 2020; and production go-live for firm-to-firm linkage validations for equities (Large Industry Members and Small OATS Reporters) and exchange and TRF/ORF linkage validations for equities (Large Industry Members and Small OATS Reporters) on October 26, 2020.[30]

Based on the foregoing, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS Rules. FINRA has determined to retire OATS and remove the OATS rules from its rulebook effective September 1, 2021. Firms must continue to report to OATS all order events that occur on or prior to August 31, 2021. Reports submitted to OATS for order events that occur after August 31, 2021 will be rejected. In other words, August 31, 2021 will be the last ''OATS Business Day,'' as defined under FINRA Rule 7450(b)(3), for which OATS will accept order events and perform routine processing (including incorporation of corrections and repairs of rejections) occurring within the normal OATS timeframe for such activities. OATS will continue to accept reports for order events that occur on or prior to August 31, 2021 (including, but not limited to, late and corrected reports for such order events) through September 16, 2021. Firms must ensure that their OATS reporting is accurate and complete for all order events that occur on or prior to August 31, 2021.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[31] in general, and furthers the objectives of Section 6(b)(5) of the Act,[32] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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 remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposed rule change is consistent with Section C.9 of Appendix C to the Plan, which requires each Participant to ''file with the SEC the relevant rule change filing to eliminate or modify its duplicative rules within six (6) months of the SEC's approval of the CAT NMS Plan.'' [33] The Plan notes

[24] FINRA notes that FINRA CAT tracks known issues relating to Industry Member and Plan Participant reporting. *See, e.g., catnmsplan.com/CAT-Transaction-Known-Issues-List.* FINRA regularly reviews and analyzes FINRA CAT's list of current and resolved issues and does not believe that any of these issues would impact its ability to incorporate and use CAT Data in its surveillance program.

[25] *See* CAT NMS Plan, Appendix D, Section 6.2.

[26] *See* CAT NMS Plan, Appendix C, Section A.2(a).

[27] *See* CAT NMS Plan, Appendix C, Section A.1(b).

[28] *See* CAT NMS Plan, Section 6.10(c).

[29] As discussed in the OATS Retirement Filing, OATS was originally proposed to fulfill one of the undertakings contained in an order issued by the Commission relating to the settlement of an enforcement action against FINRA (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) for failure to adequately enforce its rules. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (Order Approving File No SR–NASD–97–56) (''OATS Approval Order''); *see also* Securities Exchange Act Release No. 37538 (August 8, 1996); Administrative Proceeding File No. 3–9056 (''SEC Order''). In the OATS Approval Order, the Commission concluded that OATS satisfied the conditions of the SEC Order and was consistent with the Exchange Act. *See* 63 FR 12559, 12566–67. FINRA believes that it will continue to be in compliance with the requirements of the SEC Order once the OATS Rules are deleted.

[30] The Implementation Plan and Quarterly Progress Reports are available at *www.catnmsplan.com/implementation-plan.*

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(5).

[33] Appendix C of CAT NMS Plan, Approval Order at 85010.

that ''the elimination of such rules and the retirement of such systems [will] be effective at such time as CAT Data meets minimum standards of accuracy and reliability.'' [34] Accordingly, the Exchange believes the proposed rule change implements, supports, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its members in meeting regulatory obligations pursuant to, and milestones established by, the Plan. In approving the Plan, the SEC noted that it ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [35] To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather implement provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [36] and subparagraph (f)(6) of Rule 19b–4 thereunder.[37] The proposed rule change would not significantly affect the protection of investors or the public interest because it seeks to delete the Exchange's OATS rules to be consistent with FINRA's retirement of its OATS rules. The Exchange further believes that the proposed rule change would not impose any significant burden on competition because the proposed rule change is not designed to address any competitive issue but rather implements provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

A proposed rule change filed under Rule 19b–4(f)(6) [38] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[39] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As noted above, the Exchange believes that the OATS reporting requirements of the Rule 6.7400–E Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational. The Commission believes that it is consistent with the protection of investors and the public interest for the Exchange to delete its OATS reporting because FINRA has retired OATS. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[40]

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–NYSEARCA–2021–80 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–2021–80. 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–2021–80, and should be submitted on or before October 12, 2021.

[34] *Id.*

[35] Approval Order at 84697.

[36] 15 U.S.C. 78s(b)(3)(A)(iii).

[37] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[38] 17 CFR 240.19b–4(f)(6).

[39] 17 CFR 240.19b–4(f)(6)(iii).

[40] For purposed only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20217 Filed 9–17–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92984; File No. SR–CboeBYX–2021–020]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 11.22 To Introduce a Product To Be Known as Cboe Premium Exchange Tools and To Amend Its Fee Schedule To Establish a Fee for a User Login That Elects To Subscribe to the Cboe Premium Exchange Tools

September 14, 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 September 8, 2021, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I 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 BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') proposes to amend Rule 11.22 to introduce a new product to be known as Cboe Premium Exchange Tools and to amend its Fee Schedule to establish a fee for a user login that elects to subscribe to the Cboe Premium Exchange Tools. 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/equities/regulation/rule_filings/byx/*), 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 11.22(b) to introduce a new product to be known as Cboe Premium Exchange Tools, as further described below, and to amend its Fee Schedule to adopt a monthly fee assessed to users that elect to subscribe to such Cboe Premium Exchange Tools, effective August 31, 2021.[5]

Cboe Premium Exchange Tools

Currently, Members,[6] Sponsored Participants,[7] and service bureaus are leveraging certain value-added tools (*i.e.,* Cboe Premium Exchange Tools) on the Exchange to obtain certain information free of charge. Particularly, Cboe Premium Exchange Tools offers an easily accessible internet-based tool that allows users access to certain execution information for their firm through a single interface. Now, the Exchange proposes to amend Rule 11.22(b) to describe the Cboe Premium Exchange Tools in its Rules. Specifically, proposed Rule 11.22(b) provides that the Cboe Premium Exchange Tools is a web-based tool designed to give a subscribing user the ability to track latency statics of the user's logical order entry ports or execution information of the Member or a Sponsored Participant of the Member. The proposed rule also provides that a user may obtain historical reports of such execution information, as further described below.[8] Cboe Premium Exchange Tools is currently comprised of the following three reports: (i) Trade data report,[9] (ii) latency statistics report,[10] and (iii) volume history report.[11]

Trade Data Report

The trade data report offers the ability for a user to view and/or export its Member's and, if applicable, a Sponsored Participant of the Member, granular execution detail.[12] Specifically, the report currently includes the following information: Date, time, Member identifier, clearing member identifier, session, order identification, symbol, side (*i.e.,* buy, sell, sell short), price, quantity, capacity (*e.g.,* agent, principal), liquidity indicator (*i.e.,* adder or remover of liquidity), order type,[13] indicator as to whether order set or joined the national best bid or offer (''NBBO''),[14] and associated fee code(s). The information is provided in order to aid Members in conducting their own reconciliations and assist in report generation, and, unlike the Volume History Report, is available on an execution-by-execution basis.

Latency Statistics Report

The latency statistics report offers functionality to view latency statistics relating to logical order entry ports, including a Member's orders, acknowledgements, and cancels, including roundtrip data from into the edge network device and back, which accounts for latency within the Exchange order gateways and matching engines. Specifically, the latency statistics report includes the following information: (i) The roundtrip time between the order entering the Exchange's network and the time the order acknowledgement leaves the Exchange's network, (ii) the roundtrip time between an order cancellation request and the time the order cancellation request acknowledgement leaves the Exchange's network, (iii) the

[41] 17 CFR 200.30–3(a)(12).

[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 Exchange initially filed the proposal August 31, 2021 [sic] (SR–CboeBYX–2021–015). On September 8, 2021, the Exchange withdrew that filing and submitted this proposal.

[6] *See* Exchange Rule 1.5(n).

[7] *See* Exchange Rule 1.5(x).

[8] All information available to Members as described herein is historical information.

[9] Trade Data Reports may be obtained by a Member, or if authorized to do so a Sponsored Participant.

[10] Latency Statistics Reports may be obtained by a Member, Sponsored Participant or service bureaus as it relates to their respective logical order entry ports.

[11] Volume History Reports may be obtained by a Member.

[12] Sponsored Participants may also subscribe to the Trade Data Report, provided that its Sponsoring Member provides the Exchange authorization to do so. Trade Data Reports provided to Sponsored Participants only include execution detail related to the Sponsored Participant.

[13] *See* Exchange Rule 11.9.

[14] Hidden orders that neither set or join the NBBO are identified as such within the report.

roundtrip time between an order entering the Exchange's network and the time that the order appears on the Multicast PITCH feed, (iv) the roundtrip time for a Transmission Control Protocol (''TCP'') [15] message sent by the Exchange to be acknowledged by the Member, and (v) averages a Member can expect for items (i) through (iii) across their own ports and across the entire system (*i.e.,* across all Members). A Member, service bureau, or Sponsored Participant may view the latency statistics for orders that they send to the Exchange through their own respective logical order entry ports. The information included in the latency statistics report is designed to give users insight into the performance characteristics of their logical order entry ports.

Volume History Report

The volume history report provides users the functionality to view the Member's, high level volume history on the Exchange, as well as more granular added, removed, and routed orders at a per Tape and MPID level or a per security level for the purpose of tracking and measuring outcomes.[16] The tools offer functionality to allow a user to view aggregated volume history reports on behalf of the Member or a Sponsored Participant of the Member for the purpose of firm or client-level reporting, administration, and risk management.

Cboe Premium Exchange Tools Fee

The Exchange also proposes to adopt a fee applicable to users that subscribe to the proposed Cboe Premium Exchange Tools. Specifically, as proposed, the Exchange would assess a monthly fee of $40 for each user login that subscribes to any of the reports and services that comprise the Cboe Premium Exchange Tools. As discussed above, Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format. Further, a number of enhancements have recently been made to the various reports and services included in the Cboe Premium Exchange Tools. For example, the trade data report has recently been enhanced to provide timestamps with microsecond granularity for added detail on a per trade basis. Therefore, the Exchange believes the assessment of such a fee aligns with the additional value and benefits provided to users that choose to subscribe to the Cboe Premium Exchange Tools. The Exchange also believes that the proposal is appropriate to balance the Exchange resource requirements in creating, managing, and supporting the services and reports provided by the Cboe Premium Exchange Tools.

The Cboe Premium Exchange Tools fee will be assessed to a user for the entire month regardless of when the user receives access to the Premium Exchange Tools. If a user obtains or cancels a subscription to the Cboe Premium Exchange Tools on or after the first business day of the month, the user will be required to pay the entire Cboe Premium Exchange Tools fee for that month.

The Exchange anticipates a number of users will subscribe to the Cboe Premium Exchange Tools. It is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if they voluntarily choose to do so. Further, the Exchange notes that other exchanges offer similar products.[17]

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.[18] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[19] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities. The Exchange also believes the proposed rule change is consistent with the Section 6(b)(5) [20] 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) [21] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal to amend Rule 11.22(b) to provide for the Cboe Premium Exchange Tools is reasonable for several reasons. First, certain of the underlying information available via the Cboe Premium Exchange Tools is otherwise generally available to users. While the proposal provides a value-added service by setting forth such information in a user-friendly format, the underlying data included in the trade data report and volume history report contains general Member-specific execution information to which a Member would have access to without subscribing to Premium Exchange Tools, (*e.g.,* via their own order entry ports which include Member-provided order instructions, exchange-sent acknowledgement messages, and drop copies). Moreover, the data included in the trade data report and volume history report is substantially similar to data offered in the Nasdaq TradeInfo tool, which provides detailed data on the status of orders executions, cancels and breaks, and generates reports for download, and allows the member to cancel or correct open orders.[22]

While certain underlying data included in the latency statistics report such as latency averages across the System is not otherwise available to Members, or where applicable, Sponsored Participants, or service bureaus, the Exchange notes such users can obtain similar information on their own latency statistics relating to their orders, acknowledgements, TCP messages, and cancels, including roundtrip data from out of their edge network device and back without subscribing to Premium Exchange Tools. Particularly, users are able to calculate these latencies on their own servers as the underlying transaction information is timestamped, which would similarly account for the latency

[15] TCP is a communications standard that enables application programs and computing devises to exchange messages over a network.

[16] Information included in the Volume History Report includes all activity, including that executed on behalf of Sponsored Participants. Execution volume made on behalf of a Sponsored Participant is not delineated within the Volume History Report.

[17] *See* the ''TradeInfo Fees'' offered on the Nasdaq Stock Exchange (''Nasdaq''), Nasdaq BX, Inc. (''Nasdaq BX''), and the Nasdaq PHLX LLC (''Phlx''), each of which assess a fee of $95 per user per month.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(4).

[20] 15 U.S.C. 78f(b)(5).

[21] *Id.*

[22] *See* Securities and Exchange Act No. 90772 (December 22, 2020) 85 FR 86632 (December 30, 2020) (SR–NASDAQ–2020–088) (Proposed rule change describing the withdrawal of Nasdaq's QView product from sale and that the information included therein will continue to be available via TradeInfo).

throughout the Exchange side of the network (*i.e.,* the Exchange does not believe latency statistics calculated by users themselves would be materially different from the Exchange's calculations). The Exchange notes that although latency information related to averages across the system would not otherwise be available to Members, Sponsored Participants or service bureaus absent subscribing to Premium Exchange Tools, providing users such information is not novel as similar information was historically made available in an offering by Nasdaq. Specifically, prior to its decommission in December of 2020, Nasdaq provided summary latency statistics via its QView tool which provided members that subscribed to QView Latency Optics add-on service the ability to monitor three types of latency for order messages and compare that latency to the average on the Nasdaq System.[23] The specific latency statistics included: (i) The roundtrip time between order entry and receipt of acknowledgement; (ii) roundtrip time between order entry and the time that the order appears on the TotalView ITCH multicast feed; and (iii) the roundtrip time between the entry of an order cancellation request and the time that the message in reply is received by the client device.[24] Similarly as noted above, the Exchange's proposed latency statistics report provides users averages across the entire System for three types of latency: (i) The roundtrip time between the order entering the Exchange's network and the time the order acknowledgement leaves the Exchange's network, (ii) the roundtrip time between an order cancellation request and the time the order cancellation request acknowledgement leaves the Exchange's network, (iii) the roundtrip time between an order entering the Exchange's network and the time that the order appears on the Multicast PITCH feed. Even after QView was decommissioned, the underlying data needed to generate the latency statistics (other than for averages across the Nasdaq system) for each member was and continues to be available via the Nasdaq TradeInfo tool.[25]

The Exchange believes that the proposed fee for the Cboe Premium Exchange Tools is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the value and benefits provided to users that choose to subscribe to the Cboe Premium Exchange Tools on the Exchange. As discussed above, Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format. Also as described above, information provided by Premium Exchange Tools relates to the subscribing user's activity on the Exchange, and users may generally access and aggregate this information by other means, including its own internal systems, without a subscription to Premium Exchange Tools. As such, the Exchange believes that if a user determines that the fee is not cost-efficient for its needs, it may decline to subscribe to Premium Exchange Tools and access such information from other sources. Indeed, the Cboe Premium Tools is a completely voluntary product, and the Exchange is not required by any rule or regulation to offer the reports or services provided under the Cboe Premium Exchange Tools. Nonetheless, such tools may be beneficial to Members and non-Members as they provide various value-added Exchange reports and services. Providing the Cboe Premium Exchange Tools to users requires the Exchange to allocate additional resources to create, manage, and support the services and reports. Therefore, the Exchange believes that it is reasonable to assess a modest fee to users that subscribe to the Cboe Premium Exchange Tools.

The Exchange further believes the proposed fee is reasonable because the amount assessed is less than the analogous fees charged by Nasdaq, Nasdaq BX, and PHLX. The TradeInfo product offered by the aforementioned exchanges provides users the status of orders, executions, cancels and breaks, and provides the ability to cancel orders. Further, to view a variety of trading data, users can generate several different types of reports such as execution reports.[26] As described above, the Cboe Premium Exchange Tools will offer similar data to that provided by Nasdaq, Nasdaq BX, and PHLX while, the Exchange's proposed fee for the Cboe Premium Tools at $40 per month per user, is lower than each of the Nasdaq, Nasdaq BX, and PHLX fees for similar information which charge $95 per user.

The Exchange believes that the proposed fee is equitable and not unfairly discriminatory because it will apply to all Members and non-Members that choose to subscribe to the Cboe Premium Exchange Tools equally. As stated, the services and reports provided by the Cboe Premium Exchange Tools are completely optional and not necessary for trading. Rather, the Exchange voluntarily makes the Cboe Premium Exchange Tools available and users may choose to subscribe (and pay for) the Cboe Premium Exchange Tools based on their own individual business needs. Potential subscribers may subscribe to Cboe Premium Exchange Tools at any time if they believe it to be valuable or may decline to purchase such services and reports.

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 because the proposed Cboe Premium Exchange Tools will be available equally to all Members and non-Members that choose to subscribe to such tools. As stated, the Cboe Premium Exchange Tools are optional and Members and non-Members may choose to subscribe to such tools, or not, based on their view of the additional benefits and added value provided by utilizing the reports or services offered by the Cboe Premium Exchange Tools.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, Nasdaq currently offers products that include similar information to that proposed under the Cboe Premium Exchange Tools. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation

[23] *See* Securities Exchange Act Release No. 68617 (January 10, 2013), 78 FR 3480 (January 16, 2013) (SR–Nasdaq–2013–005) (introducing the Latency Optics add-on). *See also* Securities Exchange Act Release No. 82003 (November 2, 2017), 82 FR 51894 (November 8, 2017) (SR–Nasdaq–2017–113) (proposed rule change that also describes the Latency Optics add-on service, which provided, among other things, subscribing members the ability to compare their latency to the average of the Nasdaq system).

[24] *Id.*

[25] Nasdaq similarly noted that users of TradeInfo are able to calculate latencies included in the Latency Optics add-on service as the underlying transaction information is timestamped. *See* Securities and Exchange Act No. 90772 (December 22, 2020) 85 FR 86632 (December 30, 2020) (SR–NASDAQ–2020–088).

[26] *See https://www.nasdaqtrader.com/Trader.aspx?id=tradeinfo.*

NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''. Accordingly, the Exchange does not believe its proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 [27] and Rule 19b–4(f)(6) thereunder.[28]

A proposed rule change filed under Rule 19b–4(f)(6) [29] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [30] 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 proposed to implement this proposed rule change on August 31, 2021 and has asked the Commission to waive the 30-day operative delay for this filing. The Exchange states that the proposed data to be included in the proposed Cboe Premium Exchange Tools is already generally available to all users without a subscription to Cboe Premium Exchange Tools and/or is substantially similar to information that was historically, or currently is, included in similar products offered on Nasdaq.[31] The Commission believes waiver of the operative delay will allow a description of Cboe Premium Exchange Tools product to be immediately reflected in the Exchange's rules and is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative from August 31, 2021.[32]

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 No. SR–CboeBYX–2021–020 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 No. SR–CboeBYX–2021–020. 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 No. SR–CboeBYX–2021–020, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20219 Filed 9–17–21; 8:45 am]

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[33] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77724

[30] 17 CFR 240.19b–4(f)(6)(iii).

[31] *See supra* notes 21–24.

[32] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92971; File No. SR–Phlx–2021–54]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Order Audit Trail System Rules in the Equity 5 Series of the Exchange's Rulebook

September 14, 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 September 3, 2021, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the Order Audit Trail System (''OATS'') rules in the Equity 5 Series of the Exchange's rulebook that provides for the collection of information that is duplicative of the data collection requirements of the CAT. Further, the Financial Industry Regulatory Authority (''FINRA'') has determined to eliminate its OATS rules. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 613 of Regulation NMS requires national securities exchanges and FINRA to create, implement, and maintain a consolidated audit trail to capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,[3] and approved by the Commission, as modified, on November 15, 2016.[4]

On August 14, 2020, FINRA filed with the Commission a proposed rule change to delete the OATS rules once Industry Members are effectively reporting to the CAT (the ''OATS Retirement Filing'').[5] On October 29, 2020, FINRA filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'') and a response to the comments that were submitted on the original filing (''Response to Comments'').[6] On November 30, 2020, the Commission approved the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[7] On June 17, 2021, FINRA filed a proposed rule change setting forth the basis for its determination that the accuracy and reliability of the CAT meet the standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS rules.[8] The FINRA proposal stated that FINRA would retire OATS effective September 1, 2021.

After conducting an analysis of its rules in accordance with the CAT NMS Plan, the Exchange has determined that the information collected pursuant to the OATS rules is intended to be collected by CAT. Further, the Exchange believes that the Equity 5 Series will no longer be necessary and proposes to delete such rules from the Exchange's rulebook. Discussed below is a description of the duplicative rule requirements as well as the timeline for eliminating the duplicative rules followed by a discussion on the OATS Retirement Filing that formed the basis for retiring OATS.

Duplicative OATS Requirements

The Equity 5 Series consists of Section 1 through Section 6 and sets forth the recording and reporting requirements of the OATS Rules. The OATS Rules require all Exchange member organizations and associated persons to record in electronic form and report to FINRA, on a daily basis, certain information with respect to orders originated, received, transmitted, modified, canceled, or executed by members in all NMS stocks, as that term is defined in Rule 600(b)(47) of Regulation NMS,[9] traded on the Exchange. The Exchange relies on the information reported to OATS either to conduct surveillance or to facilitate surveillance conducted by FINRA pursuant to a regulatory services agreement (''RSA''). This information is used by Exchange and FINRA staff to conduct surveillance and investigations of member firms for violations of Exchange and FINRA rules and federal securities laws. The Exchange believes it is appropriate to retire OATS because the requirements of the Equity 5 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational.

Timeline for Elimination of Duplicative Rules

The CAT NMS Plan states that the elimination of rules that are duplicative of the requirements of the CAT and the retirement of the related systems should be effective at such time as CAT Data meets minimum standards of accuracy and reliability.[10] As discussed in more detail in the OATS Retirement Filing, FINRA believes that OATS may be retired effective September 1, 2021 given the error rate thresholds have

[3] *See* Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

[4] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (''Order Approving the National Market System Plan Governing the Consolidated Audit Trail) (''Approval Order'').

[5] *See* Securities Exchange Act Release No. 89679 (August 26, 2020), 85 FR 54461 (September 1, 2020) (Notice of Filing of File No. SR–FINRA–2020–024).

[6] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 29, 2020.

[7] *See* Securities Exchange Act Release No. 90535 (November 30, 2020), 85 FR 78395 (December 4, 2020) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of SR–FINRA–2020–024).

[8] *See* Securities Exchange Act Release No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021) (SR–FINRA–2021–017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Retirement of FINRA's Order Audit Trail System).

[9] 17 CFR 242.600(B)(47).

[10] Appendix C of CAT NMS Plan, Approval Order at 85010.

been met, and FINRA has determined that its usage of the CAT Data has not revealed material issues that have not been corrected and further confirmed that the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations.

OATS Retirement Filing

In the OATS Retirement Filing, FINRA proposed to eliminate the OATS rules once Industry Members are effectively reporting to the CAT and the CAT's accuracy and reliability meet certain standards. Specifically, FINRA proposed that before OATS could be retired, the CAT generally must achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower on a pre-correction basis, and 2% or lower on a post-correction basis (measured at T+5). In addition to the maximum error rates and matching thresholds, FINRA's use of CAT Data must confirm that (i) there are no material issues that have not been corrected, (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Industry Member Data.

In the OATS Retirement Filing, FINRA explained that its review of CAT Data and error rates would be based on data and linkages in the initial phase of reporting (or ''Phase 2a''), which replicate the data in OATS today and thus are most relevant for OATS retirement purposes. Phase 2a Data includes all events and scenarios covered by OATS and applies only to equities. FINRA did not consider options order events or Phase 2c data and validations, which are not in OATS today, for purposes of OATS retirement.

As described below, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing.

(1) Maximum Error Rates

As discussed in the OATS Retirement Filing, FINRA believes that relevant error rates are the primary, but not the sole, metric by which to determine the CAT's accuracy and reliability and will serve as the baseline requirement needed before OATS can be retired. FINRA proposed that, before OATS could be retired, the CAT would generally need to achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower, measured on a pre-correction or as-submitted basis, and 2% or lower on a post-correction basis (measured at T+5).[11] FINRA proposed to average the error rates across the period, rather than require a 5% pre-correction and 2% post-correction maximum each day for 180 consecutive days. FINRA also proposed to measure the error rates in the aggregate, rather than on a firm-by-firm basis. Finally, FINRA proposed to measure the error rates separately for each of the five categories, rather than evaluate all categories in the aggregate. As noted above, FINRA's assessment of the error rates for Industry Member reporting is based solely on Phase 2a CAT reporting for equity events since options orders are not included in OATS today.

As discussed in the OATS Retirement Filing, FINRA measured the error rates in each of the five categories discussed below during the period from October 26, 2020 through April 26, 2021 (the ''applicable period''). FINRA commenced this period on October 26, 2020, which was the date that Industry Members were required to begin correcting all errors for inter-firm linkages and exchange/TRF/ORF match validations. As discussed in the Response to Comments, although the production environment for inter-firm linkage and exchange/TRF/ORF match validations was open for testing as of September 28, 2020, FINRA did not believe it would be appropriate for the 180-day period to commence prior to the October 26, 2020 compliance date.[12]

Rejection Rates and Data Validations

As described in the OATS Retirement Filing, the Plan Processor must perform certain basic data validations,[13] and if a record does not pass these basic data validations, it must be rejected and returned to the CAT Reporter to be corrected and resubmitted. FINRA proposed that over the 180-day period, aggregate rejection rates must be no more than 5% pre-correction or 2% post-correction across all Industry Member Reporters. FINRA has determined that, over the applicable period, aggregate rejection rates across all Industry Member Reporters were 0.03% pre-correction and 0.01% post-correction.

Intra-Firm Linkages

As described in the OATS Retirement Filing, the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum, this requirement includes the creation of an order lifecycle between all order events handled within an individual CAT Reporter, including orders routed to internal desks or departments with different functions (*e.g.,* an internal ATS). FINRA proposed that aggregate intra-firm linkage rates across all Industry Member Reporters must be at least 95% pre-correction and 98% post-correction. FINRA has determined that, over the applicable period, aggregate intra-firm linkage rates across all Industry Member Reporters were 99.97% pre-correction and 99.99% post-correction.

Inter-Firm Linkages

As described in the OATS Retirement Filing, the Plan Processor must be able to create the lifecycle between orders routed between broker-dealers. FINRA proposed that at least a 95% pre-correction and 98% post-correction aggregate match rate be achieved for orders routed between two Industry Member Reporters. FINRA has determined that during the applicable period there was a 99.08% pre-correction and 99.84% post-correction aggregate match rate for orders routed between two Industry Member Reporters.

Order Linkage Rates

As described in the OATS Retirement Filing, in addition to creating linkages within and between broker-dealers, the Plan Processor must be able to create lifecycles to link various pieces of related orders. For example, the Plan requires linkages of order information to create an order lifecycle from origination or receipt to cancellation or execution. This category essentially combines all of the order-related linkages to capture an overall snapshot of order linkages in the CAT.[14] FINRA proposed that there be at least a 95% pre-correction and 98% post-correction rate for order linkages that are required

[11] As clarified in the OATS Retirement Filing, although FINRA does not believe that post-correction errors need to be de minimis before OATS can be retired, FINRA was not suggesting, with the proposal, that 2% would meet the ultimate objective of de minimis error rates for CAT. *See* CAT NMS Plan, Appendix C, note 102 (error rates after reprocessing of error corrections are ultimately expected to be de minimis for the CAT). *See also* Approval Order.

[12] *See* FINRA's Response to Comments, *supra* note 7.

[13] Appendix D of the CAT NMS Plan, Section 7.2, for example, requires that certain file validations (*e.g.,* file transmission and receipt are in the correct formats, confirmation of a valid SRO-Assigned Market Participant Identifier, etc.), and syntax and context checks (*e.g.,* format checks, data type checks, consistency checks, etc.) be performed on all submitted records.

[14] *See* FINRA's Response to Comments, supra note 7.

in Phase 2a. FINRA has determined that during the applicable period there was a 99.66% pre-correction and 99.93% post-correction rate for order linkages required in Phase 2a.16.[15]

Exchange and TRF/ORF Match Rates

As described in the OATS Retirement Filing, an order lifecycle must be created to link orders routed from broker-dealers to exchanges and executed orders and trade reports. FINRA proposed at least a 95% precorrection and 98% post-correction aggregate match rate across all equity exchanges [16] for orders routed from Industry Members to an exchange and, for over-the-counter executions, the same match rate for orders linked to trade reports. FINRA determined that, during the applicable period, there was a 99.51% pre-correction and 99.87% post-correction aggregate match rate across all equity exchanges for orders routed from Industry Members to an exchange and, for over-the-counter executions, there was a 99.34% pre-correction and 99.53% post-correction rate for orders linked to trade reports submitted to the FINRA Trade Reporting Facilities and OTC Reporting Facility.

As set forth above, the error rates for Industry Member reporting over the applicable period were well below the maximum rates established in the OATS Retirement Filing. FINRA also noted that the overall post-correction error rate for Phase 2a Industry Member reporting of 1.01% is comparable to the current overall OATS post-correction error rate, which generally is at or slightly below 1%. Therefore, FINRA has determined that, based on the error rates for Industry Member reporting, the CAT Data meets the accuracy and reliability baseline standards required for OATS retirement.

(2) FINRA's Use of CAT Data

In the OATS Retirement Filing, FINRA stated that while error rates are a key standardized measure in determining whether OATS retirement is appropriate, FINRA's use of the data in the CAT also must confirm that (i) there are no material issues that have not been corrected (*e.g.,* delays in the processing of data, issues with query functions, etc.), (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data.

In the OATS Retirement Filing, FINRA stated that it has been planning for OATS retirement for several years and the necessary development work has been underway for some time. FINRA also has been analyzing and testing production CAT Data for purposes of transitioning its automated equity surveillance patterns since the commencement of Phase 2a Industry Member reporting in June 2020 and through subsequent CAT milestone releases. For example, in addition to quantitative reviews, such as the error rate statistics discussed above, FINRA has conducted a series of qualitative reviews of Industry Member CAT Data. Such reviews include, among other things, comparing the count and distribution of Industry Member event reporting through CAT versus OATS (*e.g.,* new order and execution events, and data elements such as buy/sell/sell short codes), and reviewing results of examinations, alert reviews, and investigations relating to the timeliness and accuracy of Industry Member reporting. Based on such qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

As discussed in the OATS Retirement Filing, today, FINRA's surveillance patterns rely on the cross-market data model (''CMDM''), which comprises linked OATS data, equity exchange data feeds from each of the exchanges with which FINRA has entered into a RSA, and transactions reported to FINRA's equity trade reporting facilities. The CMDM will be retired and replaced by a newly created surveillance data mart, the Pattern Optimized Datamart (''POD''), which incorporates both equities and options data. At that point, FINRA's patterns will rely on CAT Data in POD, *i.e.,* Plan Participant and Industry Member data reported in CAT format and linked by CAT.[17] FINRA notes that the Plan Participants transitioned to reporting via the CAT technical specification as of April 26, 2021, and full Plan Participant equities reporting and linkage validations in accordance with the CAT specification commenced on June 1, 2021.[18] Successful completion of the transition to the CAT specification for Plan Participants is a prerequisite for FINRA to retire the CMDM and leverage CAT Data and linkages in POD for its surveillance patterns. As of the date of this filing, FINRA has completed all planned activities on schedule, including substantially completing the process of integrating CAT Data into POD and successfully running large amounts of production CAT Data for the month of May through POD.[19] FINRA anticipates completing additional activities before the proposed OATS retirement date, including, *e.g.,* planned user acceptance testing.[20]

As discussed in the OATS Retirement Filing, FINRA has performed broad analysis of its equity surveillance patterns and has determined that all of the data required to support the transition is available in CAT. By mapping OATS data to Industry Member CAT Data in POD, FINRA has confirmed that CAT Data has equivalent

[15] FINRA noted that in Phase 2a, linkage is required between the representative street side order and the order being represented when the representative order was originated specifically to represent a single order (received either from a customer or another broker-dealer) and there is: (1) An existing direct electronic link in the firm's system between the order being represented and the representative order, and (2) any resulting executions are immediately and automatically applied to the represented order in the firm's system. As set forth in the OATS Retirement Filing, while such linkages are not required in OATS, FINRA believes that it is appropriate to evaluate them for purposes of retiring OATS because they represent a significant enhancement to the data currently available in OATS and will enhance the quality of the equity audit trail. However, FINRA also explained in the Response to Comments that if all other proposed criteria have been met, FINRA would not anticipate delaying OATS retirement based on Phase 2a representative order linkage error rates alone.

In evaluating whether the standards for OATS retirement have been met, FINRA determined that the error rates for the Phase 2a representative order linkages did not have a significant negative impact on the overall error rates for order linkages. Accordingly, FINRA did not need to separately evaluate or exclude Phase 2a representative order linkage rates in measuring the error rates over the applicable period. For example, if the intra-firm linkage error rate had been above 5% over the applicable period, FINRA would have evaluated whether the error rate was the result of unlinked representative orders to create an apples-to-apples comparison to OATS.

[16] *See* Amendment No. 1.

[17] FINRA's Response to Comments noted this dependency, stating that the process of transitioning FINRA's surveillance patterns to CAT Data necessarily includes, among other things, ingestion of all Industry Member and Plan Participant data and linkages in CAT format. *See* Response to Comments, supra note 7, at 4[sic]. The Response to Comments further noted that the Plan Participants would be reporting to CAT via another mechanism until April 2021.

[18] For example, according to the CAT Reporting Technical Specification for Plan Participants (version 4.0.0-r4 dated April 20, 2021), additional linkage error feedback for off-exchange trade reports was effective as of June 1, 2021. The Technical Specifications can be found on the CAT NMS Plan website at *http://www.catnmsplan.com/sites/default/files/2021-04/04.20.2021-CAT-ReportingTechnical-Specifications-for-Participants-4.0.0-r4.pdf.*

[19] FINRA notes that additional POD releases are scheduled; however, these releases introduce minor enhancements to POD, as opposed to significant changes that would impact the way data is ingested or processed in POD.

[20] FINRA notes that user acceptance testing is the final stage of any software development life cycle and enables actual users to test the system to confirm that it is able to carry out the required tasks it was designed to address in real-world situations.

analogs to all data elements in OATS. In that regard, FINRA notes that, as a Plan Participant, FINRA has been involved in CAT development efforts to ensure that the scope and features of Industry Member data and processed output are sufficient for FINRA's surveillance program. These efforts include, for example, developing and updating the Industry Member Technical Specifications and Reporting Scenarios, conducting OATS–CAT gap analyses and validating that all such gaps have been properly addressed, and performing OATS-to-CAT field-level mappings.

With respect to Plan Participant data, FINRA notes in the OATS Retirement Filing that the test environment for Plan Participant reporting in accordance with the CAT specification opened on February 15, 2021.[21] Plan Participant equity reporting in accordance with the CAT specification in the test environment had a very high compliance rate for data ingestion and validation, and compliance in the production environment is comparable. In addition, starting on April 26, 2021, CAT began linking copies of Industry Member and Plan Participant data reported via the CAT specification in a test environment, and at that point, FINRA began its evaluation of the quality of these linkages. Based on this review and evaluation, in the OATS Retirement Filing, FINRA stated that it believes that the linkages between Plan Participant data and Industry Member data in CAT are comparable to the linkages between RSA exchange data and OATS data in the CMDM today.[22] FINRA CAT and the Plan Participants have now met the necessary criteria for a full cutover from the RSA specification to the CAT specification, including, *e.g.,* achieving comparable data ingestion validation and inter-venue linkage rates (within a variance of under one percent) between RSA and CAT specification submissions. Accordingly, the Operating Committee approved the cutover from the RSA specification to the CAT specification as the official source of Plan Participant data as of June 1, 2021, and today, all Industry Member and Plan Participant equities data reported via the CAT specification is linked in the CAT production environment.

As discussed in the OATS Retirement Filing, FINRA continues to evaluate CAT Data quality, and in particular, linkages between Industry Member and Plan Participant data, and to test its surveillance patterns to run on CAT Data in POD. In that regard, FINRA notes that it has followed established and time-tested processes and protocols throughout the development process to ensure that its patterns will perform as expected and produce the necessary output using CAT Data following the retirement of OATS. For example, FINRA's Software Development Lifecycle (''SDLC'') procedures govern systems design, changes, testing and controls. The SDLC procedures are an essential component of FINRA's operations and have been developed to serve FINRA's unique regulatory needs and structure. Additionally, consistent with SEC Regulation SCI, FINRA procedures include a plan of coordination and communication with regulatory staff. By relying on these established processes and protocols, FINRA has confidence that the CAT Data and linkages are reliable and sufficient to run FINRA's surveillance patterns.

Based on these results, as well as the results of its quantitative and qualitative reviews of CAT Data and successful efforts integrating CAT Data into POD, in the OATS Retirement Filing, FINRA stated that it believes that the complete portfolio of equity surveillance patterns will be capable of consuming CAT Data and achieving comparable (or better) output results.

Thus, FINRA proposes to retire OATS in accordance with the schedule set forth herein. FINRA will run its surveillance patterns for review periods through the end of the second quarter of 2021 using OATS data and begin using—and be fully reliant on—CAT Data for its surveillance patterns for review periods beginning in the third quarter of 2021. Following the retirement of OATS, FINRA expects to maintain the current established cadence of its monthly, quarterly and semi-annual surveillance patterns. In addition, FINRA's analytics platforms will have access to CAT Data as soon as such data is made available to regulators. Thus, outside of regularly scheduled surveillance pattern runs, FINRA can perform expedited analytics, as required by market events.

As discussed in the OATS Retirement Filing, FINRA is finalizing the development and certification of its surveillance patterns to run on CAT Data on a rolling basis and, in accordance with its existing SDLC procedures, will run a month's worth of data and compare the output before certifying each pattern. For those equity patterns that will be subject to certification after OATS retirement, FINRA anticipates that there would be sufficient time to identify and remediate any issues prior to running the patterns in accordance with the current established cadence. FINRA does not anticipate significant issues arising from additional scheduled POD releases or in the final stages of its pattern development and certification efforts.

As discussed in the OATS Retirement Filing, on an ongoing basis following the retirement of OATS, FINRA will conduct regular reviews to ensure confidence in the completeness and accuracy of Industry Member reporting, along with the ability to remediate any issues in a timely manner. Among other things, FINRA has a robust mechanism for detecting data issues, determining which issues are material for purposes of its surveillance program, and requesting resubmission and/or reprocessing of data, as necessary. FINRA also (1) performs a suite [sic] data quality checks against data sourced from CAT to POD and against data processed by POD for use in surveillance patterns; (2) oversees a robust surveillance and examination compliance program that evaluates Industry Member reporting timeliness, data quality, and other issues and trends; (3) reviews CAT compliance program alerts using a rapid remediation process and formal reviews, as necessary; and (4) reviews Industry Member self-reporting and error correction trends. FINRA believes that these practices are sufficient for identification and timely resolution of Industry Member reporting and data issues after OATS has been retired.

Specifically, with regard to the additional standards approved in the OATS Retirement Filing, through its use of CAT Data to date, as described above, FINRA believes that these standards have been satisfied. With respect to the first factor, FINRA does not believe that there are any material issues that have not been corrected (or could not be corrected in the course of operation of CAT, as approved by the Operating Committee)[23] that would impact

[21] *See, e.g.,* CAT Q1 2021 Quarterly Progress Report dated April 30, 2021, available at *www.catnmsplan.com/sites/default/files/2021-05/CAT-Q1-2021-QPR.pdf.*

[22] FINRA notes that the CAT uses the same code in both the test and production environments. Thus, FINRA believes that linkages in the test environment are reliable indicators of linkages in the production environment.

[23] FINRA notes that FINRA CAT tracks known issues relating to Industry Member and Plan Participant reporting. *See, e.g., catnmsplan.com/CAT-Transaction-Known-Issues-List.* FINRA regularly reviews and analyzes FINRA CAT's list of current and resolved issues and does not believe that any of these issues would impact its ability to incorporate and use CAT Data in its surveillance program.

FINRA's ability to incorporate and use CAT Data in FINRA's surveillance program. For example, the Plan requires that raw unprocessed data that has been ingested by the Plan Processor must be available to Participant regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1, and access to all iterations of processed data must be available to Participant regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5.[24] The Plan Processor also must ensure that regulators have access to corrected and linked order data by 8:00 a.m. Eastern Time on T+5.[25] Additionally, after ingestion by the Central Repository, the raw unprocessed data must be transformed into a format appropriate for data querying and regulatory output.[26] The user-defined direct queries and bulk extracts must provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.[27] FINRA's use of the CAT Data has not uncovered any processing delays or other material issues impacting the availability of, and FINRA's access to, the data.

With respect to the second factor, FINRA stated in the OATS Retirement Filing that it believes that the CAT includes all data necessary for FINRA to meet its surveillance obligations after the retirement of OATS. FINRA must ensure that the CAT, as the single source of order and trade data, can enable FINRA to conduct accurate and effective market surveillance in accordance with its regulatory obligations.[28] As noted above, Phase 2a Data includes all events and scenarios covered by OATS and is the most relevant for OATS retirement purposes. FINRA Rule 7440 describes the OATS requirements for recording information, which includes information related to the receipt or origination of orders, order transmittal, and order modifications, cancellations and executions. Large Industry Members and Small Industry Members that currently are reporting to OATS were required to submit data to the CAT for these same events and scenarios commencing in Phase 2a. FINRA's testing, analysis and use of the CAT Data (including integration into POD), as described above, has confirmed that the CAT includes all data necessary for FINRA to meet its surveillance obligations and that CAT is a reliable substitute for OATS. In addition, based on its qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

With respect to the third factor, FINRA stated in the OATS Retirement Filing that it believes that the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data. As detailed in the Implementation Plan and Quarterly Progress Reports submitted by the Plan Participants, the Plan Processor has met its targeted completion dates for the milestones for Phase 2a, including, for example, production Go-Live for Equities 2a file submission and data integrity validation (Large Industry Members and Small OATS Reporters) on June 22, 2020; Production Go-Live for Equities 2a Intrafirm Linkage validations on July 27, 2020; and production go-live for firm-to-firm linkage validations for equities (Large Industry Members and Small OATS Reporters) and exchange and TRF/ORF linkage validations for equities (Large Industry Members and Small OATS Reporters) on October 26, 2020.[29]

Based on the foregoing, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS Rules. FINRA has determined to retire OATS and remove the OATS rules from its rulebook effective September 1, 2021. Firms must continue to report to OATS all order events that occur on or prior to August 31, 2021. Reports submitted to OATS for order events that occur after August 31, 2021 will be rejected. In other words, August 31, 2021 will be the last ''OATS Business Day,'' as defined under FINRA Rule 7450(b)(3), for which OATS will accept order events and perform routine processing (including incorporation of corrections and repairs of rejections) occurring within the normal OATS timeframe for such activities. OATS will continue to accept reports for order events that occur on or prior to August 31, 2021 (including, but not limited to, late and corrected reports for such order events) through September 16, 2021. Firms must ensure that their OATS reporting is accurate and complete for all order events that occur on or prior to August 31, 2021.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act[30] in general and Section 6(b)(5) of the Act[31] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposed rule change is consistent with Section C.9 of Appendix C to the Plan, which requires each Participant to ''file with the SEC the relevant rule change filing to eliminate or modify its duplicative rules within six (6) months of the SEC's approval of the CAT NMS Plan.''[32] The Plan notes that ''the elimination of such rules and the retirement of such systems [will] be effective at such time as CAT Data meets minimum standards of accuracy and reliability.''[33] Accordingly, the Exchange believes the proposed rule change implements, supports, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its member organizations in meeting regulatory obligations pursuant to, and milestones established by, the Plan. In approving the Plan, the SEC noted that it ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.''[34] To the extent that this proposal implements,

[24] *See* CAT NMS Plan, Appendix D, Section 6.2.

[25] *See* CAT NMS Plan, Appendix C, Section A.2(a).

[26] *See* CAT NMS Plan, Appendix C, Section A.1(b).

[27] *See* CAT NMS Plan, Section 6.10(c).

[28] As discussed in the OATS Retirement Filing, OATS was originally proposed to fulfill one of the undertakings contained in an order issued by the Commission relating to the settlement of an enforcement action against FINRA (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) for failure to adequately enforce its rules. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (Order Approving File No SR–NASD–97–56) (''OATS Approval Order''); *see also* Securities Exchange Act Release No. 37538 (August 8, 1996); Administrative Proceeding File No. 3–9056 (''SEC Order''). In the OATS Approval Order, the Commission concluded that OATS satisfied the conditions of the SEC Order and was consistent with the Exchange Act. *See* 63 FR 12559, 12566–67. FINRA believes that it will continue to be in compliance with the requirements of the SEC Order once the OATS Rules are deleted.

[29] The Implementation Plan and Quarterly Progress Reports are available at *www.catnmsplan.com/implementation-plan.*

[30] 15 U.S.C. 78f.

[31] 15 U.S.C. 78f(b)(5).

[32] Appendix C of CAT NMS Plan, Approval Order at 85010.

[33] *Id.*

[34] Approval Order at 84697.

interprets or clarifies the Plan and applies specific requirements to member organizations, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The proposed change is not designed to address any competitive issue but rather implement provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [35] and subparagraph (f)(6) of Rule 19b–4 thereunder.[36] The proposed rule change would not significantly affect the protection of investors or the public interest because it seeks to delete the Exchange's OATS rules to be consistent with FINRA's retirement of its OATS rules. The Exchange further believes that the proposed rule change would not impose any significant burden on competition because the proposed rule change is not designed to address any competitive issue but rather implements provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

A proposed rule change filed under Rule 19b–4(f)(6) [37] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[38] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As noted above, the Exchange believes that the OATS reporting requirements of the Equity 5 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational. The Commission believes that it is consistent with the protection of investors and the public interest for the Exchange to delete its OATS reporting because FINRA has retired OATS. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[39]

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–Phlx–2021–54 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–Phlx–2021–54. 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–Phlx–2021–54, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Matthew DeLesDernier,

Assistant Secretary.

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[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[37] 17 CFR 240.19b–4(f)(6).

[38] 17 CFR 240.19b–4(f)(6)(iii).

[39] For purposed only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92980; File No. SR–BOX–2021–20]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC Facility

September 14, 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 September 1, 2021, BOX Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule on the BOX Options Market LLC (''BOX'') options facility. While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on September 1, 2021. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for trading on BOX to amend Section I.D.1. (QCC Rebate). Specifically, the Exchange proposes to remove the current flat rate rebates for QCC transactions and establish a QCC rebate tier structure.

By way of background, a Qualified Contingent Cross (''QCC'') transaction is comprised of an originating order to buy or sell at least 1,000 contracts, or 10,000 mini-option contracts, that is identified as being part of a qualified contingent trade, coupled with a contra-side order or orders totaling an equal number of contracts.[5] Currently, the Exchange assesses a fee of $0.17 per contract for Broker Dealers and Market Makers for all Agency Order, the originating order, and contra-side orders that are part of a QCC transaction.[6] The Exchange currently applies a $0.14 per contract rebate to all QCC Agency Orders where at least one party to the QCC transaction is a Broker Dealer or Market Maker and a $0.22 per contract rebate to all QCC Agency Order when both parties to the QCC transaction are a Broker Dealer or Market Maker. The above rebates are paid to the Participant that entered the order into the BOX system.

The Exchange now proposes to remove the flat rate QCC rebates currently in place and establish a tiered rebate structure where the amount of the rebate will be based off of incrementally increasing volume thresholds of QCC transactions on BOX. The Exchange notes that the way in which the rebates will be applied to the QCC transactions remains the same as it is today. The QCC rebates will still be applied to the QCC Agency Order when both parties to the QCC transaction are a Broker Dealer or Market Maker. Also, the rebate will continue to be paid to the Participant that entered the order into the BOX system when at least one party to the QCC transaction is a Broker Dealer or Market Maker. Under this proposal, the per contract rebate for QCC transactions will now be applied according to the volume threshold tier achieved. Volume thresholds will be calculated on a monthly basis by totaling the Participant's QCC Agency Order volume on BOX. Specifically, the Exchange proposes the QCC Agency Order volume thresholds as follows:

- To receive the rebate in Tier 1, a Participant must submit QCC Agency Orders totaling 0 to 1,499,999 contracts per month.
- To receive the rebate in Tier 2, a Participant must submit QCC Agency Orders totaling 1,500,000 to 2,499,999 contracts per month.
- To receive the rebate in Tier 3, a Participant must submit QCC Agency Orders totaling 2,500,000 to 3,499,999 contracts per month.
- To receive the rebate in Tier 4, a Participant must submit QCC Agency Orders totaling 3,500,000 or more contracts per month.

The proposed tiered rebate structure, including volume thresholds and applicable rebates, will be as follows:

Tier	QCC Agency Order volume on BOX (per month)	Rebate 1 (per contract)	Rebate 2 (per contract)
1	0 to 1,499,999 contracts	($0.14)	($0.22)
2	1,500,000 to 2,499,999 contracts	($0.15)	($0.23)
3	2,500,000 to 3,499,999 contracts	($0.15)	($0.24)
4	3,500,000+ contracts	($0.15)	($0.25)

When only one side of the QCC transaction is a Broker Dealer or Market Maker, Rebate 1 will apply. When both parties to the QCC transaction are a Broker Dealer or Market Maker, Rebate 2 will apply. If the Participant qualifies for both rebates, only the larger rebate

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* BOX Rule 7110(c)(6).

[6] Public Customers and Professional Customers are not assessed fees for QCC transactions on BOX. The Exchange notes that, under this proposal, the QCC transaction fees will remain the same.

will be applied to the Agency Order.[7] The Exchange notes that a similar rebate structure and rebates for QCC transactions exist at another exchange.[8]

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5)of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The proposed changes reflect a competitive pricing structure designed to incentivize market participants to direct their QCC order flow, which the Exchange believes would enhance market quality to the benefit of all Participants.

The Exchange believes the proposed changes to the QCC Rebate structure are reasonable because the proposed changes provide opportunities for Participants to receive higher rebates for incrementally increasing the Participant's Agency QCC Order volume. The Exchange again notes that a volume-based incentive structure exists at another exchange,[10] and believes that the proposed tiers are reasonable, equitable, and non-discriminatory because they are open to all Participants on an equal basis.

The Exchange believes the proposed QCC Rebate tiers are a reasonable means to encourage Participants to increase their liquidity on the Exchange, particularly in connection with additional QCC Agency Order flow to the Exchange in order to benefit from the proposed enhanced rebates. The Exchange believes that the proposed tiers are reasonable in that they provide an ample number of opportunities for a Participant to receive an enhanced rebate for qualifying orders. The proposed tiers provide an incremental incentive for Participants to strive for higher tier levels, which provide increasingly higher rebates for incrementally more QCC Agency Order volume achieved, which the Exchange believes is a reasonably designed incentive for Participants to grow their QCC order flow to receive the enhanced rebates. Further, the Exchange believes the proposed rebate structure is reasonable, as the fees assessed for QCC transactions on BOX will remain the same.

The Exchange believes the proposed enhanced rebates are reasonable and proportionate with the difficulty of the proposed volume threshold criteria and that the tiers continue to provide an incremental incentive for Participants to strive for higher tier levels, which provides increasingly higher rebates for satisfying increasingly more stringent criteria. As noted above, the Exchange also believes the proposal to adopt two alternative rebates (depending on the capacity of the parties to the transaction) is reasonable as this is how the Exchange currently assesses the flat rate rebates for QCC transactions today.

Lastly, the Exchange believes that the proposed changes represent an equitable allocation of fees and is not unfairly discriminatory because all Broker Dealer and Market Makers will be eligible for the proposed tiers and corresponding enhanced rebates. Additionally, the enhanced rebates will apply uniformly to the Participants that reach the proposed tiers. Further, the Exchange believes that applying the proposed rebates where at least one party to the QCC transaction is a Broker Dealer or Market Maker is reasonable, equitable, and not unfairly discriminatory because Public Customers and Professional Customers are not assessed fees for these transactions and, in turn, do not need the incentive of the rebate. As such, the Exchange believes the proposed changes are equitable and not unfairly discriminatory because the rebates potentially apply to all Participants that enter the originating order (except for when both the Agency Order and the Contra Order are Public Customers or Professional Customers) and because it is intended to incentivize the sending of more QCC Order to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives, and enhanced execution opportunities for all Participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.

The Exchange believes that the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the Act. First, the Exchange notes that the proposed changes apply uniformly to similarly situated Participants. The Exchange believes that the proposed changes related to QCC transactions would not impose any burden on intramarket competition, but rather, serves to increase intramarket competition by incentivizing market participants, to direct their QCC orders to the Exchange, in turn providing for more opportunities to compete at improved prices. Additionally, the proposed rule change benefits all market participants as any overall increased liquidity that may result from the proposed tier incentives benefits all investors by offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Participants have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally,

[7] The Exchange again notes that this is how BOX currently assesses the flat rate rebates for QCC transactions.

[8] *See* Cboe EDGX Exchange, Inc. (''CboeEDGX'') Fee Schedule. The Exchange notes that the proposed volume thresholds are slightly higher than the volume thresholds at CboeEDGX. Also, the Exchange notes that the rebate amounts in Rebate 1 and Rebate 2 differ slightly from CboeEDGX. Despite the differences, the Exchange believes the proposed rebate structure and rebates discussed herein are reasonable as they provide an incremental incentive for Participants to strive for the higher tier levels, which provide increasingly higher rebates for incrementally more QCC volume achieved, which the Exchange believes is a reasonably designed incentive for Participants to grow their QCC order flow to receive the enhanced rebates. Further, the Exchange notes that the QCC transaction fees at BOX will remain unchanged at $0.17 for Broker Dealer and Market Maker Agency Orders and Contra Orders for QCC Transactions. The Exchange notes that CboeEDGX assesses $0.20 to Broker Dealers and Market Makers for Agency Orders and Contra Orders for QCC transactions. As such, the Exchange believes the proposed rebate structure and rebates is reasonable and appropriate.

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *See supra* note 8.

the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 15% of the market share.[11] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange believes that the proposed rebates under the QCC rebate tiers is comparable to that of another exchange offering QCC functionality.[12] Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''. Accordingly, the Exchange does not believe the proposed change discussed herein imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

[11] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (August 16, 2021), available at *https://markets.cboe.com/us/options/market_statistics/*.

[12] *See supra* note 8.

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 Exchange Act [13] and Rule 19b–4(f)(2) thereunder,[14] because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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–BOX–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–BOX–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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2021–20, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20215 Filed 9–17–21; 8:45 am]

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[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92972; File No. SR–BX–2021–039]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Order Audit Trail System Rules in the Equity 5 Series of the Exchange's Rulebook

September 14, 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 September 3, 2021, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the Order Audit Trail System (''OATS'') rules in the Equity 5 Series of the Exchange's rulebook that provides for the collection of information that is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

duplicative of the data collection requirements of the CAT. Further, the Financial Industry Regulatory Authority (''FINRA'') has determined to eliminate its OATS rules. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/bx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 613 of Regulation NMS requires national securities exchanges and FINRA to create, implement, and maintain a consolidated audit trail to capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,[3] and approved by the Commission, as modified, on November 15, 2016.[4]

On August 14, 2020, FINRA filed with the Commission a proposed rule change to delete the OATS rules once Industry Members are effectively reporting to the CAT (the ''OATS Retirement Filing'').[5] On October 29, 2020, FINRA filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'') and a response to the comments that were submitted on the original filing (''Response to Comments'').[6] On November 30, 2020, the Commission approved the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[7] On June 17, 2021, FINRA filed a proposed rule change setting forth the basis for its determination that the accuracy and reliability of the CAT meet the standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS rules.[8] The FINRA proposal stated that FINRA would retire OATS effective September 1, 2021.

After conducting an analysis of its rules in accordance with the CAT NMS Plan, the Exchange has determined that the information collected pursuant to the OATS rules is intended to be collected by CAT. Further, the Exchange believes that the Equity 5 Series will no longer be necessary and proposes to delete such rules from the Exchange's rulebook. Discussed below is a description of the duplicative rule requirements as well as the timeline for eliminating the duplicative rules followed by a discussion on the OATS Retirement Filing that formed the basis for retiring OATS.

Duplicative OATS Requirements

The Equity 5 Series consists of Section 1 through Section 6 and sets forth the recording and reporting requirements of the OATS Rules. The OATS Rules require all Exchange member organizations and associated persons to record in electronic form and report to FINRA, on a daily basis, certain information with respect to orders originated, received, transmitted, modified, canceled, or executed by members in all NMS stocks, as that term is defined in Rule 600(b)(47) of Regulation NMS,[9] traded on the Exchange. The Exchange relies on the information reported to OATS either to conduct surveillance or to facilitate surveillance conducted by FINRA pursuant to a regulatory services agreement (''RSA''). This information is used by Exchange and FINRA staff to conduct surveillance and investigations of member firms for violations of Exchange and FINRA rules and federal securities laws. The Exchange believes it is appropriate to retire OATS because the requirements of the Equity 5 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational.

Timeline for Elimination of Duplicative Rules

The CAT NMS Plan states that the elimination of rules that are duplicative of the requirements of the CAT and the retirement of the related systems should be effective at such time as CAT Data meets minimum standards of accuracy and reliability.[10] As discussed in more detail in the OATS Retirement Filing, FINRA believes that OATS may be retired effective September 1, 2021 given the error rate thresholds have been met, and FINRA has determined that its usage of the CAT Data has not revealed material issues that have not been corrected and further confirmed that the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations.

OATS Retirement Filing

In the OATS Retirement Filing, FINRA proposed to eliminate the OATS rules once Industry Members are effectively reporting to the CAT and the CAT's accuracy and reliability meet certain standards. Specifically, FINRA proposed that before OATS could be retired, the CAT generally must achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower on a pre-correction basis, and 2% or lower on a post-correction basis (measured at T+5). In addition to the maximum error rates and matching thresholds, FINRA's use of CAT Data must confirm that (i) there are no material issues that have not been corrected, (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Industry Member Data.

In the OATS Retirement Filing, FINRA explained that its review of CAT Data and error rates would be based on data and linkages in the initial phase of

[3] *See* Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

[4] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (''Order Approving the National Market System Plan Governing the Consolidated Audit Trail) (''Approval Order'').

[5] *See* Securities Exchange Act Release No. 89679 (August 26, 2020), 85 FR 54461 (September 1, 2020) (Notice of Filing of File No. SR–FINRA–2020–024).

[6] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 29, 2020.

[7] *See* Securities Exchange Act Release No. 90535 (November 30, 2020), 85 FR 78395 (December 4, 2020) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of SR–FINRA–2020–024).

[8] *See* Securities Exchange Act Release No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021) (SR–FINRA–2021–017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Retirement of FINRA's Order Audit Trail System).

[9] 17 CFR 242.600(B)(47).

[10] Appendix C of CAT NMS Plan, Approval Order at 85010.

reporting (or ''Phase 2a''), which replicate the data in OATS today and thus are most relevant for OATS retirement purposes. Phase 2a Data includes all events and scenarios covered by OATS and applies only to equities. FINRA did not consider options order events or Phase 2c data and validations, which are not in OATS today, for purposes of OATS retirement.

As described below, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing.

(1) Maximum Error Rates

As discussed in the OATS Retirement Filing, FINRA believes that relevant error rates are the primary, but not the sole, metric by which to determine the CAT's accuracy and reliability and will serve as the baseline requirement needed before OATS can be retired. FINRA proposed that, before OATS could be retired, the CAT would generally need to achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower, measured on a pre-correction or as-submitted basis, and 2% or lower on a post-correction basis (measured at T+5).[11] FINRA proposed to average the error rates across the period, rather than require a 5% pre-correction and 2% post-correction maximum each day for 180 consecutive days. FINRA also proposed to measure the error rates in the aggregate, rather than on a firm-by-firm basis. Finally, FINRA proposed to measure the error rates separately for each of the five categories, rather than evaluate all categories in the aggregate. As noted above, FINRA's assessment of the error rates for Industry Member reporting is based solely on Phase 2a CAT reporting for equity events since options orders are not included in OATS today.

As discussed in the OATS Retirement Filing, FINRA measured the error rates in each of the five categories discussed below during the period from October 26, 2020 through April 26, 2021 (the ''applicable period''). FINRA commenced this period on October 26, 2020, which was the date that Industry Members were required to begin correcting all errors for inter-firm linkages and exchange/TRF/ORF match validations. As discussed in the Response to Comments, although the production environment for inter-firm linkage and exchange/TRF/ORF match validations was open for testing as of September 28, 2020, FINRA did not believe it would be appropriate for the 180-day period to commence prior to the October 26, 2020 compliance date.[12]

Rejection Rates and Data Validations

As described in the OATS Retirement Filing, the Plan Processor must perform certain basic data validations,[13] and if a record does not pass these basic data validations, it must be rejected and returned to the CAT Reporter to be corrected and resubmitted. FINRA proposed that over the 180-day period, aggregate rejection rates must be no more than 5% pre-correction or 2% post-correction across all Industry Member Reporters. FINRA has determined that, over the applicable period, aggregate rejection rates across all Industry Member Reporters were 0.03% pre-correction and 0.01% post-correction.

Intra-Firm Linkages

As described in the OATS Retirement Filing, the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum, this requirement includes the creation of an order lifecycle between all order events handled within an individual CAT Reporter, including orders routed to internal desks or departments with different functions (*e.g.,* an internal ATS). FINRA proposed that aggregate intra-firm linkage rates across all Industry Member Reporters must be at least 95% pre-correction and 98% post-correction. FINRA has determined that, over the applicable period, aggregate intra-firm linkage rates across all Industry Member Reporters were 99.97% pre-correction and 99.99% post-correction.

Inter-Firm Linkages

As described in the OATS Retirement Filing, the Plan Processor must be able to create the lifecycle between orders routed between broker-dealers. FINRA proposed that at least a 95% pre-correction and 98% post-correction aggregate match rate be achieved for orders routed between two Industry Member Reporters. FINRA has determined that during the applicable period there was a 99.08% pre-correction and 99.84% post-correction aggregate match rate for orders routed between two Industry Member Reporters.

Order Linkage Rates

As described in the OATS Retirement Filing, in addition to creating linkages within and between broker-dealers, the Plan Processor must be able to create lifecycles to link various pieces of related orders. For example, the Plan requires linkages of order information to create an order lifecycle from origination or receipt to cancellation or execution. This category essentially combines all of the order-related linkages to capture an overall snapshot of order linkages in the CAT.[14] FINRA proposed that there be at least a 95% pre-correction and 98% post-correction rate for order linkages that are required in Phase 2a. FINRA has determined that during the applicable period there was a 99.66% pre-correction and 99.93% post-correction rate for order linkages required in Phase 2a.16.[15]

Exchange and TRF/ORF Match Rates

As described in the OATS Retirement Filing, an order lifecycle must be

[11] As clarified in the OATS Retirement Filing, although FINRA does not believe that post-correction errors need to be de minimis before OATS can be retired, FINRA was not suggesting, with the proposal, that 2% would meet the ultimate objective of de minimis error rates for CAT. *See* CAT NMS Plan, Appendix C, note 102 (error rates after reprocessing of error corrections are ultimately expected to be de minimis for the CAT). *See also* Approval Order.

[12] *See* FINRA's Response to Comments, *supra* note 7.

[13] Appendix D of the CAT NMS Plan, Section 7.2, for example, requires that certain file validations (*e.g.,* file transmission and receipt are in the correct formats, confirmation of a valid SRO-Assigned Market Participant Identifier, etc.), and syntax and context checks (*e.g.,* format checks, data type checks, consistency checks, etc.) be performed on all submitted records.

[14] *See* FINRA's Response to Comments, supra note 7.

[15] FINRA noted that in Phase 2a, linkage is required between the representative street side order and the order being represented when the representative order was originated specifically to represent a single order (received either from a customer or another broker-dealer) and there is: (1) An existing direct electronic link in the firm's system between the order being represented and the representative order, and (2) any resulting executions are immediately and automatically applied to the represented order in the firm's system. As set forth in the OATS Retirement Filing, while such linkages are not required in OATS, FINRA believes that it is appropriate to evaluate them for purposes of retiring OATS because they represent a significant enhancement to the data currently available in OATS and will enhance the quality of the equity audit trail. However, FINRA also explained in the Response to Comments that if all other proposed criteria have been met, FINRA would not anticipate delaying OATS retirement based on Phase 2a representative order linkage error rates alone.

In evaluating whether the standards for OATS retirement have been met, FINRA determined that the error rates for the Phase 2a representative order linkages did not have a significant negative impact on the overall error rates for order linkages. Accordingly, FINRA did not need to separately evaluate or exclude Phase 2a representative order linkage rates in measuring the error rates over the applicable period. For example, if the intra-firm linkage error rate had been above 5% over the applicable period, FINRA would have evaluated whether the error rate was the result of unlinked representative orders to create an apples-to-apples comparison to OATS.

created to link orders routed from broker-dealers to exchanges and executed orders and trade reports. FINRA proposed at least a 95% precorrection and 98% post-correction aggregate match rate across all equity exchanges [16] for orders routed from Industry Members to an exchange and, for over-the-counter executions, the same match rate for orders linked to trade reports. FINRA determined that, during the applicable period, there was a 99.51% pre-correction and 99.87% post-correction aggregate match rate across all equity exchanges for orders routed from Industry Members to an exchange and, for over-the-counter executions, there was a 99.34% pre-correction and 99.53% post-correction rate for orders linked to trade reports submitted to the FINRA Trade Reporting Facilities and OTC Reporting Facility.

As set forth above, the error rates for Industry Member reporting over the applicable period were well below the maximum rates established in the OATS Retirement Filing. FINRA also noted that the overall post-correction error rate for Phase 2a Industry Member reporting of 1.01% is comparable to the current overall OATS post-correction error rate, which generally is at or slightly below 1%. Therefore, FINRA has determined that, based on the error rates for Industry Member reporting, the CAT Data meets the accuracy and reliability baseline standards required for OATS retirement.

(2) FINRA's Use of CAT Data

In the OATS Retirement Filing, FINRA stated that while error rates are a key standardized measure in determining whether OATS retirement is appropriate, FINRA's use of the data in the CAT also must confirm that (i) there are no material issues that have not been corrected (*e.g.,* delays in the processing of data, issues with query functions, etc.), (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data.

In the OATS Retirement Filing, FINRA stated that it has been planning for OATS retirement for several years and the necessary development work has been underway for some time. FINRA also has been analyzing and testing production CAT Data for purposes of transitioning its automated equity surveillance patterns since the commencement of Phase 2a Industry Member reporting in June 2020 and through subsequent CAT milestone releases. For example, in addition to quantitative reviews, such as the error rate statistics discussed above, FINRA has conducted a series of qualitative reviews of Industry Member CAT Data. Such reviews include, among other things, comparing the count and distribution of Industry Member event reporting through CAT versus OATS (*e.g.,* new order and execution events, and data elements such as buy/sell/sell short codes), and reviewing results of examinations, alert reviews, and investigations relating to the timeliness and accuracy of Industry Member reporting. Based on such qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

As discussed in the OATS Retirement Filing, today, FINRA's surveillance patterns rely on the cross-market data model (''CMDM''), which comprises linked OATS data, equity exchange data feeds from each of the exchanges with which FINRA has entered into a RSA, and transactions reported to FINRA's equity trade reporting facilities. The CMDM will be retired and replaced by a newly created surveillance data mart, the Pattern Optimized Datamart (''POD''), which incorporates both equities and options data. At that point, FINRA's patterns will rely on CAT Data in POD, *i.e.,* Plan Participant and Industry Member data reported in CAT format and linked by CAT.[17] FINRA notes that the Plan Participants transitioned to reporting via the CAT technical specification as of April 26, 2021, and full Plan Participant equities reporting and linkage validations in accordance with the CAT specification commenced on June 1, 2021.[18] Successful completion of the transition to the CAT specification for Plan Participants is a prerequisite for FINRA to retire the CMDM and leverage CAT Data and linkages in POD for its surveillance patterns. As of the date of this filing, FINRA has completed all planned activities on schedule, including substantially completing the process of integrating CAT Data into POD and successfully running large amounts of production CAT Data for the month of May through POD.[19] FINRA anticipates completing additional activities before the proposed OATS retirement date, including, *e.g.,* planned user acceptance testing.[20]

As discussed in the OATS Retirement Filing, FINRA has performed broad analysis of its equity surveillance patterns and has determined that all of the data required to support the transition is available in CAT. By mapping OATS data to Industry Member CAT Data in POD, FINRA has confirmed that CAT Data has equivalent analogs to all data elements in OATS. In that regard, FINRA notes that, as a Plan Participant, FINRA has been involved in CAT development efforts to ensure that the scope and features of Industry Member data and processed output are sufficient for FINRA's surveillance program. These efforts include, for example, developing and updating the Industry Member Technical Specifications and Reporting Scenarios, conducting OATS–CAT gap analyses and validating that all such gaps have been properly addressed, and performing OATS-to-CAT field-level mappings.

With respect to Plan Participant data, FINRA notes in the OATS Retirement Filing that the test environment for Plan Participant reporting in accordance with the CAT specification opened on February 15, 2021.[21] Plan Participant equity reporting in accordance with the CAT specification in the test environment had a very high compliance rate for data ingestion and validation, and compliance in the production environment is comparable. In addition, starting on April 26, 2021, CAT began linking copies of Industry Member and Plan Participant data reported via the CAT specification in a test environment, and at that point, FINRA began its evaluation of the

[16] *See* Amendment No. 1.

[17] FINRA's Response to Comments noted this dependency, stating that the process of transitioning FINRA's surveillance patterns to CAT Data necessarily includes, among other things, ingestion of all Industry Member and Plan Participant data and linkages in CAT format. *See* Response to Comments, supra note 7, at 4[sic]. The Response to Comments further noted that the Plan Participants would be reporting to CAT via another mechanism until April 2021.

[18] For example, according to the CAT Reporting Technical Specification for Plan Participants (version 4.0.0–r4 dated April 20, 2021), additional linkage error feedback for off-exchange trade reports was effective as of June 1, 2021. The Technical Specifications can be found on the CAT NMS Plan website at *http://www.catnmsplan.com/sites/default/files/2021-04/04.20.2021-CAT-ReportingTechnical-Specifications-for-Participants-4.0.0-r4.pdf.*

[19] FINRA notes that additional POD releases are scheduled; however, these releases introduce minor enhancements to POD, as opposed to significant changes that would impact the way data is ingested or processed in POD.

[20] FINRA notes that user acceptance testing is the final stage of any software development life cycle and enables actual users to test the system to confirm that it is able to carry out the required tasks it was designed to address in real-world situations.

[21] *See, e.g.,* CAT Q1 2021 Quarterly Progress Report dated April 30, 2021, available at *www.catnmsplan.com/sites/default/files/2021-05/CAT-Q1-2021-QPR.pdf.*

quality of these linkages. Based on this review and evaluation, in the OATS Retirement Filing, FINRA stated that it believes that the linkages between Plan Participant data and Industry Member data in CAT are comparable to the linkages between RSA exchange data and OATS data in the CMDM today.[22] FINRA CAT and the Plan Participants have now met the necessary criteria for a full cutover from the RSA specification to the CAT specification, including, *e.g.,* achieving comparable data ingestion validation and inter-venue linkage rates (within a variance of under one percent) between RSA and CAT specification submissions. Accordingly, the Operating Committee approved the cutover from the RSA specification to the CAT specification as the official source of Plan Participant data as of June 1, 2021, and today, all Industry Member and Plan Participant equities data reported via the CAT specification is linked in the CAT production environment.

As discussed in the OATS Retirement Filing, FINRA continues to evaluate CAT Data quality, and in particular, linkages between Industry Member and Plan Participant data, and to test its surveillance patterns to run on CAT Data in POD. In that regard, FINRA notes that it has followed established and time-tested processes and protocols throughout the development process to ensure that its patterns will perform as expected and produce the necessary output using CAT Data following the retirement of OATS. For example, FINRA's Software Development Lifecycle (''SDLC'') procedures govern systems design, changes, testing and controls. The SDLC procedures are an essential component of FINRA's operations and have been developed to serve FINRA's unique regulatory needs and structure. Additionally, consistent with SEC Regulation SCI, FINRA procedures include a plan of coordination and communication with regulatory staff. By relying on these established processes and protocols, FINRA has confidence that the CAT Data and linkages are reliable and sufficient to run FINRA's surveillance patterns.

Based on these results, as well as the results of its quantitative and qualitative reviews of CAT Data and successful efforts integrating CAT Data into POD, in the OATS Retirement Filing, FINRA stated that it believes that the complete portfolio of equity surveillance patterns will be capable of consuming CAT Data and achieving comparable (or better) output results.

Thus, FINRA proposes to retire OATS in accordance with the schedule set forth herein. FINRA will run its surveillance patterns for review periods through the end of the second quarter of 2021 using OATS data and begin using—and be fully reliant on—CAT Data for its surveillance patterns for review periods beginning in the third quarter of 2021. Following the retirement of OATS, FINRA expects to maintain the current established cadence of its monthly, quarterly and semi-annual surveillance patterns. In addition, FINRA's analytics platforms will have access to CAT Data as soon as such data is made available to regulators. Thus, outside of regularly scheduled surveillance pattern runs, FINRA can perform expedited analytics, as required by market events.

As discussed in the OATS Retirement Filing, FINRA is finalizing the development and certification of its surveillance patterns to run on CAT Data on a rolling basis and, in accordance with its existing SDLC procedures, will run a month's worth of data and compare the output before certifying each pattern. For those equity patterns that will be subject to certification after OATS retirement, FINRA anticipates that there would be sufficient time to identify and remediate any issues prior to running the patterns in accordance with the current established cadence. FINRA does not anticipate significant issues arising from additional scheduled POD releases or in the final stages of its pattern development and certification efforts.

As discussed in the OATS Retirement Filing, on an ongoing basis following the retirement of OATS, FINRA will conduct regular reviews to ensure confidence in the completeness and accuracy of Industry Member reporting, along with the ability to remediate any issues in a timely manner. Among other things, FINRA has a robust mechanism for detecting data issues, determining which issues are material for purposes of its surveillance program, and requesting resubmission and/or reprocessing of data, as necessary. FINRA also (1) performs a suite [sic] data quality checks against data sourced from CAT to POD and against data processed by POD for use in surveillance patterns; (2) oversees a robust surveillance and examination compliance program that evaluates Industry Member reporting timeliness, data quality, and other issues and trends; (3) reviews CAT compliance program alerts using a rapid remediation process and formal reviews, as necessary; and (4) reviews Industry Member self-reporting and error correction trends. FINRA believes that these practices are sufficient for identification and timely resolution of Industry Member reporting and data issues after OATS has been retired.

Specifically, with regard to the additional standards approved in the OATS Retirement Filing, through its use of CAT Data to date, as described above, FINRA believes that these standards have been satisfied. With respect to the first factor, FINRA does not believe that there are any material issues that have not been corrected (or could not be corrected in the course of operation of CAT, as approved by the Operating Committee)[23] that would impact FINRA's ability to incorporate and use CAT Data in FINRA's surveillance program. For example, the Plan requires that raw unprocessed data that has been ingested by the Plan Processor must be available to Participant regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1, and access to all iterations of processed data must be available to Participant regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5.[24] The Plan Processor also must ensure that regulators have access to corrected and linked order data by 8:00 a.m. Eastern Time on T+5.[25] Additionally, after ingestion by the Central Repository, the raw unprocessed data must be transformed into a format appropriate for data querying and regulatory output.[26] The user-defined direct queries and bulk extracts must provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.[27] FINRA's use of the CAT Data has not uncovered any processing delays or other material issues impacting the availability of, and FINRA's access to, the data.

With respect to the second factor, FINRA stated in the OATS Retirement Filing that it believes that the CAT includes all data necessary for FINRA to meet its surveillance obligations after

[22] FINRA notes that the CAT uses the same code in both the test and production environments. Thus, FINRA believes that linkages in the test environment are reliable indicators of linkages in the production environment.

[23] FINRA notes that FINRA CAT tracks known issues relating to Industry Member and Plan Participant reporting. *See, e.g., catnmsplan.com/CAT-Transaction-Known-Issues-List.* FINRA regularly reviews and analyzes FINRA CAT's list of current and resolved issues and does not believe that any of these issues would impact its ability to incorporate and use CAT Data in its surveillance program.

[24] *See* CAT NMS Plan, Appendix D, Section 6.2.

[25] *See* CAT NMS Plan, Appendix C, Section A.2(a).

[26] *See* CAT NMS Plan, Appendix C, Section A.1(b).

[27] *See* CAT NMS Plan, Section 6.10(c).

the retirement of OATS. FINRA must ensure that the CAT, as the single source of order and trade data, can enable FINRA to conduct accurate and effective market surveillance in accordance with its regulatory obligations.[28] As noted above, Phase 2a Data includes all events and scenarios covered by OATS and is the most relevant for OATS retirement purposes. FINRA Rule 7440 describes the OATS requirements for recording information, which includes information related to the receipt or origination of orders, order transmittal, and order modifications, cancellations and executions. Large Industry Members and Small Industry Members that currently are reporting to OATS were required to submit data to the CAT for these same events and scenarios commencing in Phase 2a. FINRA's testing, analysis and use of the CAT Data (including integration into POD), as described above, has confirmed that the CAT includes all data necessary for FINRA to meet its surveillance obligations and that CAT is a reliable substitute for OATS. In addition, based on its qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

With respect to the third factor, FINRA stated in the OATS Retirement Filing that it believes that the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data. As detailed in the Implementation Plan and Quarterly Progress Reports submitted by the Plan Participants, the Plan Processor has met its targeted completion dates for the milestones for Phase 2a, including, for example, production Go-Live for Equities 2a file submission and data integrity validation (Large Industry Members and Small OATS Reporters) on June 22, 2020; Production Go-Live for Equities 2a Intrafirm Linkage validations on July 27, 2020; and production go-live for firm-to-firm linkage validations for equities (Large Industry Members and Small OATS Reporters) and exchange and TRF/ORF linkage validations for equities (Large Industry Members and Small OATS Reporters) on October 26, 2020.[29]

Based on the foregoing, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS Rules. FINRA has determined to retire OATS and remove the OATS rules from its rulebook effective September 1, 2021. Firms must continue to report to OATS all order events that occur on or prior to August 31, 2021. Reports submitted to OATS for order events that occur after August 31, 2021 will be rejected. In other words, August 31, 2021 will be the last ''OATS Business Day,'' as defined under FINRA Rule 7450(b)(3), for which OATS will accept order events and perform routine processing (including incorporation of corrections and repairs of rejections) occurring within the normal OATS timeframe for such activities. OATS will continue to accept reports for order events that occur on or prior to August 31, 2021 (including, but not limited to, late and corrected reports for such order events) through September 16, 2021. Firms must ensure that their OATS reporting is accurate and complete for all order events that occur on or prior to August 31, 2021.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act[30] in general and Section 6(b)(5) of the Act[31] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposed rule change is consistent with Section C.9 of Appendix C to the Plan, which requires each Participant to ''file with the SEC the relevant rule change filing to eliminate or modify its duplicative rules within six (6) months of the SEC's approval of the CAT NMS Plan.''[32] The Plan notes that ''the elimination of such rules and the retirement of such systems [will] be effective at such time as CAT Data meets minimum standards of accuracy and reliability.''[33] Accordingly, the Exchange believes the proposed rule change implements, supports, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its member organizations in meeting regulatory obligations pursuant to, and milestones established by, the Plan. In approving the Plan, the SEC noted that it ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.''[34] To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to member organizations, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The proposed change is not designed to address any competitive issue but rather implement provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section

[28] As discussed in the OATS Retirement Filing, OATS was originally proposed to fulfill one of the undertakings contained in an order issued by the Commission relating to the settlement of an enforcement action against FINRA (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) for failure to adequately enforce its rules. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (Order Approving File No SR–NASD–97–56) (''OATS Approval Order''); *see also* Securities Exchange Act Release No. 37538 (August 8, 1996); Administrative Proceeding File No. 3–9056 (''SEC Order''). In the OATS Approval Order, the Commission concluded that OATS satisfied the conditions of the SEC Order and was consistent with the Exchange Act. *See* 63 FR 12559, 12566–67. FINRA believes that it will continue to be in compliance with the requirements of the SEC Order once the OATS Rules are deleted.

[29] The Implementation Plan and Quarterly Progress Reports are available at *www.catnmsplan.com/implementation-plan.*

[30] 15 U.S.C. 78f.

[31] 15 U.S.C. 78f(b)(5).

[32] Appendix C of CAT NMS Plan, Approval Order at 85010.

[33] *Id.*

[34] Approval Order at 84697.

19(b)(3)(A)(iii) of the Act [35] and subparagraph (f)(6) of Rule 19b–4 thereunder.[36] The proposed rule change would not significantly affect the protection of investors or the public interest because it seeks to delete the Exchange's OATS rules to be consistent with FINRA's retirement of its OATS rules. The Exchange further believes that the proposed rule change would not impose any significant burden on competition because the proposed rule change is not designed to address any competitive issue but rather implements provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

A proposed rule change filed under Rule 19b–4(f)(6) [37] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[38] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As noted above, the Exchange believes that the OATS reporting requirements of the Equity 5 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational. The Commission believes that it is consistent with the protection of investors and the public interest for the Exchange to delete its OATS reporting because FINRA has retired OATS. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[39]

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–BX–2021–039 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–BX–2021–039. 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–BX–2021–039, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

J. Matthew DeLesDernier,

Assistant Secretary.

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BILLING CODE 8011–01–P

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[37] 17 CFR 240.19b–4(f)(6).

[38] 17 CFR 240.19b–4(f)(6)(iii).

[39] For purposed only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92973; File No. SR–NYSENAT–2021–17]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Order Audit Trail System Rules in the Rule 6.7400 Series

September 14, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on September 7, 2021, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the Order Audit Trail System (''OATS'') rules in the Rule 6.7400 Series as these Rules provide for the collection of information that is duplicative of the data collection requirements of the CAT. Further, the Financial Industry Regulatory Authority (''FINRA'') has determined to eliminate its OATS rules. 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

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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

Rule 613 of Regulation NMS requires national securities exchanges and FINRA to create, implement, and maintain a consolidated audit trail to capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,[4] and approved by the Commission, as modified, on November 15, 2016.[5]

On August 14, 2020, FINRA filed with the Commission a proposed rule change to delete the OATS rules once Industry Members are effectively reporting to the CAT (the ''OATS Retirement Filing'').[6] On October 29, 2020, FINRA filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'') and a response to the comments that were submitted on the original filing (''Response to Comments'').[7] On November 30, 2020, the Commission approved the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[8] On June 17, 2021, FINRA filed a proposed rule change setting forth the basis for its determination that the accuracy and reliability of the CAT meet the standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS rules.[9] The FINRA proposal stated that FINRA would retire OATS effective September 1, 2021.

After conducting an analysis of its rules in accordance with the CAT NMS Plan, the Exchange has determined that the information collected pursuant to the OATS rules is intended to be collected by CAT. Further, the Exchange believes that the Rule 6.7400 Series will no longer be necessary and proposes to delete such rules from the Exchange's rulebook. Discussed below is a description of the duplicative rule requirements as well as the timeline for eliminating the duplicative rules followed by a discussion on the OATS Retirement Filing that formed the basis for retiring OATS.

Duplicative OATS Requirements

The Rule 6.7400 Series consists of Rules 6.7410 through 6.7470 and sets forth the recording and reporting requirements of the OATS Rules. The OATS Rules require all Exchange members and associated persons to record in electronic form and report to FINRA, on a daily basis, certain information with respect to orders originated, received, transmitted, modified, canceled, or executed by members in all NMS stocks, as that term is defined in Rule 600(b)(47) of Regulation NMS,[10] traded on the Exchange. The Exchange relies on the information reported to OATS either to conduct surveillance or to facilitate surveillance conducted by FINRA pursuant to a regulatory services agreement (''RSA''). This information is used by Exchange and FINRA staff to conduct surveillance and investigations of member firms for violations of Exchange and FINRA rules and federal securities laws. The Exchange believes it is appropriate to retire OATS because the requirements of the Rule 6.7400 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational.

Timeline for Elimination of Duplicative Rules

The CAT NMS Plan states that the elimination of rules that are duplicative of the requirements of the CAT and the retirement of the related systems should be effective at such time as CAT Data meets minimum standards of accuracy and reliability.[11] As discussed in more detail in the OATS Retirement Filing, FINRA believes that OATS may be retired effective September 1, 2021 given the error rate thresholds have been met, and FINRA has determined that its usage of the CAT Data has not revealed material issues that have not been corrected and further confirmed that the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations.

OATS Retirement Filing

In the OATS Retirement Filing, FINRA proposed to eliminate the OATS rules once Industry Members are effectively reporting to the CAT and the CAT's accuracy and reliability meet certain standards. Specifically, FINRA proposed that before OATS could be retired, the CAT generally must achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower on a pre-correction basis, and 2% or lower on a post-correction basis (measured at T+5). In addition to the maximum error rates and matching thresholds, FINRA's use of CAT Data must confirm that (i) there are no material issues that have not been corrected, (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Industry Member Data.

In the OATS Retirement Filing, FINRA explained that its review of CAT Data and error rates would be based on data and linkages in the initial phase of reporting (or ''Phase 2a''), which replicate the data in OATS today and thus are most relevant for OATS retirement purposes. Phase 2a Data includes all events and scenarios covered by OATS and applies only to equities. FINRA did not consider options order events or Phase 2c data and validations, which are not in OATS today, for purposes of OATS retirement.

As described below, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing.

(1) Maximum Error Rates

As discussed in the OATS Retirement Filing, FINRA believes that relevant error rates are the primary, but not the sole, metric by which to determine the CAT's accuracy and reliability and will

[4] *See* Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

[5] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (''Order Approving the National Market System Plan Governing the Consolidated Audit Trail) (''Approval Order'').

[6] *See* Securities Exchange Act Release No. 89679 (August 26, 2020), 85 FR 54461 (September 1, 2020) (Notice of Filing of File No. SR–FINRA–2020–024).

[7] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 29, 2020.

[8] *See* Securities Exchange Act Release No. 90535 (November 30, 2020), 85 FR 78395 (December 4, 2020) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of SR–FINRA–2020–024).

[9] *See* Securities Exchange Act Release No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021) (SR–FINRA–2021–017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Retirement of FINRA's Order Audit Trail System).

[10] 17 CFR 242.600(B)(47).

[11] Appendix C of CAT NMS Plan, Approval Order at 85010.

serve as the baseline requirement needed before OATS can be retired. FINRA proposed that, before OATS could be retired, the CAT would generally need to achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower, measured on a pre-correction or as-submitted basis, and 2% or lower on a post-correction basis (measured at T+5).[12] FINRA proposed to average the error rates across the period, rather than require a 5% pre-correction and 2% post-correction maximum each day for 180 consecutive days. FINRA also proposed to measure the error rates in the aggregate, rather than on a firm-by-firm basis. Finally, FINRA proposed to measure the error rates separately for each of the five categories, rather than evaluate all categories in the aggregate. As noted above, FINRA's assessment of the error rates for Industry Member reporting is based solely on Phase 2a CAT reporting for equity events since options orders are not included in OATS today.

As discussed in the OATS Retirement Filing, FINRA measured the error rates in each of the five categories discussed below during the period from October 26, 2020 through April 26, 2021 (the ''applicable period''). FINRA commenced this period on October 26, 2020, which was the date that Industry Members were required to begin correcting all errors for inter-firm linkages and exchange/TRF/ORF match validations. As discussed in the Response to Comments, although the production environment for inter-firm linkage and exchange/TRF/ORF match validations was open for testing as of September 28, 2020, FINRA did not believe it would be appropriate for the 180-day period to commence prior to the October 26, 2020 compliance date.[13]

Rejection Rates and Data Validations. As described in the OATS Retirement Filing, the Plan Processor must perform certain basic data validations,[14] and if a record does not pass these basic data validations, it must be rejected and returned to the CAT Reporter to be corrected and resubmitted. FINRA proposed that over the 180-day period, aggregate rejection rates must be no more than 5% pre-correction or 2% post-correction across all Industry Member Reporters. FINRA has determined that, over the applicable period, aggregate rejection rates across all Industry Member Reporters were 0.03% pre-correction and 0.01% post-correction.

Intra-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum, this requirement includes the creation of an order lifecycle between all order events handled within an individual CAT Reporter, including orders routed to internal desks or departments with different functions (*e.g.,* an internal ATS). FINRA proposed that aggregate intra-firm linkage rates across all Industry Member Reporters must be at least 95% pre-correction and 98% post-correction. FINRA has determined that, over the applicable period, aggregate intra-firm linkage rates across all Industry Member Reporters were 99.97% pre-correction and 99.99% post-correction.

Inter-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to create the lifecycle between orders routed between broker-dealers. FINRA proposed that at least a 95% pre-correction and 98% post-correction aggregate match rate be achieved for orders routed between two Industry Member Reporters. FINRA has determined that during the applicable period there was a 99.08% pre-correction and 99.84% post-correction aggregate match rate for orders routed between two Industry Member Reporters.

Order Linkage Rates. As described in the OATS Retirement Filing, in addition to creating linkages within and between broker-dealers, the Plan Processor must be able to create lifecycles to link various pieces of related orders. For example, the Plan requires linkages of order information to create an order lifecycle from origination or receipt to cancellation or execution. This category essentially combines all of the order-related linkages to capture an overall snapshot of order linkages in the CAT.[15] FINRA proposed that there be at least a 95% pre-correction and 98% post-correction rate for order linkages that are required in Phase 2a. FINRA has determined that during the applicable period there was a 99.66% pre-correction and 99.93% post-correction rate for order linkages required in Phase 2a.[16]

Exchange and TRF/ORF Match Rates. As described in the OATS Retirement Filing, an order lifecycle must be created to link orders routed from broker-dealers to exchanges and executed orders and trade reports. FINRA proposed at least a 95% precorrection and 98% post-correction aggregate match rate across all equity exchanges[17] for orders routed from Industry Members to an exchange and, for over-the-counter executions, the same match rate for orders linked to trade reports. FINRA determined that, during the applicable period, there was a 99.51% pre-correction and 99.87% post-correction aggregate match rate across all equity exchanges for orders routed from Industry Members to an exchange and, for over-the-counter executions, there was a 99.34% pre-correction and 99.53% post-correction rate for orders linked to trade reports submitted to the FINRA Trade Reporting Facilities and OTC Reporting Facility.

As set forth above, the error rates for Industry Member reporting over the applicable period were well below the maximum rates established in the OATS

[12] As clarified in the OATS Retirement Filing, although FINRA does not believe that post-correction errors need to be de minimis before OATS can be retired, FINRA was not suggesting, with the proposal, that 2% would meet the ultimate objective of de minimis error rates for CAT. *See* CAT NMS Plan, Appendix C, note 102 (error rates after reprocessing of error corrections are ultimately expected to be de minimis for the CAT). *See also* Approval Order.

[13] *See* FINRA's Response to Comments, *supra* note 8.

[14] Appendix D of the CAT NMS Plan, Section 7.2, for example, requires that certain file validations (*e.g.,* file transmission and receipt are in the correct formats, confirmation of a valid SRO-Assigned Market Participant Identifier, etc.), and syntax and context checks (*e.g.,* format checks, data type checks, consistency checks, etc.) be performed on all submitted records.

[15] *See* FINRA's Response to Comments, *supra* note 8.

[16] FINRA noted that in Phase 2a, linkage is required between the representative street side order and the order being represented when the representative order was originated specifically to represent a single order (received either from a customer or another broker-dealer) and there is: (1) An existing direct electronic link in the firm's system between the order being represented and the representative order, and (2) any resulting executions are immediately and automatically applied to the represented order in the firm's system. As set forth in the OATS Retirement Filing, while such linkages are not required in OATS, FINRA believes that it is appropriate to evaluate them for purposes of retiring OATS because they represent a significant enhancement to the data currently available in OATS and will enhance the quality of the equity audit trail. However, FINRA also explained in the Response to Comments that if all other proposed criteria have been met, FINRA would not anticipate delaying OATS retirement based on Phase 2a representative order linkage error rates alone.

In evaluating whether the standards for OATS retirement have been met, FINRA determined that the error rates for the Phase 2a representative order linkages did not have a significant negative impact on the overall error rates for order linkages. Accordingly, FINRA did not need to separately evaluate or exclude Phase 2a representative order linkage rates in measuring the error rates over the applicable period. For example, if the intra-firm linkage error rate had been above 5% over the applicable period, FINRA would have evaluated whether the error rate was the result of unlinked representative orders to create an apples-to-apples comparison to OATS.

[17] *See* Amendment No. 1.

Retirement Filing. FINRA also noted that the overall post-correction error rate for Phase 2a Industry Member reporting of 1.01% is comparable to the current overall OATS post-correction error rate, which generally is at or slightly below 1%. Therefore, FINRA has determined that, based on the error rates for Industry Member reporting, the CAT Data meets the accuracy and reliability baseline standards required for OATS retirement.

(2) FINRA's Use of CAT Data

In the OATS Retirement Filing, FINRA stated that while error rates are a key standardized measure in determining whether OATS retirement is appropriate, FINRA's use of the data in the CAT also must confirm that (i) there are no material issues that have not been corrected (*e.g.,* delays in the processing of data, issues with query functions, etc.), (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data.

In the OATS Retirement Filing, FINRA stated that it has been planning for OATS retirement for several years and the necessary development work has been underway for some time. FINRA also has been analyzing and testing production CAT Data for purposes of transitioning its automated equity surveillance patterns since the commencement of Phase 2a Industry Member reporting in June 2020 and through subsequent CAT milestone releases. For example, in addition to quantitative reviews, such as the error rate statistics discussed above, FINRA has conducted a series of qualitative reviews of Industry Member CAT Data. Such reviews include, among other things, comparing the count and distribution of Industry Member event reporting through CAT versus OATS (*e.g.,* new order and execution events, and data elements such as buy/sell/sell short codes), and reviewing results of examinations, alert reviews, and investigations relating to the timeliness and accuracy of Industry Member reporting. Based on such qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

As discussed in the OATS Retirement Filing, today, FINRA's surveillance patterns rely on the cross-market data model (''CMDM''), which comprises linked OATS data, equity exchange data feeds from each of the exchanges with which FINRA has entered into a RSA, and transactions reported to FINRA's equity trade reporting facilities. The CMDM will be retired and replaced by a newly created surveillance data mart, the Pattern Optimized Datamart (''POD''), which incorporates both equities and options data. At that point, FINRA's patterns will rely on CAT Data in POD, *i.e.,* Plan Participant and Industry Member data reported in CAT format and linked by CAT.[18] FINRA notes that the Plan Participants transitioned to reporting via the CAT technical specification as of April 26, 2021, and full Plan Participant equities reporting and linkage validations in accordance with the CAT specification commenced on June 1, 2021.[19] Successful completion of the transition to the CAT specification for Plan Participants is a prerequisite for FINRA to retire the CMDM and leverage CAT Data and linkages in POD for its surveillance patterns. As of the date of this filing, FINRA has completed all planned activities on schedule, including substantially completing the process of integrating CAT Data into POD and successfully running large amounts of production CAT Data for the month of May through POD.[20] FINRA anticipates completing additional activities before the proposed OATS retirement date, including, *e.g.,* planned user acceptance testing.[21]

As discussed in the OATS Retirement Filing, FINRA has performed broad analysis of its equity surveillance patterns and has determined that all of the data required to support the transition is available in CAT. By mapping OATS data to Industry Member CAT Data in POD, FINRA has confirmed that CAT Data has equivalent analogs to all data elements in OATS. In that regard, FINRA notes that, as a Plan Participant, FINRA has been involved in CAT development efforts to ensure that the scope and features of Industry Member data and processed output are sufficient for FINRA's surveillance program. These efforts include, for example, developing and updating the Industry Member Technical Specifications and Reporting Scenarios, conducting OATS–CAT gap analyses and validating that all such gaps have been properly addressed, and performing OATS-to-CAT field-level mappings.

With respect to Plan Participant data, FINRA notes in the OATS Retirement Filing that the test environment for Plan Participant reporting in accordance with the CAT specification opened on February 15, 2021.[22] Plan Participant equity reporting in accordance with the CAT specification in the test environment had a very high compliance rate for data ingestion and validation, and compliance in the production environment is comparable. In addition, starting on April 26, 2021, CAT began linking copies of Industry Member and Plan Participant data reported via the CAT specification in a test environment, and at that point, FINRA began its evaluation of the quality of these linkages. Based on this review and evaluation, in the OATS Retirement Filing, FINRA stated that it believes that the linkages between Plan Participant data and Industry Member data in CAT are comparable to the linkages between RSA exchange data and OATS data in the CMDM today.[23] FINRA CAT and the Plan Participants have now met the necessary criteria for a full cutover from the RSA specification to the CAT specification, including, *e.g.,* achieving comparable data ingestion validation and inter-venue linkage rates (within a variance of under one percent) between RSA and CAT specification submissions. Accordingly, the Operating Committee approved the cutover from the RSA specification to the CAT specification as the official source of Plan Participant data as of June 1, 2021, and today, all Industry Member and Plan Participant equities data reported via the CAT

[18] FINRA's Response to Comments noted this dependency, stating that the process of transitioning FINRA's surveillance patterns to CAT Data necessarily includes, among other things, ingestion of all Industry Member and Plan Participant data and linkages in CAT format. *See* Response to Comments, *supra* note 8, at 4[sic]. The Response to Comments further noted that the Plan Participants would be reporting to CAT via another mechanism until April 2021.

[19] For example, according to the CAT Reporting Technical Specification for Plan Participants (version 4.0.0–r4 dated April 20, 2021), additional linkage error feedback for off-exchange trade reports was effective as of June 1, 2021. The Technical Specifications can be found on the CAT NMS Plan website at *www.catnmsplan.com/sites/default/files/2021–04/04.20.2021-CAT-ReportingTechnical-Specifications-for-Participants-4.0.0-r4.pdf.*

[20] FINRA notes that additional POD releases are scheduled; however, these releases introduce minor enhancements to POD, as opposed to significant changes that would impact the way data is ingested or processed in POD.

[21] FINRA notes that user acceptance testing is the final stage of any software development life cycle and enables actual users to test the system to confirm that it is able to carry out the required tasks it was designed to address in real-world situations.

[22] *See, e.g.,* CAT Q1 2021 Quarterly Progress Report dated April 30, 2021, available at *www.catnmsplan.com/sites/default/files/2021-05/CAT-Q1-2021-QPR.pdf.*

[23] FINRA notes that the CAT uses the same code in both the test and production environments. Thus, FINRA believes that linkages in the test environment are reliable indicators of linkages in the production environment.

specification is linked in the CAT production environment.

As discussed in the OATS Retirement Filing, FINRA continues to evaluate CAT Data quality, and in particular, linkages between Industry Member and Plan Participant data, and to test its surveillance patterns to run on CAT Data in POD. In that regard, FINRA notes that it has followed established and time-tested processes and protocols throughout the development process to ensure that its patterns will perform as expected and produce the necessary output using CAT Data following the retirement of OATS. For example, FINRA's Software Development Lifecycle (''SDLC'') procedures govern systems design, changes, testing and controls. The SDLC procedures are an essential component of FINRA's operations and have been developed to serve FINRA's unique regulatory needs and structure. Additionally, consistent with SEC Regulation SCI, FINRA procedures include a plan of coordination and communication with regulatory staff. By relying on these established processes and protocols, FINRA has confidence that the CAT Data and linkages are reliable and sufficient to run FINRA's surveillance patterns.

Based on these results, as well as the results of its quantitative and qualitative reviews of CAT Data and successful efforts integrating CAT Data into POD, in the OATS Retirement Filing, FINRA stated that it believes that the complete portfolio of equity surveillance patterns will be capable of consuming CAT Data and achieving comparable (or better) output results.

Thus, FINRA proposes to retire OATS in accordance with the schedule set forth herein. FINRA will run its surveillance patterns for review periods through the end of the second quarter of 2021 using OATS data and begin using—and be fully reliant on—CAT Data for its surveillance patterns for review periods beginning in the third quarter of 2021. Following the retirement of OATS, FINRA expects to maintain the current established cadence of its monthly, quarterly and semi-annual surveillance patterns. In addition, FINRA's analytics platforms will have access to CAT Data as soon as such data is made available to regulators. Thus, outside of regularly scheduled surveillance pattern runs, FINRA can perform expedited analytics, as required by market events.

As discussed in the OATS Retirement Filing, FINRA is finalizing the development and certification of its surveillance patterns to run on CAT Data on a rolling basis and, in accordance with its existing SDLC procedures, will run a month's worth of data and compare the output before certifying each pattern. For those equity patterns that will be subject to certification after OATS retirement, FINRA anticipates that there would be sufficient time to identify and remediate any issues prior to running the patterns in accordance with the current established cadence. FINRA does not anticipate significant issues arising from additional scheduled POD releases or in the final stages of its pattern development and certification efforts.

As discussed in the OATS Retirement Filing, on an ongoing basis following the retirement of OATS, FINRA will conduct regular reviews to ensure confidence in the completeness and accuracy of Industry Member reporting, along with the ability to remediate any issues in a timely manner. Among other things, FINRA has a robust mechanism for detecting data issues, determining which issues are material for purposes of its surveillance program, and requesting resubmission and/or reprocessing of data, as necessary. FINRA also (1) performs a suite of data quality checks against data sourced from CAT to POD and against data processed by POD for use in surveillance patterns; (2) oversees a robust surveillance and examination compliance program that evaluates Industry Member reporting timeliness, data quality, and other issues and trends; (3) reviews CAT compliance program alerts using a rapid remediation process and formal reviews, as necessary; and (4) reviews Industry Member self-reporting and error correction trends. FINRA believes that these practices are sufficient for identification and timely resolution of Industry Member reporting and data issues after OATS has been retired.

Specifically, with regard to the additional standards approved in the OATS Retirement Filing, through its use of CAT Data to date, as described above, FINRA believes that these standards have been satisfied. With respect to the first factor, FINRA does not believe that there are any material issues that have not been corrected (or could not be corrected in the course of operation of CAT, as approved by the Operating Committee)[24] that would impact FINRA's ability to incorporate and use CAT Data in FINRA's surveillance program. For example, the Plan requires that raw unprocessed data that has been ingested by the Plan Processor must be available to Participant regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1, and access to all iterations of processed data must be available to Participant regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5.[25] The Plan Processor also must ensure that regulators have access to corrected and linked order data by 8:00 a.m. Eastern Time on T+5.[26] Additionally, after ingestion by the Central Repository, the raw unprocessed data must be transformed into a format appropriate for data querying and regulatory output.[27] The user-defined direct queries and bulk extracts must provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.[28] FINRA's use of the CAT Data has not uncovered any processing delays or other material issues impacting the availability of, and FINRA's access to, the data.

With respect to the second factor, FINRA stated in the OATS Retirement Filing that it believes that the CAT includes all data necessary for FINRA to meet its surveillance obligations after the retirement of OATS. FINRA must ensure that the CAT, as the single source of order and trade data, can enable FINRA to conduct accurate and effective market surveillance in accordance with its regulatory obligations.[29] As noted above, Phase 2a Data includes all events and scenarios covered by OATS and is the most relevant for OATS retirement purposes. FINRA Rule 7440 describes the OATS requirements for recording information, which includes information related to

[24] FINRA notes that FINRA CAT tracks known issues relating to Industry Member and Plan Participant reporting. *See, e.g., catnmsplan.com/CAT-Transaction-Known-Issues-List.* FINRA regularly reviews and analyzes FINRA CAT's list of current and resolved issues and does not believe that any of these issues would impact its ability to incorporate and use CAT Data in its surveillance program.

[25] *See* CAT NMS Plan, Appendix D, Section 6.2.

[26] *See* CAT NMS Plan, Appendix C, Section A.2(a).

[27] *See* CAT NMS Plan, Appendix C, Section A.1(b).

[28] *See* CAT NMS Plan, Section 6.10(c).

[29] As discussed in the OATS Retirement Filing, OATS was originally proposed to fulfill one of the undertakings contained in an order issued by the Commission relating to the settlement of an enforcement action against FINRA (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) for failure to adequately enforce its rules. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (Order Approving File No SR–NASD–97–56) (''OATS Approval Order''); *see also* Securities Exchange Act Release No. 37538 (August 8, 1996); Administrative Proceeding File No. 3–9056 (''SEC Order''). In the OATS Approval Order, the Commission concluded that OATS satisfied the conditions of the SEC Order and was consistent with the Exchange Act. *See* 63 FR 12559, 12566–67. FINRA believes that it will continue to be in compliance with the requirements of the SEC Order once the OATS Rules are deleted.

the receipt or origination of orders, order transmittal, and order modifications, cancellations and executions. Large Industry Members and Small Industry Members that currently are reporting to OATS were required to submit data to the CAT for these same events and scenarios commencing in Phase 2a. FINRA's testing, analysis and use of the CAT Data (including integration into POD), as described above, has confirmed that the CAT includes all data necessary for FINRA to meet its surveillance obligations and that CAT is a reliable substitute for OATS. In addition, based on its qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

With respect to the third factor, FINRA stated in the OATS Retirement Filing that it believes that the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data. As detailed in the Implementation Plan and Quarterly Progress Reports submitted by the Plan Participants, the Plan Processor has met its targeted completion dates for the milestones for Phase 2a, including, for example, production Go-Live for Equities 2a file submission and data integrity validation (Large Industry Members and Small OATS Reporters) on June 22, 2020; Production Go-Live for Equities 2a Intrafirm Linkage validations on July 27, 2020; and production go-live for firm-to-firm linkage validations for equities (Large Industry Members and Small OATS Reporters) and exchange and TRF/ORF linkage validations for equities (Large Industry Members and Small OATS Reporters) on October 26, 2020.[30]

Based on the foregoing, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS Rules. FINRA has determined to retire OATS and remove the OATS rules from its rulebook effective September 1, 2021. Firms must continue to report to OATS all order events that occur on or prior to August 31, 2021. Reports submitted to OATS for order events that occur after August 31, 2021 will be rejected. In other words, August 31, 2021 will be the last ''OATS Business Day,'' as defined under FINRA Rule 7450(b)(3), for which OATS will accept order events and perform routine processing (including incorporation of corrections and repairs of rejections) occurring within the normal OATS timeframe for such activities. OATS will continue to accept reports for order events that occur on or prior to August 31, 2021 (including, but not limited to, late and corrected reports for such order events) through September 16, 2021. Firms must ensure that their OATS reporting is accurate and complete for all order events that occur on or prior to August 31, 2021.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[31] in general, and furthers the objectives of Section 6(b)(5) of the Act,[32] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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 remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposed rule change is consistent with Section C.9 of Appendix C to the Plan, which requires each Participant to ''file with the SEC the relevant rule change filing to eliminate or modify its duplicative rules within six (6) months of the SEC's approval of the CAT NMS Plan.'' [33] The Plan notes that ''the elimination of such rules and the retirement of such systems [will] be effective at such time as CAT Data meets minimum standards of accuracy and reliability.'' [34] Accordingly, the Exchange believes the proposed rule change implements, supports, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its members in meeting regulatory obligations pursuant to, and milestones established by, the Plan. In approving the Plan, the SEC noted that it ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [35] To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather implement provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [36] and subparagraph (f)(6) of Rule 19b–4 thereunder.[37] The proposed rule change would not significantly affect the protection of investors or the public interest because it seeks to delete the Exchange's OATS rules to be consistent with FINRA's retirement of its OATS rules. The Exchange further believes that the proposed rule change would not impose any significant burden on competition because the proposed rule change is not designed to address any competitive issue but rather implements provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

[30] The Implementation Plan and Quarterly Progress Reports are available at *www.catnmsplan.com/implementation-plan.*

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(5).

[33] Appendix C of CAT NMS Plan, Approval Order at 85010.

[34] *Id.*

[35] Approval Order at 84697.

[36] 15 U.S.C. 78s(b)(3)(A)(iii).

[37] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b–4(f)(6) [38] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[39] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As noted above, the Exchange believes that the OATS reporting requirements of the Rule 6.7400 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational. The Commission believes that it is consistent with the protection of investors and the public interest for the Exchange to delete its OATS reporting because FINRA has retired OATS. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[40]

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–NYSENAT–2021–17 *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–NYSENAT–2021–17. 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–NYSENAT–2021–17, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

J. Matthew DeLesDernier,

Assistant Secretary.

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[38] 17 CFR 240.19b–4(f)(6).

[39] 17 CFR 240.19b–4(f)(6)(iii).

[40] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92983; File No. SR–NYSECHX–2021–12]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Order Audit Trail System Rules in the Rule 6.7400 Series

September 14, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on September 7, 2021, the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the Order Audit Trail System (''OATS'') rules in the Rule 6.7400 Series as these Rules provide for the collection of information that is duplicative of the data collection requirements of the CAT. Further, the Financial Industry Regulatory Authority (''FINRA'') has determined to eliminate its OATS rules. 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

Rule 613 of Regulation NMS requires national securities exchanges and FINRA to create, implement, and maintain a consolidated audit trail to capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Participants filed the Plan to

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

comply with Rule 613 of Regulation NMS under the Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,[4] and approved by the Commission, as modified, on November 15, 2016.[5]

On August 14, 2020, FINRA filed with the Commission a proposed rule change to delete the OATS rules once Industry Members are effectively reporting to the CAT (the ''OATS Retirement Filing'').[6] On October 29, 2020, FINRA filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'') and a response to the comments that were submitted on the original filing (''Response to Comments'').[7] On November 30, 2020, the Commission approved the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[8] On June 17, 2021, FINRA filed a proposed rule change setting forth the basis for its determination that the accuracy and reliability of the CAT meet the standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS rules.[9] The FINRA proposal stated that FINRA would retire OATS effective September 1, 2021.

After conducting an analysis of its rules in accordance with the CAT NMS Plan, the Exchange has determined that the information collected pursuant to the OATS rules is intended to be collected by CAT. Further, the Exchange believes that the Rule 6.7400 Series will no longer be necessary and proposes to delete such rules from the Exchange's rulebook. Discussed below is a description of the duplicative rule requirements as well as the timeline for eliminating the duplicative rules followed by a discussion on the OATS Retirement Filing that formed the basis for retiring OATS.

Duplicative OATS Requirements

The Rule 6.7400 Series consists of Rules 6.7410 through 6.7470 and sets forth the recording and reporting requirements of the OATS Rules. The OATS Rules require all Exchange members and associated persons to record in electronic form and report to FINRA, on a daily basis, certain information with respect to orders originated, received, transmitted, modified, canceled, or executed by members in all NMS stocks, as that term is defined in Rule 600(b)(47) of Regulation NMS,[10] traded on the Exchange. The Exchange relies on the information reported to OATS either to conduct surveillance or to facilitate surveillance conducted by FINRA pursuant to a regulatory services agreement (''RSA''). This information is used by Exchange and FINRA staff to conduct surveillance and investigations of member firms for violations of Exchange and FINRA rules and federal securities laws. The Exchange believes it is appropriate to retire OATS because the requirements of the Rule 6.7400 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational.

Timeline for Elimination of Duplicative Rules

The CAT NMS Plan states that the elimination of rules that are duplicative of the requirements of the CAT and the retirement of the related systems should be effective at such time as CAT Data meets minimum standards of accuracy and reliability.[11] As discussed in more detail in the OATS Retirement Filing, FINRA believes that OATS may be retired effective September 1, 2021 given the error rate thresholds have been met, and FINRA has determined that its usage of the CAT Data has not revealed material issues that have not been corrected and further confirmed that the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations.

OATS Retirement Filing

In the OATS Retirement Filing, FINRA proposed to eliminate the OATS rules once Industry Members are effectively reporting to the CAT and the CAT's accuracy and reliability meet certain standards. Specifically, FINRA proposed that before OATS could be retired, the CAT generally must achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower on a pre-correction basis, and 2% or lower on a post-correction basis (measured at T+5). In addition to the maximum error rates and matching thresholds, FINRA's use of CAT Data must confirm that (i) there are no material issues that have not been corrected, (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Industry Member Data.

In the OATS Retirement Filing, FINRA explained that its review of CAT Data and error rates would be based on data and linkages in the initial phase of reporting (or ''Phase 2a''), which replicate the data in OATS today and thus are most relevant for OATS retirement purposes. Phase 2a Data includes all events and scenarios covered by OATS and applies only to equities. FINRA did not consider options order events or Phase 2c data and validations, which are not in OATS today, for purposes of OATS retirement.

As described below, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing.

(1) Maximum Error Rates

As discussed in the OATS Retirement Filing, FINRA believes that relevant error rates are the primary, but not the sole, metric by which to determine the CAT's accuracy and reliability and will serve as the baseline requirement needed before OATS can be retired. FINRA proposed that, before OATS could be retired, the CAT would generally need to achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower, measured on a pre-correction or as-submitted basis, and 2% or lower on a post-correction basis (measured at T+5).[12] FINRA proposed to average the error rates across the period, rather than require a 5% pre-correction and 2% post-correction maximum each day for 180 consecutive days. FINRA also proposed to measure the error rates in the aggregate, rather than on a firm-by-firm

[4] *See* Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

[5] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (''Order Approving the National Market System Plan Governing the Consolidated Audit Trail) (''Approval Order'').

[6] *See* Securities Exchange Act Release No. 89679 (August 26, 2020), 85 FR 54461 (September 1, 2020) (Notice of Filing of File No. SR–FINRA–2020–024).

[7] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 29, 2020.

[8] *See* Securities Exchange Act Release No. 90535 (November 30, 2020), 85 FR 78395 (December 4, 2020) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of SR–FINRA–2020–024).

[9] *See* Securities Exchange Act Release No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021) (SR–FINRA–2021–017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Retirement of FINRA's Order Audit Trail System).

[10] 17 CFR 242.600(B)(47).

[11] Appendix C of CAT NMS Plan, Approval Order at 85010.

[12] As clarified in the OATS Retirement Filing, although FINRA does not believe that post-correction errors need to be de minimis before OATS can be retired, FINRA was not suggesting, with the proposal, that 2% would meet the ultimate objective of de minimis error rates for CAT. *See* CAT NMS Plan, Appendix C, note 102 (error rates after reprocessing of error corrections are ultimately expected to be de minimis for the CAT). *See also* Approval Order.

basis. Finally, FINRA proposed to measure the error rates separately for each of the five categories, rather than evaluate all categories in the aggregate. As noted above, FINRA's assessment of the error rates for Industry Member reporting is based solely on Phase 2a CAT reporting for equity events since options orders are not included in OATS today.

As discussed in the OATS Retirement Filing, FINRA measured the error rates in each of the five categories discussed below during the period from October 26, 2020 through April 26, 2021 (the ''applicable period''). FINRA commenced this period on October 26, 2020, which was the date that Industry Members were required to begin correcting all errors for inter-firm linkages and exchange/TRF/ORF match validations. As discussed in the Response to Comments, although the production environment for inter-firm linkage and exchange/TRF/ORF match validations was open for testing as of September 28, 2020, FINRA did not believe it would be appropriate for the 180-day period to commence prior to the October 26, 2020 compliance date.[13]

Rejection Rates and Data Validations. As described in the OATS Retirement Filing, the Plan Processor must perform certain basic data validations,[14] and if a record does not pass these basic data validations, it must be rejected and returned to the CAT Reporter to be corrected and resubmitted. FINRA proposed that over the 180-day period, aggregate rejection rates must be no more than 5% pre-correction or 2% post-correction across all Industry Member Reporters. FINRA has determined that, over the applicable period, aggregate rejection rates across all Industry Member Reporters were 0.03% pre-correction and 0.01% post-correction.

Intra-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum, this requirement includes the creation of an order lifecycle between all order events handled within an individual CAT Reporter, including orders routed to internal desks or departments with different functions (*e.g.,* an internal ATS). FINRA proposed that aggregate intra-firm linkage rates across all Industry Member Reporters must be at least 95% pre-correction and 98% post-correction. FINRA has determined that, over the applicable period, aggregate intra-firm linkage rates across all Industry Member Reporters were 99.97% pre-correction and 99.99% post-correction.

Inter-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to create the lifecycle between orders routed between broker-dealers. FINRA proposed that at least a 95% pre-correction and 98% post-correction aggregate match rate be achieved for orders routed between two Industry Member Reporters. FINRA has determined that during the applicable period there was a 99.08% pre-correction and 99.84% post-correction aggregate match rate for orders routed between two Industry Member Reporters.

Order Linkage Rates. As described in the OATS Retirement Filing, in addition to creating linkages within and between broker-dealers, the Plan Processor must be able to create lifecycles to link various pieces of related orders. For example, the Plan requires linkages of order information to create an order lifecycle from origination or receipt to cancellation or execution. This category essentially combines all of the order-related linkages to capture an overall snapshot of order linkages in the CAT.[15] FINRA proposed that there be at least a 95% pre-correction and 98% post-correction rate for order linkages that are required in Phase 2a. FINRA has determined that during the applicable period there was a 99.66% pre-correction and 99.93% post-correction rate for order linkages required in Phase 2a.[16]

Exchange and TRF/ORF Match Rates. As described in the OATS Retirement Filing, an order lifecycle must be created to link orders routed from broker-dealers to exchanges and executed orders and trade reports. FINRA proposed at least a 95% precorrection and 98% post-correction aggregate match rate across all equity exchanges[17] for orders routed from Industry Members to an exchange and, for over-the-counter executions, the same match rate for orders linked to trade reports. FINRA determined that, during the applicable period, there was a 99.51% pre-correction and 99.87% post-correction aggregate match rate across all equity exchanges for orders routed from Industry Members to an exchange and, for over-the-counter executions, there was a 99.34% pre-correction and 99.53% post-correction rate for orders linked to trade reports submitted to the FINRA Trade Reporting Facilities and OTC Reporting Facility.

As set forth above, the error rates for Industry Member reporting over the applicable period were well below the maximum rates established in the OATS Retirement Filing. FINRA also noted that the overall post-correction error rate for Phase 2a Industry Member reporting of 1.01% is comparable to the current overall OATS post-correction error rate, which generally is at or slightly below 1%. Therefore, FINRA has determined that, based on the error rates for Industry Member reporting, the CAT Data meets the accuracy and reliability baseline standards required for OATS retirement.

(2) FINRA's Use of CAT Data

In the OATS Retirement Filing, FINRA stated that while error rates are a key standardized measure in determining whether OATS retirement is appropriate, FINRA's use of the data in the CAT also must confirm that (i) there are no material issues that have not been corrected (*e.g.,* delays in the processing of data, issues with query functions, etc.), (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor

[13] *See* FINRA's Response to Comments, *supra* note 8.

[14] Appendix D of the CAT NMS Plan, Section 7.2, for example, requires that certain file validations (*e.g.,* file transmission and receipt are in the correct formats, confirmation of a valid SRO-Assigned Market Participant Identifier, etc.), and syntax and context checks (*e.g.,* format checks, data type checks, consistency checks, etc.) be performed on all submitted records.

[15] *See* FINRA's Response to Comments, *supra* note 8.

[16] FINRA noted that in Phase 2a, linkage is required between the representative street side order and the order being represented when the representative order was originated specifically to represent a single order (received either from a customer or another broker-dealer) and there is: (1) An existing direct electronic link in the firm's system between the order being represented and the representative order, and (2) any resulting executions are immediately and automatically applied to the represented order in the firm's system. As set forth in the OATS Retirement Filing, while such linkages are not required in OATS, FINRA believes that it is appropriate to evaluate them for purposes of retiring OATS because they represent a significant enhancement to the data currently available in OATS and will enhance the quality of the equity audit trail. However, FINRA also explained in the Response to Comments that if all other proposed criteria have been met, FINRA would not anticipate delaying OATS retirement based on Phase 2a representative order linkage error rates alone.

In evaluating whether the standards for OATS retirement have been met, FINRA determined that the error rates for the Phase 2a representative order linkages did not have a significant negative impact on the overall error rates for order linkages. Accordingly, FINRA did not need to separately evaluate or exclude Phase 2a representative order linkage rates in measuring the error rates over the applicable period. For example, if the intra-firm linkage error rate had been above 5% over the applicable period, FINRA would have evaluated whether the error rate was the result of unlinked representative orders to create an apples-to-apples comparison to OATS.

[17] *See* Amendment No. 1.

is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data.

In the OATS Retirement Filing, FINRA stated that it has been planning for OATS retirement for several years and the necessary development work has been underway for some time. FINRA also has been analyzing and testing production CAT Data for purposes of transitioning its automated equity surveillance patterns since the commencement of Phase 2a Industry Member reporting in June 2020 and through subsequent CAT milestone releases. For example, in addition to quantitative reviews, such as the error rate statistics discussed above, FINRA has conducted a series of qualitative reviews of Industry Member CAT Data. Such reviews include, among other things, comparing the count and distribution of Industry Member event reporting through CAT versus OATS (*e.g.,* new order and execution events, and data elements such as buy/sell/sell short codes), and reviewing results of examinations, alert reviews, and investigations relating to the timeliness and accuracy of Industry Member reporting. Based on such qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

As discussed in the OATS Retirement Filing, today, FINRA's surveillance patterns rely on the cross-market data model (''CMDM''), which comprises linked OATS data, equity exchange data feeds from each of the exchanges with which FINRA has entered into a RSA, and transactions reported to FINRA's equity trade reporting facilities. The CMDM will be retired and replaced by a newly created surveillance data mart, the Pattern Optimized Datamart (''POD''), which incorporates both equities and options data. At that point, FINRA's patterns will rely on CAT Data in POD, *i.e.,* Plan Participant and Industry Member data reported in CAT format and linked by CAT.[18] FINRA notes that the Plan Participants transitioned to reporting via the CAT technical specification as of April 26, 2021, and full Plan Participant equities reporting and linkage validations in accordance with the CAT specification commenced on June 1, 2021.[19] Successful completion of the transition to the CAT specification for Plan Participants is a prerequisite for FINRA to retire the CMDM and leverage CAT Data and linkages in POD for its surveillance patterns. As of the date of this filing, FINRA has completed all planned activities on schedule, including substantially completing the process of integrating CAT Data into POD and successfully running large amounts of production CAT Data for the month of May through POD.[20] FINRA anticipates completing additional activities before the proposed OATS retirement date, including, *e.g.,* planned user acceptance testing.[21]

As discussed in the OATS Retirement Filing, FINRA has performed broad analysis of its equity surveillance patterns and has determined that all of the data required to support the transition is available in CAT. By mapping OATS data to Industry Member CAT Data in POD, FINRA has confirmed that CAT Data has equivalent analogs to all data elements in OATS. In that regard, FINRA notes that, as a Plan Participant, FINRA has been involved in CAT development efforts to ensure that the scope and features of Industry Member data and processed output are sufficient for FINRA's surveillance program. These efforts include, for example, developing and updating the Industry Member Technical Specifications and Reporting Scenarios, conducting OATS–CAT gap analyses and validating that all such gaps have been properly addressed, and performing OATS-to-CAT field-level mappings.

With respect to Plan Participant data, FINRA notes in the OATS Retirement Filing that the test environment for Plan Participant reporting in accordance with the CAT specification opened on February 15, 2021.[22] Plan Participant equity reporting in accordance with the CAT specification in the test environment had a very high compliance rate for data ingestion and validation, and compliance in the production environment is comparable. In addition, starting on April 26, 2021, CAT began linking copies of Industry Member and Plan Participant data reported via the CAT specification in a test environment, and at that point, FINRA began its evaluation of the quality of these linkages. Based on this review and evaluation, in the OATS Retirement Filing, FINRA stated that it believes that the linkages between Plan Participant data and Industry Member data in CAT are comparable to the linkages between RSA exchange data and OATS data in the CMDM today.[23] FINRA CAT and the Plan Participants have now met the necessary criteria for a full cutover from the RSA specification to the CAT specification, including, *e.g.,* achieving comparable data ingestion validation and inter-venue linkage rates (within a variance of under one percent) between RSA and CAT specification submissions. Accordingly, the Operating Committee approved the cutover from the RSA specification to the CAT specification as the official source of Plan Participant data as of June 1, 2021, and today, all Industry Member and Plan Participant equities data reported via the CAT specification is linked in the CAT production environment.

As discussed in the OATS Retirement Filing, FINRA continues to evaluate CAT Data quality, and in particular, linkages between Industry Member and Plan Participant data, and to test its surveillance patterns to run on CAT Data in POD. In that regard, FINRA notes that it has followed established and time-tested processes and protocols throughout the development process to ensure that its patterns will perform as expected and produce the necessary output using CAT Data following the retirement of OATS. For example, FINRA's Software Development Lifecycle (''SDLC'') procedures govern systems design, changes, testing and controls. The SDLC procedures are an essential component of FINRA's operations and have been developed to serve FINRA's unique regulatory needs and structure. Additionally, consistent with SEC Regulation SCI, FINRA procedures include a plan of coordination and communication with

[18] FINRA's Response to Comments noted this dependency, stating that the process of transitioning FINRA's surveillance patterns to CAT Data necessarily includes, among other things, ingestion of all Industry Member and Plan Participant data and linkages in CAT format. *See* Response to Comments, *supra* note 8, at 4[sic]. The Response to Comments further noted that the Plan Participants would be reporting to CAT via another mechanism until April 2021.

[19] For example, according to the CAT Reporting Technical Specification for Plan Participants (version 4.0.0-r4 dated April 20, 2021), additional linkage error feedback for off-exchange trade reports was effective as of June 1, 2021. The Technical Specifications can be found on the CAT NMS Plan website at *www.catnmsplan.com/sites/default/files/2021–04/04.20.2021–CAT-ReportingTechnical-Specifications-for-Participants-4.0.0-r4.pdf.*

[20] FINRA notes that additional POD releases are scheduled; however, these releases introduce minor enhancements to POD, as opposed to significant changes that would impact the way data is ingested or processed in POD.

[21] FINRA notes that user acceptance testing is the final stage of any software development life cycle and enables actual users to test the system to confirm that it is able to carry out the required tasks it was designed to address in real-world situations.

[22] *See, e.g.,* CAT Q1 2021 Quarterly Progress Report dated April 30, 2021, available at *www.catnmsplan.com/sites/default/files/2021-05/CAT-Q1-2021-QPR.pdf.*

[23] FINRA notes that the CAT uses the same code in both the test and production environments. Thus, FINRA believes that linkages in the test environment are reliable indicators of linkages in the production environment.

regulatory staff. By relying on these established processes and protocols, FINRA has confidence that the CAT Data and linkages are reliable and sufficient to run FINRA's surveillance patterns.

Based on these results, as well as the results of its quantitative and qualitative reviews of CAT Data and successful efforts integrating CAT Data into POD, in the OATS Retirement Filing, FINRA stated that it believes that the complete portfolio of equity surveillance patterns will be capable of consuming CAT Data and achieving comparable (or better) output results.

Thus, FINRA proposes to retire OATS in accordance with the schedule set forth herein. FINRA will run its surveillance patterns for review periods through the end of the second quarter of 2021 using OATS data and begin using—and be fully reliant on—CAT Data for its surveillance patterns for review periods beginning in the third quarter of 2021. Following the retirement of OATS, FINRA expects to maintain the current established cadence of its monthly, quarterly and semi-annual surveillance patterns. In addition, FINRA's analytics platforms will have access to CAT Data as soon as such data is made available to regulators. Thus, outside of regularly scheduled surveillance pattern runs, FINRA can perform expedited analytics, as required by market events.

As discussed in the OATS Retirement Filing, FINRA is finalizing the development and certification of its surveillance patterns to run on CAT Data on a rolling basis and, in accordance with its existing SDLC procedures, will run a month's worth of data and compare the output before certifying each pattern. For those equity patterns that will be subject to certification after OATS retirement, FINRA anticipates that there would be sufficient time to identify and remediate any issues prior to running the patterns in accordance with the current established cadence. FINRA does not anticipate significant issues arising from additional scheduled POD releases or in the final stages of its pattern development and certification efforts.

As discussed in the OATS Retirement Filing, on an ongoing basis following the retirement of OATS, FINRA will conduct regular reviews to ensure confidence in the completeness and accuracy of Industry Member reporting, along with the ability to remediate any issues in a timely manner. Among other things, FINRA has a robust mechanism for detecting data issues, determining which issues are material for purposes of its surveillance program, and requesting resubmission and/or reprocessing of data, as necessary. FINRA also (1) performs a suite of data quality checks against data sourced from CAT to POD and against data processed by POD for use in surveillance patterns; (2) oversees a robust surveillance and examination compliance program that evaluates Industry Member reporting timeliness, data quality, and other issues and trends; (3) reviews CAT compliance program alerts using a rapid remediation process and formal reviews, as necessary; and (4) reviews Industry Member self-reporting and error correction trends. FINRA believes that these practices are sufficient for identification and timely resolution of Industry Member reporting and data issues after OATS has been retired.

Specifically, with regard to the additional standards approved in the OATS Retirement Filing, through its use of CAT Data to date, as described above, FINRA believes that these standards have been satisfied. With respect to the first factor, FINRA does not believe that there are any material issues that have not been corrected (or could not be corrected in the course of operation of CAT, as approved by the Operating Committee)[24] that would impact FINRA's ability to incorporate and use CAT Data in FINRA's surveillance program. For example, the Plan requires that raw unprocessed data that has been ingested by the Plan Processor must be available to Participant regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1, and access to all iterations of processed data must be available to Participant regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5.[25] The Plan Processor also must ensure that regulators have access to corrected and linked order data by 8:00 a.m. Eastern Time on T+5.[26] Additionally, after ingestion by the Central Repository, the raw unprocessed data must be transformed into a format appropriate for data querying and regulatory output.[27] The user-defined direct queries and bulk extracts must provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.[28] FINRA's use of the CAT Data has not uncovered any processing delays or other material issues impacting the availability of, and FINRA's access to, the data.

With respect to the second factor, FINRA stated in the OATS Retirement Filing that it believes that the CAT includes all data necessary for FINRA to meet its surveillance obligations after the retirement of OATS. FINRA must ensure that the CAT, as the single source of order and trade data, can enable FINRA to conduct accurate and effective market surveillance in accordance with its regulatory obligations.[29] As noted above, Phase 2a Data includes all events and scenarios covered by OATS and is the most relevant for OATS retirement purposes. FINRA Rule 7440 describes the OATS requirements for recording information, which includes information related to the receipt or origination of orders, order transmittal, and order modifications, cancellations and executions. Large Industry Members and Small Industry Members that currently are reporting to OATS were required to submit data to the CAT for these same events and scenarios commencing in Phase 2a. FINRA's testing, analysis and use of the CAT Data (including integration into POD), as described above, has confirmed that the CAT includes all data necessary for FINRA to meet its surveillance obligations and that CAT is a reliable substitute for OATS. In addition, based on its qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

With respect to the third factor, FINRA stated in the OATS Retirement Filing that it believes that the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of

[24] FINRA notes that FINRA CAT tracks known issues relating to Industry Member and Plan Participant reporting. *See, e.g., catnmsplan.com/CAT-Transaction-Known-Issues-List.* FINRA regularly reviews and analyzes FINRA CAT's list of current and resolved issues and does not believe that any of these issues would impact its ability to incorporate and use CAT Data in its surveillance program.

[25] *See* CAT NMS Plan, Appendix D, Section 6.2.

[26] *See* CAT NMS Plan, Appendix C, Section A.2(a).

[27] *See* CAT NMS Plan, Appendix C, Section A.1(b).

[28] *See* CAT NMS Plan, Section 6.10(c).

[29] As discussed in the OATS Retirement Filing, OATS was originally proposed to fulfill one of the undertakings contained in an order issued by the Commission relating to the settlement of an enforcement action against FINRA (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) for failure to adequately enforce its rules. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (Order Approving File No SR–NASD–97–56) (''OATS Approval Order''); *see also* Securities Exchange Act Release No. 37538 (August 8, 1996); Administrative Proceeding File No. 3–9056 (''SEC Order''). In the OATS Approval Order, the Commission concluded that OATS satisfied the conditions of the SEC Order and was consistent with the Exchange Act. *See* 63 FR 12559, 12566–67. FINRA believes that it will continue to be in compliance with the requirements of the SEC Order once the OATS Rules are deleted.

Phase 2a Data. As detailed in the Implementation Plan and Quarterly Progress Reports submitted by the Plan Participants, the Plan Processor has met its targeted completion dates for the milestones for Phase 2a, including, for example, production Go-Live for Equities 2a file submission and data integrity validation (Large Industry Members and Small OATS Reporters) on June 22, 2020; Production Go-Live for Equities 2a Intrafirm Linkage validations on July 27, 2020; and production go-live for firm-to-firm linkage validations for equities (Large Industry Members and Small OATS Reporters) and exchange and TRF/ORF linkage validations for equities (Large Industry Members and Small OATS Reporters) on October 26, 2020.[30]

Based on the foregoing, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS Rules. FINRA has determined to retire OATS and remove the OATS rules from its rulebook effective September 1, 2021. Firms must continue to report to OATS all order events that occur on or prior to August 31, 2021. Reports submitted to OATS for order events that occur after August 31, 2021 will be rejected. In other words, August 31, 2021 will be the last ''OATS Business Day,'' as defined under FINRA Rule 7450(b)(3), for which OATS will accept order events and perform routine processing (including incorporation of corrections and repairs of rejections) occurring within the normal OATS timeframe for such activities. OATS will continue to accept reports for order events that occur on or prior to August 31, 2021 (including, but not limited to, late and corrected reports for such order events) through September 16, 2021. Firms must ensure that their OATS reporting is accurate and complete for all order events that occur on or prior to August 31, 2021.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[31] in general, and furthers the objectives of Section 6(b)(5) of the Act,[32] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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 remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposed rule change is consistent with Section C.9 of Appendix C to the Plan, which requires each Participant to ''file with the SEC the relevant rule change filing to eliminate or modify its duplicative rules within six (6) months of the SEC's approval of the CAT NMS Plan.'' [33] The Plan notes that ''the elimination of such rules and the retirement of such systems [will] be effective at such time as CAT Data meets minimum standards of accuracy and reliability.'' [34] Accordingly, the Exchange believes the proposed rule change implements, supports, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its members in meeting regulatory obligations pursuant to, and milestones established by, the Plan. In approving the Plan, the SEC noted that it ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [35] To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather implement provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [36] and subparagraph (f)(6) of Rule 19b–4 thereunder.[37] The proposed rule change would not significantly affect the protection of investors or the public interest because it seeks to delete the Exchange's OATS rules to be consistent with FINRA's retirement of its OATS rules. The Exchange further believes that the proposed rule change would not impose any significant burden on competition because the proposed rule change is not designed to address any competitive issue but rather implements provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

A proposed rule change filed under Rule 19b–4(f)(6) [38] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[39] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As noted above, the Exchange believes that the OATS reporting requirements of the Rule 6.7400 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational. The Commission believes that it is consistent with the protection

[30] The Implementation Plan and Quarterly Progress Reports are available at *www.catnmsplan.com/implementation-plan.*

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(5).

[33] Appendix C of CAT NMS Plan, Approval Order at 85010.

[34] *Id.*

[35] Approval Order at 84697.

[36] 15 U.S.C. 78s(b)(3)(A)(iii).

[37] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[38] 17 CFR 240.19b–4(f)(6).

[39] 17 CFR 240.19b–4(f)(6)(iii).

of investors and the public interest for the Exchange to delete its OATS reporting because FINRA has retired OATS. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[40]

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–NYSECHX–2021–12 *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–NYSECHX–2021–12. 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–NYSECHX–2021–12, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20218 Filed 9–17–21; 8:45 am]

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[40] For purposed only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, September 23, 2021.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: September 16, 2021.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–20402 Filed 9–16–21; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92970; File No. SR–CboeBZX–2021–047]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 11.22 To Introduce a Product To Be Known as ''Cboe Premium Exchange Tools'' and To Amend Its Fee Schedule To Establish a Fee for a User Login That Elects To Subscribe to the Cboe Premium Exchange Tools

September 14, 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 August 31, 2021, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I 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.

[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).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend Rule 11.22 to introduce a new product to be known as ''Cboe Premium Exchange Tools'' and to amend its Fee Schedule to establish a fee for a user login that elects to subscribe to the Cboe Premium Exchange Tools. 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/equities/regulation/rule_filings/bzx/*), 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 11.22(b) to introduce a new product to be known as Cboe Premium Exchange Tools, as further described below, and to amend its Fee Schedule to adopt a monthly fee assessed to users that elect to subscribe to such Cboe Premium Exchange Tools, effective August 31, 2021.

Cboe Premium Exchange Tools

Currently, Members,[5] Sponsored Participants,[6] and service bureaus are leveraging certain value-added tools (*i.e.,* Cboe Premium Exchange Tools) on the Exchange to obtain certain information free of charge. Particularly, Cboe Premium Exchange Tools offers an easily accessible internet-based tool that allows users access to certain execution information for their firm through a single interface. Now, the Exchange proposes to amend Rule 11.22(b) to describe the Cboe Premium Exchange Tools in its Rules. Specifically, proposed Rule 11.22(b) provides that the Cboe Premium Exchange Tools is a web-based tool designed to give a subscribing user the ability to track latency statics of the user's logical order entry ports or execution information of the Member or a Sponsored Participant of the Member. The proposed rule also provides that a user may obtain historical reports of such execution information, as further described below.[7] Cboe Premium Exchange Tools is currently comprised of the following three reports: (i) Trade data report,[8] (ii) latency statistics report,[9] and (iii) volume history report.[10]

Trade Data Report

The trade data report offers the ability for a user to view and/or export its Member's and, if applicable, a Sponsored Participant of the Member, granular execution detail.[11] Specifically, the report currently includes the following information: Date, time, Member identifier, clearing member identifier, session, order identification, symbol, side (*i.e.,* buy, sell, sell short), price, quantity, capacity (*e.g.,* agent, principal), liquidity indicator (*i.e.,* adder or remover of liquidity), order type,[12] indicator as to whether order set or joined the national best bid or offer (''NBBO''),[13] and associated fee code(s). The information is provided in order to aid Members in conducting their own reconciliations and assist in report generation, and, unlike the Volume History Report, is available on an execution-by-execution basis.

Latency Statistics Report

The latency statistics report offers functionality to view latency statistics relating to logical order entry ports, including a Member's orders, acknowledgements, and cancels, including roundtrip data from into the edge network device and back, which accounts for latency within the Exchange order gateways and matching engines. Specifically, the latency statistics report includes the following information: (i) The roundtrip time between the order entering the Exchange's network and the time the order acknowledgement leaves the Exchange's network, (ii) the roundtrip time between an order cancellation request and the time the order cancellation request acknowledgement leaves the Exchange's network, (iii) the roundtrip time between an order entering the Exchange's network and the time that the order appears on the Multicast PITCH feed, (iv) the roundtrip time for a Transmission Control Protocol (''TCP'') [14] message sent by the Exchange to be acknowledged by the Member, and (v) averages a Member can expect for items (i) through (iii) across their own ports and across the entire system (*i.e.,* across all Members). A Member, service bureau, or Sponsored Participant may view the latency statistics for orders that they send to the Exchange through their own respective logical order entry ports. The information included in the latency statistics report is designed to give users insight into the performance characteristics of their logical order entry ports.

Volume History Report

The volume history report provides users the functionality to view the Member's, high level volume history on the Exchange, as well as more granular added, removed, and routed orders at a per Tape and MPID level or a per security level for the purpose of tracking and measuring outcomes.[15] The tools offer functionality to allow a user to view aggregated volume history reports on behalf of the Member or a Sponsored Participant of the Member for the purpose of firm or client-level reporting, administration, and risk management.

Cboe Premium Exchange Tools Fee

The Exchange also proposes to adopt a fee applicable to users that subscribe to the proposed Cboe Premium Exchange Tools. Specifically, as proposed, the Exchange would assess a monthly fee of $65 for each user login that subscribes to any of the reports and services that comprise the Cboe

[5] *See* Exchange Rule 1.5(n).

[6] *See* Exchange Rule 1.5(x).

[7] All information available to Members as described herein is historical information.

[8] Trade Data Reports may be obtained by a Member, or if authorized to do so a Sponsored Participant.

[9] Latency Statistics Reports may be obtained by a Member, Sponsored Participant or service bureaus as it relates to their respective logical order entry ports.

[10] Volume History Reports may be obtained by a Member.

[11] Sponsored Participants may also subscribe to the Trade Data Report, provided that its Sponsoring Member provides the Exchange authorization to do so. Trade Data Reports provided to Sponsored Participants only include execution detail related to the Sponsored Participant.

[12] *See* Exchange Rule 11.9.

[13] Hidden orders that neither set or join the NBBO are identified as such within the report.

[14] TCP is a communications standard that enables application programs and computing devises to exchange messages over a network.

[15] Information included in the Volume History Report includes all activity, including that executed on behalf of Sponsored Participants. Execution volume made on behalf of a Sponsored Participant is not delineated within the Volume History Report.

Premium Exchange Tools. As discussed above, Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format. Further, a number of enhancements have recently been made to the various reports and services included in the Cboe Premium Exchange Tools. For example, the trade data report has recently been enhanced to provide timestamps with microsecond granularity for added detail on a per trade basis. Therefore, the Exchange believes the assessment of such a fee aligns with the additional value and benefits provided to users that choose to subscribe to the Cboe Premium Exchange Tools. The Exchange also believes that the proposal is appropriate to balance the Exchange resource requirements in creating, managing, and supporting the services and reports provided by the Cboe Premium Exchange Tools.

The Cboe Premium Exchange Tools fee will be assessed to a user for the entire month regardless of when the user receives access to the Premium Exchange Tools. If a user obtains or cancels a subscription to the Cboe Premium Exchange Tools on or after the first business day of the month, the user will be required to pay the entire Cboe Premium Exchange Tools fee for that month.

The Exchange anticipates a number of users will subscribe to the Cboe Premium Exchange Tools. It is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if they voluntarily choose to do so. Further, the Exchange notes that other exchanges offer similar products.[16]

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.[17] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[18] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities. The Exchange also believes the proposed rule change is consistent with the Section 6(b)(5)[19] 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)[20] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal to amend Rule 11.22(b) to provide for the Cboe Premium Exchange Tools is reasonable for several reasons. First, certain of the underlying information available via the Cboe Premium Exchange Tools is otherwise generally available to users. While the proposal provides a value-added service by setting forth such information in a user-friendly format, the underlying data included in the trade data report and volume history report contains general Member-specific execution information to which a Member would have access to without subscribing to Premium Exchange Tools, (*e.g.,* via their own order entry ports which include Member-provided order instructions, exchange-sent acknowledgement messages, and drop copies). Moreover, the data included in the trade data report and volume history report is substantially similar to data offered in the Nasdaq TradeInfo tool, which provides detailed data on the status of orders executions, cancels and breaks, and generates reports for download, and allows the member to cancel or correct open orders.[21]

While certain underlying data included in the latency statistics report such as latency averages across the System is not otherwise available to Members, or where applicable, Sponsored Participants, or service bureaus, the Exchange notes such users can obtain similar information on their own latency statistics relating to their orders, acknowledgements, TCP messages, and cancels, including roundtrip data from out of their edge network device and back without subscribing to Premium Exchange Tools. Particularly, users are able to calculate these latencies on their own servers as the underlying transaction information is timestamped, which would similarly account for the latency throughout the Exchange side of the network (*i.e.,* the Exchange does not believe latency statistics calculated by users themselves would be materially different from the Exchange's calculations). The Exchange notes that although latency information related to averages across the system would not otherwise be available to Members, Sponsored Participants or service bureaus absent subscribing to Premium Exchange Tools, providing users such information is not novel as similar information was historically made available in an offering by Nasdaq. Specifically, prior to its decommission in December of 2020, Nasdaq provided summary latency statistics via its QView tool which provided members that subscribed to QView Latency Optics add-on service the ability to monitor three types of latency for order messages and compare that latency to the average on the Nasdaq System.[22] The specific latency statistics included: (i) The roundtrip time between order entry and receipt of acknowledgement; (ii) roundtrip time between order entry and the time that the order appears on the TotalView ITCH multicast feed; and (iii) the roundtrip time between the entry of an order cancellation request and the time that the message in reply is received by the client device.[23] Similarly as noted above, the Exchange's proposed latency statistics report provides users averages across the entire System for three types of latency: (i) The roundtrip time between the order entering the Exchange's network and the time the order acknowledgement leaves the Exchange's network, (ii) the roundtrip time between an order cancellation request and the

[16] *See* the ''TradeInfo Fees'' offered on the Nasdaq Stock Exchange (''Nasdaq''), Nasdaq BX, Inc. (''Nasdaq BX''), and the Nasdaq PHLX LLC (''Phlx''), each of which assess a fee of $95 per user per month.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4).

[19] 15 U.S.C. 78f(b)(5).

[20] *Id.*

[21] *See* Securities and Exchange Act No. 90772 (December 22, 2020) 85 FR 86632 (December 30, 2020) (SR–NASDAQ–2020–088) (Proposed rule change describing the withdrawal of Nasdaq's QView product from sale and that the information included therein will continue to be available via TradeInfo).

[22] *See* Securities Exchange Act Release No. 68617 (January 10, 2013), 78 FR 3480 (January 16, 2013) (SR–Nasdaq–2013–005) (introducing the Latency Optics add-on). *See also* Securities Exchange Act Release No. 82003 (November 2, 2017), 82 FR 51894 (November 8, 2017) (SR–Nasdaq–2017–113) (proposed rule change that also describes the Latency Optics add-on service, which provided, among other things, subscribing members the ability to compare their latency to the average of the Nasdaq system).

[23] *Id.*

time the order cancellation request acknowledgement leaves the Exchange's network, (iii) the roundtrip time between an order entering the Exchange's network and the time that the order appears on the Multicast PITCH feed. Even after QView was decommissioned, the underlying data needed to generate the latency statistics (other than for averages across the Nasdaq system) for each member was and continues to be available via the Nasdaq TradeInfo tool.[24]

The Exchange believes that the proposed fee for the Cboe Premium Exchange Tools is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the value and benefits provided to users that choose to subscribe to the Cboe Premium Exchange Tools on the Exchange. As discussed above, Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format. Also as described above, information provided by Premium Exchange Tools relates to the subscribing user's activity on the Exchange, and users may generally access and aggregate this information by other means, including its own internal systems, without a subscription to Premium Exchange Tools. As such, the Exchange believes that if a user determines that the fee is not cost-efficient for its needs, it may decline to subscribe to Premium Exchange Tools and access such information from other sources. Indeed, the Cboe Premium Tools is a completely voluntary product, and the Exchange is not required by any rule or regulation to offer the reports or services provided under the Cboe Premium Exchange Tools. Nonetheless, such tools may be beneficial to Members and non-Members as they provide various value-added Exchange reports and services. Providing the Cboe Premium Exchange Tools to users requires the Exchange to allocate additional resources to create, manage, and support the services and reports. Therefore, the Exchange believes that it is reasonable to assess a modest fee to users that subscribe to the Cboe Premium Exchange Tools.

The Exchange further believes the proposed fee is reasonable because the amount assessed is less than the analogous fees charged by Nasdaq, Nasdaq BX, and PHLX. The TradeInfo product offered by the aforementioned exchanges provides users the status of orders, executions, cancels and breaks, and provides the ability to cancel orders. Further, to view a variety of trading data, users can generate several different types of reports such as execution reports.[25] As described above, the Cboe Premium Exchange Tools will offer similar data to that provided by Nasdaq, Nasdaq BX, and PHLX while, the Exchange's proposed fee for the Cboe Premium Tools at $65 per month per user, is lower than each of the Nasdaq, Nasdaq BX, and PHLX fees for similar information which charge $95 per user.

The Exchange believes that the proposed fee is equitable and not unfairly discriminatory because it will apply to all Members and non-Members that choose to subscribe to the Cboe Premium Exchange Tools equally. As stated, the services and reports provided by the Cboe Premium Exchange Tools are completely optional and not necessary for trading. Rather, the Exchange voluntarily makes the Cboe Premium Exchange Tools available and users may choose to subscribe (and pay for) the Cboe Premium Exchange Tools based on their own individual business needs. Potential subscribers may subscribe to Cboe Premium Exchange Tools at any time if they believe it to be valuable or may decline to purchase such services and reports.

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 because the proposed Cboe Premium Exchange Tools will be available equally to all Members and non-Members that choose to subscribe to such tools. As stated, the Cboe Premium Exchange Tools are optional and Members and non-Members may choose to subscribe to such tools, or not, based on their view of the additional benefits and added value provided by utilizing the reports or services offered by the Cboe Premium Exchange Tools.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, Nasdaq currently offers products that include similar information to that proposed under the Cboe Premium Exchange Tools. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[N]o one disputes that competition for order flow is 'fierce.' '' . . . As the SEC explained, '[i]'n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''. Accordingly, the Exchange does not believe its proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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

[24] Nasdaq similarly noted that users of TradeInfo are able to calculate latencies included in the Latency Optics add-on service as the underlying transaction information is timestamped. *See* Securities and Exchange Act No. 90772 (December 22, 2020) 85 FR 86632 (December 30, 2020) (SR–NASDAQ–2020–088).

[25] *See https://www.nasdaqtrader.com/Trader.aspx?id=tradeinfo.*

19(b)(3)(A) of the Act[26] and Rule 19b–4(f)(6) thereunder.[27]

A proposed rule change filed under Rule 19b–4(f)(6)[28] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[29] 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 proposed to implement this proposed rule change on August 31, 2021 and has asked the Commission to waive the 30-day operative delay for this filing. The Exchange states that the proposed data to be included in the proposed Cboe Premium Exchange Tools is already generally available to all users without a subscription to Cboe Premium Exchange Tools and/or is substantially similar to information that was historically, or currently is, included in similar products offered on Nasdaq.[30] The Commission believes waiver of the operative delay will allow a description of Cboe Premium Exchange Tools product to be immediately reflected in the Exchange's rules and is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[31]

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.

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 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 Commission has waived that requirement in this case.

[28] 17 CFR 240.19b–4(f)(6).

[29] 17 CFR 240.19b–4(f)(6)(iii).

[30] *See supra* notes 21–24.

[31] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–CboeBZX–2021–047 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 No. SR-CboeBZX–2021–047. 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 No. SR–CboeBZX–2021–047, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20210 Filed 9–17–21; 8:45 am]

BILLING CODE 8011–01–P

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34374; File No. 812–15218]

Pomona Investment Fund, et al.

September 14, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under section 17(d) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

APPLICANTS: Pomona Investment Fund (the ''Fund''); Pomona Management LLC (''Pomona''); Pomona Capital X, L.P., Pomona Capital IX L.P. and Pomona Partnership Holdings VIII, L.P., (collectively, the ''Existing Affiliated Funds'').

FILING DATES: The application was filed on April 19, 2021, and amended on July 13, 2021.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on October 12, 2021 and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the

Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: Secretary, U.S. Securities and Exchange Commission: *Secretarys-Office@sec.gov.*

Applicants: c/o *William.bielefeld@dechert.com.*

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at 202–551–6990, or Trace W. Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The Applicants request an order of the Commission under section 17(d) of the Act and rule 17d–1 under the Act (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund and one or more other Regulated Funds [1] and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which one or more Regulated Funds (or its Wholly-Owned Investment Sub (defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

Applicants

2. The Fund is organized as a Delaware Statutory Trust and is a closed-end management investment company registered under the Act. The Fund's Board [4] will be comprised of a majority of members who are Independent Trustees.[5]

3. Pomona is a Delaware limited liability company and is a registered investment adviser with the Commission under the Advisers Act. Pomona serves as the investment adviser to the Fund and the investment adviser to the Existing Affiliated Funds.

4. Applicants represent that each Existing Affiliated Fund would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act. The Pomona Proprietary Accounts will hold various financial assets in a principal capacity. Pomona and its affiliates may operate through wholly- or majority-owned subsidiaries. Currently, there are no Pomona Proprietary Accounts or subsidiaries that exist and currently intend to participate in the Co-Investment Program.

5. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[6] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the applicable parent Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

6. Applicants state that the Advisers are presented with a substantial number of investment opportunities each year on behalf of their clients, and that the Advisers must determine how to allocate those opportunities in a manner that, over time, is fair and equitable to all of their clients. Such investment opportunities may be Potential Co-Investment Transactions.

7. Applicants represent that the Adviser has established processes for allocating initial investment opportunities, opportunities for subsequent investment in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, Applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and Affiliated Funds and (ii) comply with the Conditions. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies [7] and any Board-Established Criteria [8] of a

[1] ''Regulated Funds'' means the Fund and any Future Regulated Funds. ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act, (b) whose investment adviser is an Adviser, and (c) that intends to participate in the proposed co-investment program (the ''Co-Investment Program'').

''Adviser'' means Pomona and any other investment adviser that is (i) controlling, under common control with, or controlled by Pomona, (ii) registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') and (iii) not a Regulated Fund or a subsidiary of a Regulated Fund.

[2] ''Affiliated Fund'' means the Existing Affiliated Funds, any Future Affiliated Fund or any Pomona Proprietary Account. ''Future Affiliated Fund'' means any entity (a) whose investment adviser is an Adviser, (b) that would be an investment company but for section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act, and (c) that intends to participate in the Co-Investment Program. ''Pomona Proprietary Account'' means any account of an Adviser or its affiliates or any company that is a direct or indirect, wholly- or majority-owned subsidiary of the Adviser or its affiliates, which, from time to time, may hold various financial assets in a principal capacity.

[3] All existing entities that currently intend to rely on the Order have been named as Applicants and any existing or future entities that may rely on the Order in the future will comply with the terms and Conditions of the application.

[4] ''Board'' means the board of trustees (or the equivalent) of the applicable Regulated Fund.

[5] ''Independent Trustee'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in section 2(a)(19) of the Act. No Independent Trustee of a Regulated Fund will have a direct or indirect financial interest in any Co-Investment Transaction or any interest in any portfolio company, other than indirectly through share ownership in one of the Regulated Funds.

[6] ''Wholly-Owned Investment Sub'' means an entity (i) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and, in the case of a SBIC Subsidiary (defined below), maintain a license under the SBA Act (defined below) and issue debentures guaranteed by the SBA (defined below)); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the Small Business Administration (the ''SBA'') to operate under the Small Business Investment Act of 1958, as amended, (the ''SBA Act'') as a small business investment company.

[7] ''Objectives and Strategies'' means a Regulated Fund's investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act of 1933 (the ''Securities Act'') or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders.

[8] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to such Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall

Regulated Fund, the policies and procedures will require that the Adviser to such Regulated Fund receives sufficient information to allow such Adviser's investment committee to make its independent determination and recommendations under the Conditions.

8. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

9. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the Adviser's investment committee will approve an investment amount to be allocated to each Regulated Fund and/or Affiliated Fund participating in the Potential Co-Investment Transaction. Applicants state further that, each proposed order amount may be reviewed and adjusted, in accordance with the Advisers' written allocation policies and procedures, by the Adviser's investment committee.[9] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[10]

10. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[11] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain. The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with condition 2, 6, 7, 8 or 9, as applicable.

B. Follow-On Investments

11. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments[12] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

12. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[13] If the Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer will be governed by the requirements of Standard Review Follow-Ons.

13. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment[14] or (ii) a Non-Negotiated Follow-On Investment.[15]

within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Trustees. The Independent Trustees of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[9] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of the Advisers.

[10] ''Required Majority'' means a required majority, as defined in section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a business development company (''BDC'') subject to section 57(o).

[11] Each Adviser will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Trustees with information concerning the Affiliated Fund's and Regulated Funds' order sizes to assist the Eligible Trustees with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Trustees'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose).

[12] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[13] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[14] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Trustees in accordance with Condition 8(c).

[15] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters. ''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life

Continued

Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

14. Applicants propose that Dispositions [16] would be divided into two categories. If the Regulated Funds and the Affiliated Funds holding investments in the issuer have previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[17]

15. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition [18] or (ii) the securities are Tradable Securities [19] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

16. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

17. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on matters specified in the Condition.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application.

2. Co-Investment Transactions are prohibited by rule 17d–1 without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by rule 17d–1, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated Fund within the meaning of section 2(a)(3) by reason of common control because (i) Pomona manages, and may be deemed to control, the Existing Affiliated Funds and any other Affiliated Fund will be managed by, and may be deemed to be controlled by, an Adviser to Affiliated Funds; (ii) Pomona is the investment adviser to, and may be deemed to control, the Fund and an Adviser to the Regulated Funds will be the investment adviser to, and may be deemed to control, any Future Regulated Fund; and (iii) the Advisers to Affiliated Funds and the Advisers to Regulated Funds are under common control. Thus, each of the Affiliated Funds could be deemed to be a person related to the Regulated Funds in a manner described by rule 17d–1; and therefore the prohibitions of rule 17d–1 would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds.

3. In addition, because the Pomona Proprietary Accounts are controlled by the Adviser or its affiliates and, therefore, may be under common control with the Fund, any future Advisers, and any Future Regulated Funds, the Pomona Proprietary Accounts could be deemed to be persons related to the Regulated Funds (or a company controlled by the Regulated Funds) in a manner described by section 17(d) and also prohibited from participating in the Co-Investment Program. Each Regulated Fund would also be related to each other Regulated Fund in a manner described by rule 17d–1, and thus prohibited from participating in Co-Investment Transactions with each other.

Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[16] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[17] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Trustees must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review is required because such findings were not required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[18] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Trustees.

[19] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

4. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order shall be subject to the following conditions:

1. *Identification and Referral of Potential Co-Investment Transactions*

(a) The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions*

(a) If an Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Trustees with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Trustees with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Trustees of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or the Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its shareholders and do not involve overreaching in respect of the Regulated Fund or its shareholders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's shareholders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Fund and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Trustees will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv) the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [20] financial benefit to the Advisers, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition

[20] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

14, (B) to the extent permitted by section 17(e), (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[21] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[22]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Fund[23] will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c) *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i) (A) The participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [24] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Fund, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by rule 17d–1 and records the basis for the finding in the Board minutes.

(c) *Additional Requirements.* The Disposition may only be completed in reliance on the Order if:

(i) *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by rule 17d–1;

(iv) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in

[21] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[22] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate. ''Close Affiliate'' means the Adviser, the Regulated Funds, the Affiliated Fund and any other person described in section 57(b) (after giving effect to rule 57b–1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D). ''Remote Affiliate'' means any person described in section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[23] Any Pomona Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for purposes of Conditions 6(a)(i), 7(a)(i), 8(a)(i), and 9(a)(i).

[24] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [25] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i) (A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[26] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Trustees must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them *pro rata* based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and any Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by rule 17d–1. The basis for the Board's findings will be recorded in its minutes.

(c) *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

[25] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[26] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and any Affiliated Fund, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or any Affiliated Fund, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

(i) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by rule 17d–1;

(iii) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in Section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a) Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or any Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Trustees, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance.

(d) The Independent Trustees will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under section 57(f).

12. *Trustee Independence.* No Independent Trustee of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and any participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[27] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by an Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Adviser, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by section 17(e), or (iii) in the case of the Adviser, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated

[27] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20207 Filed 9–17–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92974; File No. SR–NASDAQ–2021–069]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend The Nasdaq Options Market's Pricing Schedule at Options 7, Section 2(1)

September 14, 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 September 1, 2021, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend The Nasdaq Options Market's (''NOM'') Pricing Schedule at Options 7, Section 2(1).

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend NOM's Pricing Schedule at Options 7, Section 2(1) to amend the (i) Customer[3] and Professional[4] Rebates to Add Liquidity in Penny Symbols, and (ii) Tier 3 Market Maker[5] Rebate to Add Liquidity in Penny Symbols.

Customer and Professional Rebate To Add Liquidity in Penny Symbols

Today, the Exchange pays tiered Customer and Professional Rebates to Add Liquidity in Penny Symbols that are $0.20 (Tier 1), $0.25 (Tier 2), $0.42 (Tier 3), $0.43 (Tier 4), $0.45 (Tier 5), and $0.48 (Tier 6). These rebates are paid per the highest tier achieved below.

Monthly volume	
Tier 1	Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols of up to 0.10% of total industry customer equity and ETF option average daily volume (''ADV'') contracts per day in a month.
Tier 2	Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.10% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month.
Tier 3	Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% to 0.30% of total industry customer equity and ETF option ADV contracts per day in a month.
Tier 4	Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.30% to 0.40% of total industry customer equity and ETF option ADV contracts per day in a month.
Tier 5	Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.40% to 0.80% of total industry customer equity and ETF option ADV contracts per day in a month.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Customer'' or (''C'') applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of broker or dealer or for the account of a ''Professional'' (as that term is defined in Options 1, Section 1(a)(47)).

[4] The term ''Professional'' or (''P'') means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Options 1, Section 1(a)(47). All Professional orders shall be appropriately marked by Participants.

[5] The term ''NOM Market Maker'' or (''M'') is a Participant that has registered as a Market Maker on NOM pursuant to Options 2, Section 1, and must also remain in good standing pursuant to Options 2, Section 9. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

Monthly volume	
Tier 6	Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.80% or more of total industry customer equity and ETF option ADV contracts per day in a month, or Participant adds: (1) Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.20% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS (defined below).

In addition, the Exchange currently ties the tiered Penny Symbol add liquidity rebate program described above to its Market Access and Routing Subsidy (''MARS'') program in Section 2(4) as a means to attract additional liquidity to the Exchange from market participants. Under MARS, the Exchange pays qualifying Participants to subsidize their costs of providing routing services to route orders to NOM. To qualify for MARS, Participants must have System Eligibility.[6] In addition, Participants that have System Eligibility, and have routed and executed the requisite number of Eligible Contracts[7] daily in a month (''Average Daily Volume'' or ''ADV'') that add liquidity on NOM are entitled to tiered MARS Payments, which are currently paid per the highest tier achieved below.[8]

Tiers	Average daily volume (''ADV'')
1	2,000
2	5,000
3	10,000
4	20,000
5	45,000
6	75,000
7	100,000
8	125,000
9	150,000

One of the present ways that the Exchange ties the tiered Penny Symbol add liquidity rebate program and MARS, each as described above, is through note ''8'' of Options 7, Section 2(1) where Participants that qualify for any MARS Payment Tier in Options 7, Section 2(4) receive: (1) An additional $0.05 per contract Penny Symbol Customer Rebate to Add Liquidity for each transaction which adds liquidity in Penny Symbols in that month, in addition to qualifying Customer Rebate to Add Liquidity Tiers 1, or (2) an additional $0.04 per contract Penny Symbol Customer Rebate to Add Liquidity for each transaction which adds liquidity in Penny Symbols in that month, in addition to qualifying Penny Symbol Customer Rebate to Add Liquidity Tiers 2–6.[9] The purpose of the note ''8'' incentive is to attract additional order flow to NOM by way of encouraging participation in both the tiered Penny Symbol add liquidity Customer rebate program and in MARS.

The Exchange now proposes a number of changes to the current tiered Penny Symbol add liquidity rebate program described above. The Exchange first proposes to increase the Tier 3 and Tier 4 Customer and Professional rebates from $0.42 to $0.43 per contract and from $0.43 to $0.44 per contract, respectively. The Exchange believes that the higher Tier 3 and Tier 4 rebates, together with the proposed changes described below, will further encourage Participants to reach for the higher Customer and Professional rebate tiers by bringing additional order flow that adds liquidity on the Exchange, which will be ultimately beneficial to all market participants.

The Exchange also proposes to add an alternative route to achieve the proposed $0.43 per contract Tier 3 Customer and Professional Rebate to Add Liquidity in Penny Symbols that will be tied to MARS. Specifically, the Exchange proposes that Participants will also be eligible to receive the proposed $0.43 per contract Tier 3 Customer and Professional Rebate to Add Liquidity in Penny Symbols if the Participant adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.15% to less than 0.20% of total industry customer equity and ETF option ADV contracts per day in a month and qualifies for MARS. The Exchange also proposes to make related changes by renumbering the existing method to qualify for the Tier 3 Customer and Professional rebate as paragraph (a) and the proposed alternative method as paragraph (b).[10] By adding an alternative route to achieve the Tier 3 Customer and Professional rebate that is tied to MARS, the Exchange is seeking to incentivize Participants to increase their liquidity adding activity on NOM to improve the quality of the market.

Lastly, the Exchange proposes to amend note 8 of Options 7, Section 2(1) to increase the additional $0.04 per contract rebate currently offered to Participants that qualify for any MARS Payment Tier in addition qualifying for Penny Symbol Customer Rebates to Add Liquidity Tiers 2–5 to $0.05 per contract. As proposed, Participants may earn Customer Rebates to Add Liquidity in Penny Symbols up to $0.30 in Tier 2, $0.48 in Tier 3, $0.49 in Tier 4, and $0.50 in Tier 5, provided they meet the note 8 qualifications.[11] Participants that

[6] Specifically, to qualify for MARS, the Participant's routing system (''System'') would be required to: (1) Enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM's API to access current NOM match engine functionality. Further, the Participant's System would also need to cause NOM to be the one of the top three default destination exchanges for (a) individually executed marketable orders if NOM is at the national best bid or offer (''NBBO''), regardless of size or time or (b) orders that establish a new NBBO on NOM's Order Book, but allow any user to manually override NOM as a default destination on an order-by-order basis. Any NOM Participant would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies NOM that it appears to be robust and reliable. The Participant remains solely responsible for implementing and operating its System.

[7] For the purpose of qualifying for the MARS Payment, Eligible Contracts may include Firm, Non-NOM Market Maker, Broker-Dealer, or Joint Back Office or ''JBO'' equity option orders that add liquidity and are electronically delivered and executed. Eligible Contracts do not include Mini Option orders.

[8] The specified MARS Payment will be paid on all executed Eligible Contracts that add liquidity, which are routed to NOM through a participating NOM Participant's System and meet the requisite Eligible Contracts ADV. No payment will be made with respect to orders that are routed to NOM, but not executed. Furthermore, a Participant will not be entitled to receive any other revenue from the Exchange for the use of its System specifically with respect to orders routed to NOM.

[9] Accordingly, a Participant that qualifies for the additional incentives in note ''8'' by executing the requisite MARS volume and qualifying for a Customer Rebate to Add Liquidity Tiers 1–6 in Penny Symbols can earn up to $0.25 in Tier 1, $0.29 in Tier 2, $0.46 in Tier 3, $0.47 in Tier 4, $0.49 in Tier 5, and $0.52 in Tier 6.

[10] As described above, the existing Tier 3 rebate qualification requires the Participant to add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% to 0.30% of total industry customer equity and ETF option ADV contracts per day in a month.

[11] As proposed above, the Tier 3 and Tier 4 Customer Rebates to Add Liquidity in Penny

qualify for the note 8 incentives will continue to be eligible to earn up to $0.25 for the Penny Symbol Customer Rebate to Add Liquidity in Tier 1 and $0.52 for the Penny Symbol Customer Rebate to Add Liquidity in Tier 6 as these incentives will not be amended under this proposal. The purpose of the proposed changes to the Penny Symbol Customer Rebates to Add Liquidity Tiers 2–5 is to further encourage Participants to bring additional Customer liquidity to the Exchange by reaching for the higher Customer tiers, and further fortify participation in MARS by encouraging Participants to route/execute the requisite number of Eligible Contracts that add liquidity in order to qualify for any of the MARS Payment Tier 1–9 describe above.

Market Maker Rebate To Add Liquidity in Penny Symbols

Today, the Exchange pays tiered Market Maker Rebates to Add Liquidity in Penny Symbols that are $0.20 (Tier 1), $0.25 (Tier 2), $0.30 (Tier 3),[12] $0.32 (Tier 4),[13] $0.44 (Tier 5), and $0.48 (Tier 6). These rebates are paid per the highest tier achieved below.

Monthly volume	
Tier 1	Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of up to 0.10% of total industry customer equity and ETF option average daily volume (''ADV'') contracts per day in a month.
Tier 2	Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.10% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month.
Tier 3	Participant: (a) Adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% to 0.60% of total industry customer equity and ETF option ADV contracts per day in a month: or (b)(1) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.80% or more of Consolidated Volume (''CV'') which adds liquidity in the same month on The Nasdaq Stock Market, (2) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.15% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (3) executes greater than 0.01% of CV via Market-on- Close/Limit-on-Close (''MOC/LOC'') volume within The Nasdaq Stock Market Closing Cross in the same month.
Tier 4	Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of above 0.60% of total industry customer equity and ETF option ADV contracts per day in a month.
Tier 5	Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month and transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume (''CV'') which adds liquidity in the same month on The Nasdaq Stock Market.
Tier 6	Participant: (a)(1) Adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.95% of total industry customer equity and ETF option ADV contracts per day in a month, (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 30,000 or more contracts per day in a month must be removing liquidity, and (3) adds Firm, Broker-Dealer and Non-NOM Market Maker liquidity in Non-Penny Symbols of 10,000 or more contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month, and (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 15,000 or more contracts per day in a month must be removing liquidity.

As set forth above, the Exchange currently offers two different paths in (a) and (b) for Participants to achieve the Tier 3 Market Maker rebate. The Exchange now proposes to amend the Tier 3 qualifications in (b) as follows:[14]

Participant . . . (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.07% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month, (2) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.70% or more of Consolidated Volume (''CV'') which adds liquidity in the same month on The Nasdaq Stock Market, (3) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.10% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (4) executes greater than 0.01% of CV via Market-on- Close/Limit-on-Close (''MOC/LOC'') volume within The Nasdaq Stock Market Closing Cross in the same month.

The proposal adds an options component and lowers two of the existing equity components, namely by decreasing the percentage requirement that Market Makers transact in all securities through one or more of its Nasdaq Market Center MPIDs from 0.80% to 0.70% and decreasing the percentage requirement that Market Makers transact in Tape B securities through one or more of its Nasdaq Market Center MPIDs from 0.15% to 0.10%.[15] By lowering the percentage thresholds, the Exchange intends to render the Tier 3 rebate more readily accessible to Market Makers. If more Market Makers find that this rebate is accessible to them, then more will seek to qualify for it by adding liquidity on The Nasdaq Stock Market. Together with the proposed options component, which is designed to incentivize Market Makers to add liquidity on NOM, the Exchange believes that its proposal will improve the quality of the Exchange's equity and options markets, to the benefit of all market participants.

Technical Amendments

The Exchange proposes to correct two rule citations to the MARS Payment Tiers in Section (6).[16] The Exchange recently renumbered this section to Section 2(4) and did not update these citations.[17]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[19] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges

Symbols will also be increased to $0.43 and $0.44, respectively.

[12] This rebate is $0.40 per contract in the following symbols: AAPL, SPY, QQQ, IWM, and VXX. *See* Options 7, Section 2(1), note 4.

[13] *Id.*

[14] The Exchange will also correct a punctuation error in Tier 3.

[15] All NOM Participants are required to be members of The Nasdaq Stock Market pursuant to General 3 (Membership and Access).

[16] Specifically, notes 6 and 8 in Options 7, Section 2(1).

[17] *See* Securities Exchange Act Release No. 91677 (April 26, 2021), 86 FR 22989 (April 30, 2021) (SR–NASDAQ–2021–021).

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(4) and (5).

among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [20]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [21]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

Customer and Professional Rebate To Add Liquidity in Penny Symbols

The Exchange believes that the proposed changes to the Customer and Professional Rebates to Add Liquidity in Penny Symbols described above are reasonably designed to attract additional liquidity to the Exchange. The Exchange believes it is reasonable to increase the Tier 3 and Tier 4 Customer and Professional rebates because Participants will be encouraged to submit additional order flow to reach for the higher rebates.[22] The Exchange believes that the proposed higher rebates will incentivize substantial liquidity adding activity on the Exchange, and that any increased activity and growth that may result from this proposal will improve the overall quality of the market, to the benefit of all market participants.

The Exchange believes that the proposed alternative method to qualify for the higher Tier 3 Customer and Professional Rebate to Add Liquidity in Penny Symbols is reasonable because it will create an additional opportunity for Participants to earn the Tier 3 rebate by incentivizing Participants to add greater liquidity on NOM. Specifically, the Exchange is proposing to require that the Participant add Customer and/or Professional liquidity in Penny and/or Non-Penny Symbols of 0.15% to less than 0.20% of total industry customer and ETF option ADV contracts per day in a month and qualify for MARS in order to receive the proposed $0.43 per contract Tier 3 rebate. The Exchange believes that this will encourage liquidity adding activity in Customer and Professional orders to earn the Tier 3 rebate. The proposal will also incentivize Participants to qualify for the MARS program, which is designed to attract higher volumes of electronic equity and ETF options volume to the Exchange. As discussed above, to qualify for MARS, Participants must have System Eligibility, which has various requirements for Participants to maintain their routing systems, including the requirement that NOM be one of the top three default destination exchanges on the Participant's routing system for execution. If more Participants seek to qualify for MARS, the proposal will bring higher volumes of orders to NOM, which will enhance market quality by offering greater price discovery and increased opportunities to trade, to the benefit of all Participants. The Exchange also notes that the proposed alternative route to achieve the Tier 3 Customer and Professional rebate is similar to an existing method for achieving the Tier 6 Customer and Professional rebate except the proposal will have lower volume requirements, which will be commensurate with the lower Tier 3 rebate provided. In particular, one of the ways to earn the Tier 6 rebate ($0.48 per contract) currently requires the Participant to add (1) Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.20% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) add liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualify for MARS. As discussed above, the proposed alternative route to earn the Tier 3 rebate ($0.43 with the proposed changes) will require the Participant to add (1) Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.15% to less than 0.20% of total industry customer equity and ETF option ADV contracts per day in a month, and (2) qualify for MARS.

The Exchange also believes that the proposed changes in note 8 to increase the supplemental rebates offered to Participants that qualify for any MARS Payment Tier in Section 2(4) in addition to qualifying for Penny Symbol Customer Rebates to Add Liquidity in Tiers 2–5 from $0.04 to $0.05 per contract will further encourage Participants to send higher volumes of electronic equity and ETF options to NOM for execution to receive this additional incentive. In particular, to receive the increased supplemental rebates, Participants will need to have System Eligibility and execute the requisite number of Eligible Contracts ADV to qualify for any of the MARS Payment Tiers in Section 2(4). If more Participants seek to qualify for MARS Payments Tiers by sending and executing more Eligible Contracts on NOM to earn the increased supplemental rebates for Penny Symbol Customer rebate tiers 2–5, then market

[20] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[21] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[22] Participants are required to add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% to 0.30% of total industry customer equity and ETF option ADV contracts per day in a month to earn the proposed Tier 3 Customer and Professional rebate, and above 0.30% to 0.40% of total industry customer equity and ETF option ADV contracts per day in a month to earn the proposed Tier 4 Customer and Professional rebate. These qualifications are not being amended with this proposal, although the Exchange will add an alternative route to earn the proposed Tier 3 rebate, as discussed above.

quality will improve and the Exchange will become more attractive to existing and prospective market participants. The Exchange also believes that the proposed changes in note 8 will improve market quality by incentivizing Participants to submit additional qualifying volume that adds liquidity to earn the Penny Symbol Customer Rebates to Add Liquidity in Tiers 2–5, and therefore become eligible for the additional note 8 incentives, provided that they also qualify for any MARS Payment Tier.

The Exchange also believes that the proposed changes to the Customer and Professional Rebates to Add Liquidity in Penny Symbols discussed above are equitable and not unfairly discriminatory because the Exchange will uniformly apply the changes to all qualifying Participants. All Participants may qualify for MARS provided they have requisite System Eligibility. Furthermore, the Exchange believes it is equitable and not unfairly discriminatory to pay the proposed rebates to eligible Customer and Professional liquidity adding orders (*i.e.,* the proposed Tier 3 and Tier 4 rebates, and the proposed Tier 3 alternative route) or to eligible Customer liquidity adding orders (*i.e.,* the proposed note 8 incentive changes). Customer liquidity benefits all market participants by providing more trading opportunities, which attracts market makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes that incentivizing Professional liquidity is similarly beneficial, as the proposed changes may cause market participants to select NOM as a venue to send Professional order flow, increasing competition among the exchanges. As with Customer liquidity, the Exchange believes that increased Professional order flow should benefit other market participants.

Market Maker Rebate To Add Liquidity in Penny Symbols

The Exchange believes that its proposal to amend the qualifications for the Tier 3 Market Maker Rebate to Add Liquidity in Penny Symbols is reasonably designed to incentivize Market Makers to increase their liquidity adding activity on the Exchange's equity and options markets. By lowering the percentage thresholds for the equity components in the manner described above, the Exchange intends to render the Tier 3 rebate more readily accessible to Market Makers. If more Market Makers find that this rebate is accessible to them, then more will seek to qualify for it by adding liquidity on The Nasdaq Stock Market. Together with the proposed options component, which is designed to encourage Market Makers to add liquidity on NOM, the Exchange believes that its proposal will improve the quality of the Exchange's equity and options markets, to the benefit of all market participants.

The Exchange also believes that the proposed changes to the qualifications for the Tier 3 Market Maker Rebate to Add Liquidity in Penny Symbols is equitable and not unfairly discriminatory because the Exchange will pay the Tier 3 rebate uniformly to any qualifying Market Maker. Market Makers add value through continuous quoting and the commitment of capital.[23] Because Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering the rebate to only Market Makers is equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging Market Makers to add greater liquidity benefits all market participants, both on NOM and The Nasdaq Stock Market, in the quality of order interaction.

Technical Amendments

The Exchange believes that the proposed updates to the rule citations for MARS Payment Tiers are reasonable, equitable, and not unfairly discriminatory as these amendments will bring greater clarity to the Rulebook.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of intra-market competition, the Exchange does not that its proposals will place any category of market participant at a competitive disadvantage. As discussed above, while the Exchange's proposals provide incentives for certain order flow and activity on the Exchange (*i.e.,* Customer and Professional liquidity adding activity in Penny Symbols and Market Maker Rebate liquidity adding activity in Penny Symbols), the proposed changes are ultimately aimed at attracting greater liquidity to the Exchange, which benefits all market participants in the quality of order interaction.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The Exchange's proposed changes to the Customer and Professional Rebates to Add Liquidity in Penny Symbols and the Tier 3 Market Maker Rebate to Add Liquidity in Penny Symbols are pro-competitive in that the Exchange intends for the changes to increase liquidity addition and activity on the Exchange, thereby rendering the Exchange a more attractive and vibrant venue to existing and prospective market participants.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Participants or competing exchanges to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the

[23] *See* Options 2, Sections 4 and 5.

[24] 15 U.S.C. 78s(b)(3)(A)(ii).

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–NASDAQ–2021–069 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number *SR–NASDAQ–2021–069.* This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–NASDAQ–2021–069* and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20214 Filed 9–17–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92981; File No. SR–NYSEAMER–2021–38]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Order Audit Trail System Rules in the Rule 7400 Series

September 14, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on September 7, 2021, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the Order Audit Trail System (''OATS'') rules in the Rule 7400 Series as these Rules provide for the collection of information that is duplicative of the data collection requirements of the CAT. Further, the Financial Industry Regulatory Authority (''FINRA'') has determined to eliminate its OATS rules. 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

Rule 613 of Regulation NMS requires national securities exchanges and FINRA to create, implement, and maintain a consolidated audit trail to capture customer and order event information for orders in NMS Securities and OTC Equity Securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single consolidated data source. The Participants filed the Plan to comply with Rule 613 of Regulation NMS under the Act. The Plan was published for comment in the **Federal Register** on May 17, 2016,[4] and approved by the Commission, as modified, on November 15, 2016.[5]

On August 14, 2020, FINRA filed with the Commission a proposed rule change to delete the OATS rules once Industry Members are effectively reporting to the CAT (the ''OATS Retirement Filing'').[6] On October 29, 2020, FINRA filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'') and a response to the comments that were submitted on the original filing (''Response to Comments'').[7] On November 30, 2020, the Commission approved the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[8] On June 17, 2021, FINRA filed a proposed rule change setting forth the basis for its determination that the accuracy and reliability of the CAT meet the standards approved by the Commission

[25] 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] *See* Securities Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

[5] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (''Order Approving the National Market System Plan Governing the Consolidated Audit Trail) (''Approval Order'').

[6] *See* Securities Exchange Act Release No. 89679 (August 26, 2020), 85 FR 54461 (September 1, 2020) (Notice of Filing of File No. SR–FINRA–2020–024).

[7] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated October 29, 2020.

[8] *See* Securities Exchange Act Release No. 90535 (November 30, 2020), 85 FR 78395 (December 4, 2020) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of SR–FINRA–2020–024).

in the OATS Retirement Filing for purposes of eliminating the OATS rules.[9] The FINRA proposal stated that FINRA would retire OATS effective September 1, 2021.

After conducting an analysis of its rules in accordance with the CAT NMS Plan, the Exchange has determined that the information collected pursuant to the OATS rules is intended to be collected by CAT. Further, the Exchange believes that the Rule 7400 Series will no longer be necessary and proposes to delete such rules from the Exchange's rulebook. Discussed below is a description of the duplicative rule requirements as well as the timeline for eliminating the duplicative rules followed by a discussion on the OATS Retirement Filing that formed the basis for retiring OATS.

Duplicative OATS Requirements

The Rule 7400 Series consists of Rules 7410 through 7470 and sets forth the recording and reporting requirements of the OATS Rules. The OATS Rules require all Exchange members and associated persons to record in electronic form and report to FINRA, on a daily basis, certain information with respect to orders originated, received, transmitted, modified, canceled, or executed by members in all NMS stocks, as that term is defined in Rule 600(b)(47) of Regulation NMS,[10] traded on the Exchange. The Exchange relies on the information reported to OATS either to conduct surveillance or to facilitate surveillance conducted by FINRA pursuant to a regulatory services agreement (''RSA''). This information is used by Exchange and FINRA staff to conduct surveillance and investigations of member firms for violations of Exchange and FINRA rules and federal securities laws. The Exchange believes it is appropriate to retire OATS because the requirements of the Rule 7400 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational.

Timeline for Elimination of Duplicative Rules

The CAT NMS Plan states that the elimination of rules that are duplicative of the requirements of the CAT and the retirement of the related systems should be effective at such time as CAT Data meets minimum standards of accuracy and reliability.[11] As discussed in more detail in the OATS Retirement Filing, FINRA believes that OATS may be retired effective September 1, 2021 given the error rate thresholds have been met, and FINRA has determined that its usage of the CAT Data has not revealed material issues that have not been corrected and further confirmed that the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations.

OATS Retirement Filing

In the OATS Retirement Filing, FINRA proposed to eliminate the OATS rules once Industry Members are effectively reporting to the CAT and the CAT's accuracy and reliability meet certain standards. Specifically, FINRA proposed that before OATS could be retired, the CAT generally must achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower on a pre-correction basis, and 2% or lower on a post-correction basis (measured at T+5). In addition to the maximum error rates and matching thresholds, FINRA's use of CAT Data must confirm that (i) there are no material issues that have not been corrected, (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Industry Member Data.

In the OATS Retirement Filing, FINRA explained that its review of CAT Data and error rates would be based on data and linkages in the initial phase of reporting (or ''Phase 2a''), which replicate the data in OATS today and thus are most relevant for OATS retirement purposes. Phase 2a Data includes all events and scenarios covered by OATS and applies only to equities. FINRA did not consider options order events or Phase 2c data and validations, which are not in OATS today, for purposes of OATS retirement.

As described below, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing.

(1) Maximum Error Rates

As discussed in the OATS Retirement Filing, FINRA believes that relevant error rates are the primary, but not the sole, metric by which to determine the CAT's accuracy and reliability and will serve as the baseline requirement needed before OATS can be retired. FINRA proposed that, before OATS could be retired, the CAT would generally need to achieve a sustained error rate for Industry Member reporting in five categories for a period of at least 180 days of 5% or lower, measured on a pre-correction or as-submitted basis, and 2% or lower on a post-correction basis (measured at T+5).[12] FINRA proposed to average the error rates across the period, rather than require a 5% pre-correction and 2% post-correction maximum each day for 180 consecutive days. FINRA also proposed to measure the error rates in the aggregate, rather than on a firm-by-firm basis. Finally, FINRA proposed to measure the error rates separately for each of the five categories, rather than evaluate all categories in the aggregate. As noted above, FINRA's assessment of the error rates for Industry Member reporting is based solely on Phase 2a CAT reporting for equity events since options orders are not included in OATS today.

As discussed in the OATS Retirement Filing, FINRA measured the error rates in each of the five categories discussed below during the period from October 26, 2020 through April 26, 2021 (the ''applicable period''). FINRA commenced this period on October 26, 2020, which was the date that Industry Members were required to begin correcting all errors for inter-firm linkages and exchange/TRF/ORF match validations. As discussed in the Response to Comments, although the production environment for inter-firm linkage and exchange/TRF/ORF match validations was open for testing as of September 28, 2020, FINRA did not believe it would be appropriate for the 180-day period to commence prior to the October 26, 2020 compliance date.[13]

Rejection Rates and Data Validations. As described in the OATS Retirement Filing, the Plan Processor must perform certain basic data validations,[14] and if a

[9] *See* Securities Exchange Act Release No. 92239 (June 23, 2021), 86 FR 34293 (June 29, 2021) (SR–FINRA–2021–017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Retirement of FINRA's Order Audit Trail System).

[10] 17 CFR 242.600(B)(47).

[11] Appendix C of CAT NMS Plan, Approval Order at 85010.

[12] As clarified in the OATS Retirement Filing, although FINRA does not believe that post-correction errors need to be de minimis before OATS can be retired, FINRA was not suggesting, with the proposal, that 2% would meet the ultimate objective of de minimis error rates for CAT. *See* CAT NMS Plan, Appendix C, note 102 (error rates after reprocessing of error corrections are ultimately expected to be de minimis for the CAT). *See also* Approval Order.

[13] *See* FINRA's Response to Comments, *supra* note 8.

[14] Appendix D of the CAT NMS Plan, Section 7.2, for example, requires that certain file validations (*e.g.,* file transmission and receipt are in the correct formats, confirmation of a valid SRO-Assigned Market Participant Identifier, etc.), and syntax and context checks (*e.g.,* format checks, data type

Continued

record does not pass these basic data validations, it must be rejected and returned to the CAT Reporter to be corrected and resubmitted. FINRA proposed that over the 180-day period, aggregate rejection rates must be no more than 5% pre-correction or 2% post-correction across all Industry Member Reporters. FINRA has determined that, over the applicable period, aggregate rejection rates across all Industry Member Reporters were 0.03% pre-correction and 0.01% post-correction.

Intra-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum, this requirement includes the creation of an order lifecycle between all order events handled within an individual CAT Reporter, including orders routed to internal desks or departments with different functions (*e.g.,* an internal ATS). FINRA proposed that aggregate intra-firm linkage rates across all Industry Member Reporters must be at least 95% pre-correction and 98% post-correction. FINRA has determined that, over the applicable period, aggregate intra-firm linkage rates across all Industry Member Reporters were 99.97% pre-correction and 99.99% post-correction.

Inter-Firm Linkages. As described in the OATS Retirement Filing, the Plan Processor must be able to create the lifecycle between orders routed between broker-dealers. FINRA proposed that at least a 95% pre-correction and 98% post-correction aggregate match rate be achieved for orders routed between two Industry Member Reporters. FINRA has determined that during the applicable period there was a 99.08% pre-correction and 99.84% post-correction aggregate match rate for orders routed between two Industry Member Reporters.

Order Linkage Rates. As described in the OATS Retirement Filing, in addition to creating linkages within and between broker-dealers, the Plan Processor must be able to create lifecycles to link various pieces of related orders. For example, the Plan requires linkages of order information to create an order lifecycle from origination or receipt to cancellation or execution. This category essentially combines all of the order-related linkages to capture an overall snapshot of order linkages in the CAT.[15] FINRA proposed that there be at least a 95% pre-correction and 98% post-correction rate for order linkages that are required in Phase 2a. FINRA has determined that during the applicable period there was a 99.66% pre-correction and 99.93% post-correction rate for order linkages required in Phase 2a.[16]

Exchange and TRF/ORF Match Rates. As described in the OATS Retirement Filing, an order lifecycle must be created to link orders routed from broker-dealers to exchanges and executed orders and trade reports. FINRA proposed at least a 95% precorrection and 98% post-correction aggregate match rate across all equity exchanges[17] for orders routed from Industry Members to an exchange and, for over-the-counter executions, the same match rate for orders linked to trade reports. FINRA determined that, during the applicable period, there was a 99.51% pre-correction and 99.87% post-correction aggregate match rate across all equity exchanges for orders routed from Industry Members to an exchange and, for over-the-counter executions, there was a 99.34% pre-correction and 99.53% post-correction rate for orders linked to trade reports submitted to the FINRA Trade Reporting Facilities and OTC Reporting Facility.

As set forth above, the error rates for Industry Member reporting over the applicable period were well below the maximum rates established in the OATS Retirement Filing. FINRA also noted that the overall post-correction error rate for Phase 2a Industry Member reporting of 1.01% is comparable to the current overall OATS post-correction error rate, which generally is at or slightly below 1%. Therefore, FINRA has determined that, based on the error rates for Industry Member reporting, the CAT Data meets the accuracy and reliability baseline standards required for OATS retirement.

(2) FINRA's Use of CAT Data

In the OATS Retirement Filing, FINRA stated that while error rates are a key standardized measure in determining whether OATS retirement is appropriate, FINRA's use of the data in the CAT also must confirm that (i) there are no material issues that have not been corrected (*e.g.,* delays in the processing of data, issues with query functions, etc.), (ii) the CAT includes all data necessary to allow FINRA to continue to meet its surveillance obligations, and (iii) the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data.

In the OATS Retirement Filing, FINRA stated that it has been planning for OATS retirement for several years and the necessary development work has been underway for some time. FINRA also has been analyzing and testing production CAT Data for purposes of transitioning its automated equity surveillance patterns since the commencement of Phase 2a Industry Member reporting in June 2020 and through subsequent CAT milestone releases. For example, in addition to quantitative reviews, such as the error rate statistics discussed above, FINRA has conducted a series of qualitative reviews of Industry Member CAT Data. Such reviews include, among other things, comparing the count and distribution of Industry Member event reporting through CAT versus OATS (*e.g.,* new order and execution events, and data elements such as buy/sell/sell short codes), and reviewing results of examinations, alert reviews, and investigations relating to the timeliness and accuracy of Industry Member reporting. Based on such qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

As discussed in the OATS Retirement Filing, today, FINRA's surveillance patterns rely on the cross-market data model (''CMDM''), which comprises linked OATS data, equity exchange data feeds from each of the exchanges with

checks, consistency checks, etc.) be performed on all submitted records.

[15] *See* FINRA's Response to Comments, *supra* note 8.

[16] FINRA noted that in Phase 2a, linkage is required between the representative street side order and the order being represented when the representative order was originated specifically to represent a single order (received either from a customer or another broker-dealer) and there is: (1) An existing direct electronic link in the firm's system between the order being represented and the representative order, and (2) any resulting executions are immediately and automatically applied to the represented order in the firm's system. As set forth in the OATS Retirement Filing, while such linkages are not required in OATS, FINRA believes that it is appropriate to evaluate them for purposes of retiring OATS because they represent a significant enhancement to the data currently available in OATS and will enhance the quality of the equity audit trail. However, FINRA also explained in the Response to Comments that if all other proposed criteria have been met, FINRA would not anticipate delaying OATS retirement based on Phase 2a representative order linkage error rates alone.

In evaluating whether the standards for OATS retirement have been met, FINRA determined that the error rates for the Phase 2a representative order linkages did not have a significant negative impact on the overall error rates for order linkages. Accordingly, FINRA did not need to separately evaluate or exclude Phase 2a representative order linkage rates in measuring the error rates over the applicable period. For example, if the intra-firm linkage error rate had been above 5% over the applicable period, FINRA would have evaluated whether the error rate was the result of unlinked representative orders to create an apples-to-apples comparison to OATS.

[17] *See* Amendment No. 1.

which FINRA has entered into a RSA, and transactions reported to FINRA's equity trade reporting facilities. The CMDM will be retired and replaced by a newly created surveillance data mart, the Pattern Optimized Datamart (''POD''), which incorporates both equities and options data. At that point, FINRA's patterns will rely on CAT Data in POD, *i.e.,* Plan Participant and Industry Member data reported in CAT format and linked by CAT.[18] FINRA notes that the Plan Participants transitioned to reporting via the CAT technical specification as of April 26, 2021, and full Plan Participant equities reporting and linkage validations in accordance with the CAT specification commenced on June 1, 2021.[19] Successful completion of the transition to the CAT specification for Plan Participants is a prerequisite for FINRA to retire the CMDM and leverage CAT Data and linkages in POD for its surveillance patterns. As of the date of this filing, FINRA has completed all planned activities on schedule, including substantially completing the process of integrating CAT Data into POD and successfully running large amounts of production CAT Data for the month of May through POD.[20] FINRA anticipates completing additional activities before the proposed OATS retirement date, including, *e.g.,* planned user acceptance testing.[21]

As discussed in the OATS Retirement Filing, FINRA has performed broad analysis of its equity surveillance patterns and has determined that all of the data required to support the transition is available in CAT. By mapping OATS data to Industry Member CAT Data in POD, FINRA has confirmed that CAT Data has equivalent analogs to all data elements in OATS. In that regard, FINRA notes that, as a Plan Participant, FINRA has been involved in CAT development efforts to ensure that the scope and features of Industry Member data and processed output are sufficient for FINRA's surveillance program. These efforts include, for example, developing and updating the Industry Member Technical Specifications and Reporting Scenarios, conducting OATS–CAT gap analyses and validating that all such gaps have been properly addressed, and performing OATS-to-CAT field-level mappings.

With respect to Plan Participant data, FINRA notes in the OATS Retirement Filing that the test environment for Plan Participant reporting in accordance with the CAT specification opened on February 15, 2021.[22] Plan Participant equity reporting in accordance with the CAT specification in the test environment had a very high compliance rate for data ingestion and validation, and compliance in the production environment is comparable. In addition, starting on April 26, 2021, CAT began linking copies of Industry Member and Plan Participant data reported via the CAT specification in a test environment, and at that point, FINRA began its evaluation of the quality of these linkages. Based on this review and evaluation, in the OATS Retirement Filing, FINRA stated that it believes that the linkages between Plan Participant data and Industry Member data in CAT are comparable to the linkages between RSA exchange data and OATS data in the CMDM today.[23] FINRA CAT and the Plan Participants have now met the necessary criteria for a full cutover from the RSA specification to the CAT specification, including, *e.g.,* achieving comparable data ingestion validation and inter-venue linkage rates (within a variance of under one percent) between RSA and CAT specification submissions. Accordingly, the Operating Committee approved the cutover from the RSA specification to the CAT specification as the official source of Plan Participant data as of June 1, 2021, and today, all Industry Member and Plan Participant equities data reported via the CAT specification is linked in the CAT production environment.

As discussed in the OATS Retirement Filing, FINRA continues to evaluate CAT Data quality, and in particular, linkages between Industry Member and Plan Participant data, and to test its surveillance patterns to run on CAT Data in POD. In that regard, FINRA notes that it has followed established and time-tested processes and protocols throughout the development process to ensure that its patterns will perform as expected and produce the necessary output using CAT Data following the retirement of OATS. For example, FINRA's Software Development Lifecycle (''SDLC'') procedures govern systems design, changes, testing and controls. The SDLC procedures are an essential component of FINRA's operations and have been developed to serve FINRA's unique regulatory needs and structure. Additionally, consistent with SEC Regulation SCI, FINRA procedures include a plan of coordination and communication with regulatory staff. By relying on these established processes and protocols, FINRA has confidence that the CAT Data and linkages are reliable and sufficient to run FINRA's surveillance patterns.

Based on these results, as well as the results of its quantitative and qualitative reviews of CAT Data and successful efforts integrating CAT Data into POD, in the OATS Retirement Filing, FINRA stated that it believes that the complete portfolio of equity surveillance patterns will be capable of consuming CAT Data and achieving comparable (or better) output results.

Thus, FINRA proposes to retire OATS in accordance with the schedule set forth herein. FINRA will run its surveillance patterns for review periods through the end of the second quarter of 2021 using OATS data and begin using—and be fully reliant on—CAT Data for its surveillance patterns for review periods beginning in the third quarter of 2021. Following the retirement of OATS, FINRA expects to maintain the current established cadence of its monthly, quarterly and semi-annual surveillance patterns. In addition, FINRA's analytics platforms will have access to CAT Data as soon as such data is made available to regulators. Thus, outside of regularly scheduled surveillance pattern runs, FINRA can perform expedited analytics, as required by market events.

As discussed in the OATS Retirement Filing, FINRA is finalizing the development and certification of its surveillance patterns to run on CAT Data on a rolling basis and, in

[18] FINRA's Response to Comments noted this dependency, stating that the process of transitioning FINRA's surveillance patterns to CAT Data necessarily includes, among other things, ingestion of all Industry Member and Plan Participant data and linkages in CAT format. *See* Response to Comments, *supra* note 8, at 4[sic]. The Response to Comments further noted that the Plan Participants would be reporting to CAT via another mechanism until April 2021.

[19] For example, according to the CAT Reporting Technical Specification for Plan Participants (version 4.0.0–r4 dated April 20, 2021), additional linkage error feedback for off-exchange trade reports was effective as of June 1, 2021. The Technical Specifications can be found on the CAT NMS Plan website at *www.catnmsplan.com/sites/default/files/2021-04/04.20.2021-CAT-ReportingTechnical-Specifications-for-Participants-4.0.0-r4.pdf.*

[20] FINRA notes that additional POD releases are scheduled; however, these releases introduce minor enhancements to POD, as opposed to significant changes that would impact the way data is ingested or processed in POD.

[21] FINRA notes that user acceptance testing is the final stage of any software development life cycle and enables actual users to test the system to confirm that it is able to carry out the required tasks it was designed to address in real-world situations.

[22] *See, e.g.,* CAT Q1 2021 Quarterly Progress Report dated April 30, 2021, available at *www.catnmsplan.com/sites/default/files/2021-05/CAT-Q1-2021-QPR.pdf.*

[23] FINRA notes that the CAT uses the same code in both the test and production environments. Thus, FINRA believes that linkages in the test environment are reliable indicators of linkages in the production environment.

accordance with its existing SDLC procedures, will run a month's worth of data and compare the output before certifying each pattern. For those equity patterns that will be subject to certification after OATS retirement, FINRA anticipates that there would be sufficient time to identify and remediate any issues prior to running the patterns in accordance with the current established cadence. FINRA does not anticipate significant issues arising from additional scheduled POD releases or in the final stages of its pattern development and certification efforts.

As discussed in the OATS Retirement Filing, on an ongoing basis following the retirement of OATS, FINRA will conduct regular reviews to ensure confidence in the completeness and accuracy of Industry Member reporting, along with the ability to remediate any issues in a timely manner. Among other things, FINRA has a robust mechanism for detecting data issues, determining which issues are material for purposes of its surveillance program, and requesting resubmission and/or reprocessing of data, as necessary. FINRA also (1) performs a suite of data quality checks against data sourced from CAT to POD and against data processed by POD for use in surveillance patterns; (2) oversees a robust surveillance and examination compliance program that evaluates Industry Member reporting timeliness, data quality, and other issues and trends; (3) reviews CAT compliance program alerts using a rapid remediation process and formal reviews, as necessary; and (4) reviews Industry Member self-reporting and error correction trends. FINRA believes that these practices are sufficient for identification and timely resolution of Industry Member reporting and data issues after OATS has been retired.

Specifically, with regard to the additional standards approved in the OATS Retirement Filing, through its use of CAT Data to date, as described above, FINRA believes that these standards have been satisfied. With respect to the first factor, FINRA does not believe that there are any material issues that have not been corrected (or could not be corrected in the course of operation of CAT, as approved by the Operating Committee)[24] that would impact FINRA's ability to incorporate and use CAT Data in FINRA's surveillance program. For example, the Plan requires that raw unprocessed data that has been ingested by the Plan Processor must be available to Participant regulatory staff and the SEC prior to 12:00 p.m. Eastern Time on T+1, and access to all iterations of processed data must be available to Participant regulatory staff and the SEC between 12:00 p.m. Eastern Time on T+1 and T+5.[25] The Plan Processor also must ensure that regulators have access to corrected and linked order data by 8:00 a.m. Eastern Time on T+5.[26] Additionally, after ingestion by the Central Repository, the raw unprocessed data must be transformed into a format appropriate for data querying and regulatory output.[27] The user-defined direct queries and bulk extracts must provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.[28] FINRA's use of the CAT Data has not uncovered any processing delays or other material issues impacting the availability of, and FINRA's access to, the data.

With respect to the second factor, FINRA stated in the OATS Retirement Filing that it believes that the CAT includes all data necessary for FINRA to meet its surveillance obligations after the retirement of OATS. FINRA must ensure that the CAT, as the single source of order and trade data, can enable FINRA to conduct accurate and effective market surveillance in accordance with its regulatory obligations.[29] As noted above, Phase 2a Data includes all events and scenarios covered by OATS and is the most relevant for OATS retirement purposes. FINRA Rule 7440 describes the OATS requirements for recording information, which includes information related to the receipt or origination of orders, order transmittal, and order modifications, cancellations and executions. Large Industry Members and Small Industry Members that currently are reporting to OATS were required to submit data to the CAT for these same events and scenarios commencing in Phase 2a. FINRA's testing, analysis and use of the CAT Data (including integration into POD), as described above, has confirmed that the CAT includes all data necessary for FINRA to meet its surveillance obligations and that CAT is a reliable substitute for OATS. In addition, based on its qualitative data reviews, FINRA has concluded that Industry Member CAT Data, in the aggregate, is a sufficient replacement for OATS for purposes of FINRA's surveillance program.

With respect to the third factor, FINRA stated in the OATS Retirement Filing that it believes that the Plan Processor is sufficiently meeting its obligations under the CAT NMS Plan relating to the reporting and linkage of Phase 2a Data. As detailed in the Implementation Plan and Quarterly Progress Reports submitted by the Plan Participants, the Plan Processor has met its targeted completion dates for the milestones for Phase 2a, including, for example, production Go-Live for Equities 2a file submission and data integrity validation (Large Industry Members and Small OATS Reporters) on June 22, 2020; Production Go-Live for Equities 2a Intrafirm Linkage validations on July 27, 2020; and production go-live for firm-to-firm linkage validations for equities (Large Industry Members and Small OATS Reporters) and exchange and TRF/ORF linkage validations for equities (Large Industry Members and Small OATS Reporters) on October 26, 2020.[30]

Based on the foregoing, FINRA has determined that the CAT meets the accuracy and reliability standards approved by the Commission in the OATS Retirement Filing for purposes of eliminating the OATS Rules. FINRA has determined to retire OATS and remove the OATS rules from its rulebook effective September 1, 2021. Firms must continue to report to OATS all order events that occur on or prior to August 31, 2021. Reports submitted to OATS for order events that occur after August 31, 2021 will be rejected. In other words, August 31, 2021 will be the last ''OATS Business Day,'' as defined under FINRA Rule 7450(b)(3), for which OATS will accept order events and perform routine

[24] FINRA notes that FINRA CAT tracks known issues relating to Industry Member and Plan Participant reporting. *See, e.g., catnmsplan.com/CAT-Transaction-Known-Issues-List.* FINRA regularly reviews and analyzes FINRA CAT's list of current and resolved issues and does not believe that any of these issues would impact its ability to incorporate and use CAT Data in its surveillance program.

[25] *See* CAT NMS Plan, Appendix D, Section 6.2.

[26] *See* CAT NMS Plan, Appendix C, Section A.2(a).

[27] *See* CAT NMS Plan, Appendix C, Section A.1(b).

[28] *See* CAT NMS Plan, Section 6.10(c).

[29] As discussed in the OATS Retirement Filing, OATS was originally proposed to fulfill one of the undertakings contained in an order issued by the Commission relating to the settlement of an enforcement action against FINRA (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) for failure to adequately enforce its rules. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (Order Approving File No SR–NASD–97–56) (''OATS Approval Order''); *see also* Securities Exchange Act Release No. 37538 (August 8, 1996); Administrative Proceeding File No. 3–9056 (''SEC Order''). In the OATS Approval Order, the Commission concluded that OATS satisfied the conditions of the SEC Order and was consistent with the Exchange Act. *See* 63 FR 12559, 12566–67. FINRA believes that it will continue to be in compliance with the requirements of the SEC Order once the OATS Rules are deleted.

[30] The Implementation Plan and Quarterly Progress Reports are available at *www.catnmsplan.com/implementation-plan.*

processing (including incorporation of corrections and repairs of rejections) occurring within the normal OATS timeframe for such activities. OATS will continue to accept reports for order events that occur on or prior to August 31, 2021 (including, but not limited to, late and corrected reports for such order events) through September 16, 2021. Firms must ensure that their OATS reporting is accurate and complete for all order events that occur on or prior to August 31, 2021.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[31] in general, and furthers the objectives of Section 6(b)(5) of the Act,[32] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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 remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the proposed rule change is consistent with Section C.9 of Appendix C to the Plan, which requires each Participant to ''file with the SEC the relevant rule change filing to eliminate or modify its duplicative rules within six (6) months of the SEC's approval of the CAT NMS Plan.'' [33] The Plan notes that ''the elimination of such rules and the retirement of such systems [will] be effective at such time as CAT Data meets minimum standards of accuracy and reliability.'' [34] Accordingly, the Exchange believes the proposed rule change implements, supports, interprets or clarifies the provisions of the Plan, and is designed to assist the Exchange and its members in meeting regulatory obligations pursuant to, and milestones established by, the Plan. In approving the Plan, the SEC noted that it ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [35] To the extent that this proposal implements, interprets or clarifies the Plan and applies specific requirements to members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather implement provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [36] and subparagraph (f)(6) of Rule 19b–4 thereunder.[37] The proposed rule change would not significantly affect the protection of investors or the public interest because it seeks to delete the Exchange's OATS rules to be consistent with FINRA's retirement of its OATS rules. The Exchange further believes that the proposed rule change would not impose any significant burden on competition because the proposed rule change is not designed to address any competitive issue but rather implements provisions of the CAT NMS Plan, and is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan.

A proposed rule change filed under Rule 19b–4(f)(6) [38] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[39] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As noted above, the Exchange believes that the OATS reporting requirements of the Rule 7400 Series are duplicative of information available in the CAT and thus will no longer be necessary now that the CAT is operational. The Commission believes that it is consistent with the protection of investors and the public interest for the Exchange to delete its OATS reporting because FINRA has retired OATS. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[40]

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–NYSEAMER–2021–38 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(5).

[33] Appendix C of CAT NMS Plan, Approval Order at 85010.

[34] *Id.*

[35] Approval Order at 84697.

[36] 15 U.S.C. 78s(b)(3)(A)(iii).

[37] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[38] 17 CFR 240.19b–4(f)(6).

[39] 17 CFR 240.19b–4(f)(6)(iii).

[40] For purposed only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2021–38. 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–2021–38, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–20216 Filed 9–17–21; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17176 and #17177; ARIZONA Disaster Number AZ–00074]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Arizona

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Arizona (FEMA–4620–DR), dated 09/13/2021.

Incident: Severe Storms and Flooding.

Incident Period: 07/22/2021 through 07/24/2021.

DATES: Issued on 09/13/2021.

Physical Loan Application Deadline Date: 11/12/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 06/13/2022.

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 President's major disaster declaration on 09/13/2021, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Apache, Coconino, Navajo.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.000
Non-Profit Organizations without Credit Available Elsewhere	2.000
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.000

The number assigned to this disaster for physical damage is 17176 6 and for economic injury is 17177 0.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2021–20208 Filed 9–17–21; 8:45 am]

BILLING CODE 8026–03–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 670 (Sub-No. 3)]

Renewal of Rail Energy Transportation Advisory Committee

AGENCY: Surface Transportation Board.

ACTION: Notice of intent to renew charter.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given that the Surface Transportation Board (Board) intends to renew the charter of the Rail Energy Transportation Advisory Committee (RETAC).

ADDRESSES: A copy of the charter is available on the Board's website at *https://prod.stb.gov/resources/stakeholder-committees/retac/.*

FOR FURTHER INFORMATION CONTACT: Kristen Nunnally, Designated Federal Officer, at (202) 245–0312. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: RETAC was established by the Board on September 24, 2007, to provide advice and guidance to the Board, on a continuing basis, and to provide a forum for the discussion of emerging issues and concerns regarding the transportation by rail of energy resources, including, but not necessarily limited to, coal and biofuels (such as ethanol), and petroleum. RETAC functions solely as an advisory body and complies with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., and its implementing regulations.

RETAC consists of approximately 25 voting members, excluding the governmental representatives. The membership comprises a balanced representation of individuals experienced in issues affecting the transportation of energy resources, including no fewer than: Five representatives from the Class I railroads; three representatives from Class II and III railroads; three representatives from coal producers; five representatives from electric utilities (including at least one rural electric cooperative and one state- or municipally-owned utility); four representatives from biofuel feedstock growers or providers and biofuel refiners, processors, and distributors; two representatives from private car owners, car lessors, or car manufacturers; and one representative from the petroleum shipping industry. The Committee may also include up to two members with relevant experience

[41] 17 CFR 200.30–3(a)(12).

but not necessarily affiliated with one of the aforementioned industries or sectors. All voting members of the Committee serve in a representative capacity on behalf of their respective industry or stakeholder group. The Board Members are *ex officio* (non-voting) members of RETAC. Representatives from the U.S. Departments of Agriculture, Energy, and Transportation, and the Federal Energy Regulatory Commission may be invited to serve on the Committee in an advisory capacity as *ex officio* (non-voting) members.

RETAC meets at least twice a year, and meetings are open to the public, consistent with the Government in the Sunshine Act, Public Law 94–409 (1976).

Further information about RETAC is available on the Board's website (*https://prod.stb.gov/resources/stakeholder-committees/retac/*) and at the General Services Administration's FACA database (*https://facadatabase.gov/*).

Decided: September 14, 2021.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Aretha Laws-Byrum,

Clearance Clerk.

[FR Doc. 2021–20188 Filed 9–17–21; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 519 (Sub-No. 5)]

Renewal of National Grain Car Council

AGENCY: Surface Transportation Board.

ACTION: Notice of intent to renew charter.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given that the Surface Transportation Board (Board) intends to renew the charter of the National Grain Car Council (NGCC).

ADDRESSES: A copy of the charter is available on the Board's website at *https://prod.stb.gov/resources/stakeholder-committees/grain-car-council/.*

FOR FURTHER INFORMATION CONTACT: Alan Cassiday, Designated Federal Officer, at (202) 245–0308. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The NGCC functions as a continuing working group to facilitate private-sector solutions and recommendations to the Board on matters affecting grain transportation. The NGCC functions solely as an advisory body and complies with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., and its implementing regulations.

The NGCC consists of approximately 42 members, excluding the governmental representatives. The membership comprises a balanced representation of individuals knowledgeable in the transportation of grain, including no fewer than 14 members from the Class I railroads (one marketing and one car management representative from each Class I), seven representatives from Class II and III carriers, 14 representatives from grain shippers and receivers, and seven representatives from private car owners and car manufacturers. The members of the Board are *ex officio* (non-voting) members of the NGCC, and the Vice Chairman of the Board is designated as Co-Chairman of the NGCC.

The NGCC meets at least annually, and meetings are open to the public, consistent with the Government in the Sunshine Act, Pub. L. 94–409 (1976).

Further information about the NGCC is available on the Board's website (*https://prod.stb.gov/resources/stakeholder-committees/grain-car-council/*) and at the General Services Administration's FACA database (*https://facadatabase.gov/*).

Decided: September 14, 2021.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2021–20250 Filed 9–17–21; 8:45 am]

BILLING CODE 4915–01–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Resource Stewardship Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Resource Stewardship Council (RRSC) will hold a virtual meeting on Wednesday, September 22, 2021, to learn about proposed Biodiversity policy and hear updates on multiple subjects.

DATES: The meeting will be held on Wednesday, September 22, 2021 from 9:00 a.m. to 2:00 p.m. EDT.

ADDRESSES: The meeting is virtual and open to the public. Members of the public must preregister at the following link: *https://bit.ly/RRSC-Sept* by 5 p.m. September 20, 2021. Anyone needing special accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Cathy Coffey, *ccoffey@tva.gov* or 865–632–4494.

SUPPLEMENTARY INFORMATION: The RRSC was established to advise TVA on its natural resource and stewardship activities, and the priorities among competing objectives and values. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2.

The meeting agenda includes the following:

1. Welcome and Introductions
2. Presentation Regarding TVA's Proposed Biodiversity Policy
3. Seek advice from RRSC on Biodiversity Policy
4. Update on Natural Resource projects
5. Public Comment period

A 30-minute public comment session will be held at 9:30 a.m. EDT. If you wish to speak, please send the email request to *ccoffey@tva.gov* by 5 p.m. on September 21. Written comments also are invited. Written comments must be emailed to *ccoffey@tva.gov* no later than 5 p.m. on September 20, 2021, so they may be shared with the RRSC prior to the meeting.

Dated: September 7, 2021.

The DFO of the Tennessee Valley Authority and Vice President of External Strategy & Regulatory Affairs, Melanie Farrell, having reviewed and approved this document, is delegating the authority to sign this document to Cathy Coffey, Senior Program Manager of Stakeholder Relations, for purposes of publication in the **Federal Register**.

Cathy Coffey,

Senior Program Manager, Stakeholder Relations, Tennessee Valley Authority.

[FR Doc. 2021–20259 Filed 9–17–21; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Office of the Secretary

[Docket No. DOT–OST–2021–0103]

Reassignment of Schedules at Newark-Liberty International Airport

AGENCY: Office of the Secretary of Transportation (OST) and Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed reassignment of schedules at Newark Liberty International Airport.

SUMMARY: By this notice, the U.S. Department of Transportation

(Department or DOT), including the Federal Aviation Administration (FAA), provides notice of its intention to approve schedule plans, for a single low-cost carrier (LCC) or ultra-low-cost carrier (ULCC), to operate the 16 peak afternoon and evening runway timings previously approved for operation by Southwest Airlines, Inc. (Southwest) at Newark-Liberty International Airport (EWR or Newark). The Department is seeking comment on the proposed process as well as the proposed eligibility and evaluation criteria described below. Comments are due no later than September 27, 2021.

DATES: Submit comments on or before September 27, 2021.

ADDRESSES: Submit comments to docket DOT–OST–2021–0103.

FOR FURTHER INFORMATION CONTACT: Todd Homan, Director, Office of Aviation Analysis, 1200 New Jersey Avenue SE, Washington, DC 20590 or (202) 366–5903; or Al Meilus, Manager, Slot Administration, AJR–G, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–2822; email *Al.Meilus@faa.gov.*

SUPPLEMENTARY INFORMATION: This notice and the actions the Department is proposing are in response to the Court of Appeals for the D.C. Circuit's decision in *Spirit Airlines* v. *DOT, et al.,* and in furtherance of the whole of government approach to competition embodied in the President's Executive Order 14036.[1]

Background

In 2010, United Airlines, Inc. (United) and Continental Airlines, Inc. (Continental) announced plans to merge. In response to concerns raised by the Department of Justice (DOJ) over the transaction and its potential anticompetitive effects, particularly where Continental was the dominant carrier, United agreed to transfer 36 of its take-off and landing rights (operating authorizations or slots) at EWR to Southwest Airlines, Inc. (Southwest). DOJ found that, ''[t]he transfer of slots and other assets at Newark to Southwest, a low cost carrier that currently has only limited service in the New York metropolitan area and no Newark service, resolves the department's principal competition concerns and will likely significantly benefit consumers on overlap routes as well as on many other routes.'' [2] United and Continental carried out their merger and the post-merger United became the dominant carrier at EWR.

At the time of the merger, EWR was an FAA-designated Level 3 (slot-coordinated) airport, meaning that, in order to perform a take-off or landing during most hours, an air carrier needed an FAA-allocated slot for the time of the operation. Under then-applicable rules, carriers that held slots could trade or lease them to other carriers.[3] In 2016, as the result of improved operational metrics, FAA re-designated EWR a Level 2 (schedule facilitated) airport.[4] Under Level 2, slots are not allocated. Rather, carriers submit schedule requests for the upcoming season to FAA, and FAA works cooperatively with carriers to seek voluntary schedule adjustments from carriers to alleviate delays and other operational issues. Once agreed upon, FAA approves each carrier's schedule. Under Level 2, carriers generally retain schedule priority based on actual operations conducted as approved in the previous corresponding season, but such schedule approvals are not transferrable like slots (*i.e.,* carriers cannot trade or lease their approved schedules to other carriers).

On July 25, 2019, Southwest announced that it would cease operations at EWR effective November 3, 2019.[5] As Southwest could not lease its approved runway timings to another carrier under Level 2 rules, upon its cessation of service, Southwest's approved runway timings reverted to FAA. Sixteen of these operations were in peak afternoon and evening hours (specifically, the period from 14:00–21:59 Eastern Time) at EWR when schedule approvals were generally not otherwise available. These operations were also in hours when approved schedules were generally at or above the 79/hour operational cap imposed by FAA, on average and considering offsets in adjacent periods. In an effort to improve performance at EWR, FAA lowered the scheduling limit effective with the summer 2018 season that commenced in March 2018.[6] Following this change, FAA approved flights above the 79/hour limit only if operated in the previous corresponding season by the same carrier and dating back to the higher limit.

In a letter dated August 12, 2019, the Assistant Attorney General for the Antitrust Division stated that, ''[Southwest's] decision implicates the relief we negotiated with United Airlines as a condition of its merger with Continental in 2010. We are therefore committed to working with the DOT and FAA to evaluate how best to reallocate Southwest's capacity at the airport in a manner consistent with our enforcement decision in that matter.'' The letter goes on to state:

> Those divestitures indeed facilitated important competition at the airport. Southwest used the slots to introduce new low-fare competition to United on multiple routes resulting in substantially lowered fares and increased service . . . Given that United already holds approximately 66% of authorizations at Newark, and that competition for United is already in short supply at the airport (*e.g.,* 81 of 148 routes at the airport are monopoly routes operated by United), we believe the DOT and FAA should seek to resolve the reallocation issue in a way that preserves competition at the airport. To do otherwise would undermine the goal of the remedy the DOJ negotiated with United as a condition of its merger with Continental.

On October 2, 2019, as part of a routine scheduling notice, FAA announced that it would not replace or ''backfill'' all of Southwest's operations in the EWR schedule to the extent such operations exceeded the scheduling limits for purposes of the summer 2020 scheduling season.[7] However, FAA also stated that it planned to assess the impacts of the peak period Southwest reductions and other schedule changes at EWR on performance, as well as the impacts on competition in close coordination with the Office of the Secretary of Transportation, in the upcoming Winter 2019/2020 and Summer 2020 scheduling seasons.[8]

[1] See Executive Order issued July 9, 2021, available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.*

[2] ''United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns'', United States Department of Justice Press Release, August 27, 2010, *https://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response.*

[3] *See* Operating Limitations at Newark Liberty International Airport, 74 FR 51648 (Oct. 7, 2009).

[4] *See* ''Change of Newark Liberty International Airport (EWR) Designation'', 81 FR 19861, April 6, 2016.

[5] ''Southwest Reports Record Second Quarter Revenues And Earnings Per Share'', Southwest Airlines Press Release, July 25, 2019, *https://www.swamedia.com/releases/release-424146113c6f2a2eebe84fb61d59a4ff-southwest-reports-record-second-quarter-revenues-and-earnings-per-share?query=newark.*

[6] *See* Notice of Submission Deadline for the Summer 2018 Scheduling Season, 82 FR 45938 (Oct. 2, 2017). The winter season limits were already at 79 per hour based on winter season capacity analyses. *See also* Notice of Submission Deadline for the Winter 2018 Scheduling Season, 83 FR 21335 (May 9, 2018). The FAA had also previously targeted a scheduling limit of 79 operations per hour in the initial transition from Level 3 slot controls to Level 2 schedule facilitation at EWR.

[7] See ''Submission Deadline for Schedule Information for Newark Liberty International Airport for the Summer 2020 Scheduling Season'', 84 FR 52580, October 2, 2019, at 52582.

[8] *Ibid.*

Ultimately, for the 36 slots that were the subject of the 2010 United/Continental divestiture, FAA reallocated 20 of Southwest's operations, but did not ''backfill'' 16 peak-hour operations.

Spirit Airlines sought review by the U.S. Court of Appeals for the D.C. Circuit, challenging FAA's decision not to backfill the 16 peak-hour operations, claiming that FAA's decision was arbitrary and capricious because FAA failed to consider the effect of its decision on competition and did not explain why it could not use a less burdensome tool (such as a schedule reduction meeting under 49 U.S.C. 41722), and lacked substantial evidence for its decision. On May 21, 2021, the D.C. Circuit vacated FAA's decision and remanded the matter to the agency to address the issue of competition.[9] In doing so, the D.C. Circuit stated that ''the agency . . . ignored information about the competitive situation at Newark'' and that the ''record provides precious little insight into whether or how the FAA approached the competition problem.'' [10] The D.C. Circuit also highlighted the fact that the agency did not discuss ''why it prefers miniscule reductions in delay more than competition that could lower fares for passengers.'' [11] Finally, the Court cautioned that ''[i]f the FAA again decides to retire Southwest's peak-period slots, it should be prepared to provide a reasoned explanation for preferring to cut travel time an average of one minute rather than to cut the price of flying by as much as 45 percent on routes that would gain a second carrier.'' [12]

Demand and Congestion at EWR

Consistent with the delay modeling results included in the administrative record in *Spirit Airlines* v. *DOT, et al.* (D.C. Cir. 19–1248), with demand at pre-pandemic levels, FAA estimates that ''backfilling'' the 16 runway timings previously held by Southwest in peak afternoon and evening periods would increase delay at EWR by 5.9%, or by an average of 1.2 minutes per operation throughout the day. However, since the 16 runway timings are all in the peak afternoon and evening period; the added delay would be concentrated in these hours.

EWR and LaGuardia Airport (LGA) are the two most delayed airports in the National Airspace System (NAS) as reported through Aviation System Performance Metrics (ASPM) delays compared to scheduled gate departures/arrivals. Congestion at EWR should be considered in context against the other NYC area airports as well as Philadelphia International Airport (PHL), airports within similar operational and passenger catchment areas.[13] Compared to LGA, EWR has a slightly higher completion rate,[14] but also a higher rate of delayed operations. In fiscal year (FY) 2019, EWR's completion rate (97.0%) was lower than the NAS average, but similar to the completion rate at LGA (96.8%) and PHL (97.4%). Also in FY 2019, EWR's rate of delayed flights was 29.4% compared to schedule for gate departures and gate arrivals, which is higher than LGA (26.1%), John F. Kennedy International Airport (22.5%), and PHL (20.4%).[15]

The FAA made significant progress smoothing and balancing the schedule at EWR under the Level 2 construct just prior to the COVID–19 pandemic. The sudden, drastic disruption caused by COVID–19 affects the analysis and relevant long-term effects of operational, performance, and demand-related changes at EWR, including those changes resulting from Southwest leaving the airport. Access to EWR and the New York City area generally remains coveted, and schedule requests for flights at EWR have exceeded the desired scheduling limits in multiple hours. While the FAA would accommodate the reassignment of the 16 peak afternoon and evening operations as proposed in this notice, the FAA would continue to seek voluntary cooperation from all carriers to adjust schedules at EWR in an effort to manage the operation within the desired scheduling limits.

FAA notes that the COVID–19 public health emergency has created uncertainty about the ultimate recovery of demand back to pre-COVID levels or the potential for a ''new normal'' in demand levels at EWR as the public's travel patterns have, and continue, to evolve, and carriers restructure their networks to accommodate this dynamic. Given this evolving situation, FAA will continue to monitor performance at EWR and review its capacity evaluation and targeted scheduling limits at EWR in the future. However, at the current time, the desired hourly scheduling limit at EWR remains at 79 operations per hour and 43 operations per half-hour.[16] Based on historical demand and an increase in operations in ''shoulder'' periods adjacent to the busiest hours before the COVID–19 public health emergency, most hours are now at the desired hourly scheduling limits. To help with a balance between arrivals and departures, the desired maximum number of scheduled arrivals or departures, respectively, is 43 in an hour and 24 in a half-hour. This would allow some higher levels of operations in certain periods (not to exceed the hourly limits) and some recovery from lower demand in adjacent periods. FAA will seek to work in coordination with the awarded carrier to adjust schedules within the peak afternoon and evening period, including minor changes between adjacent half hours, in the interest of optimizing efficiency and accommodating the carrier's schedule plans, consistent with the usual Level 2 process.

Proposed Reassignment

As stated above, FAA estimates that, in a pre-COVID–19 environment, reassigning the 16 peak-hour operations would result in additional delays, for all EWR operations, of approximately 1.2 minutes per operation throughout the day. United, by far the largest carrier at EWR by several measures, operates many routes on a monopoly basis. The Department has previously found that introducing LCC services in competition on monopoly routes significantly reduces fares on those routes.[17] One study found that the presence of LCCs and ULCCs causes a decrease in average one-way fares of between $15–$36.[18] Absent introduction of these LCC services, it is highly unlikely that there will be any significant reduction in fares. These potential savings to

[9] *Spirit Airlines Inc.* v. *DOT et al.,* 997 F.3d 1247, 1255 (D.C. Cir. 2021).

[10] *Id.* at 1256.

[11] *Id.*

[12] *Id.* at 1257.

[13] An airport's catchment area is the geographic area from which your airport can reasonably expect to draw commercial air service passengers. *See* ''Defining Your Airport's Catchment Area'' available at: *https://crp.trb.org/acrpwebresource1/defining-your-airports-catchment-area/.*

[14] Completion Rate refers to the percentage of scheduled and/or planned air carrier arrivals that were not cancelled. Calculated as Metric Arrivals/(Metric Arrivals + Cancelled Arrivals). Cancelled Arrivals are determined next day using air carrier flight plan cancellation messages and scheduled flights not flown. Airline Service Quality Performance (ASQP) cancellation data are used when available. *See* ''ASPM Cancellations: Definitions of Variables'' available at: *https://aspm.faa.gov/aspmhelp/index/ASPM_CancellationsDefinitions_of_Variables.html.*

[15] *See* docket for ASPM data.

[16] *See* 86 FR 24448 (May 6, 2021).

[17] *See* ''U.S. DOT/FAA—Notice of a Petition for Waiver and Solicitation of Comments on Grant of Petition with Conditions'', FAA–2010–0109–0097, Jul. 21, 2011, at 33–34.

[18] Wittman, Michael D.; Swelbar, William S. (August 2013). Evolving Trends of U.S. Domestic Airfares: The Impacts of Competition, Consolidation, and Low-Cost Carriers at 20; *see also* Bennett, Randall D.; Craun, James M. (May 1993). The Airline Deregulation Evolution Continues: The Southwest Effect. Office of Aviation Analysis, U.S. Department of Transportation.

consumers are important objectives of the President's Executive Order on competition, particularly in a concentrated market. There are many benefits of competition, including lower fares, more throughput, higher utilization of scarce assets, more opportunities to develop flexible or common use airport facilities, and reduced opportunities for exclusionary behavior such as ''babysitting.'' That will not change unless we introduce the LCC services and at the same time, seek necessary adjustments by incumbent carriers to mitigate the potential delays. The Department believes that the benefits of lower fares significantly outweigh the impacts of additional delays.

Given the court's decision, ongoing competition issues at EWR, and Executive Order 14036, the Department believes that it is necessary to reintroduce the competition that was previously provided by Southwest at EWR even though this will increase delays at EWR. Pursuant to the Department and FAA's authority under 49 U.S.C. 40101, 40103, and 41712, the Department is initiating a proceeding to reassign the 16 peak-hour runway timings at issue. The Department believes that reassigning these schedule plans to operate in the 16-peak hour runway timings, in a manner that would continue to satisfy DOJ's competition remedy related to the United/Continental merger, and as quickly as possible, best satisfies the public interest and addresses the concerns of the D.C. Circuit.

This action is not a routine approval of schedule plans that would typically be handled under FAA's standard schedule facilitation procedures. The Department notes that this proceeding arises out of an unusual circumstance, where Southwest stopped operating at EWR, thus returning a large number of operations that Southwest acquired as a condition of the United-Continental merger. Thus, the Department is treating this matter as the reassignment and continuation of the DOJ-approved competition remedy to the United-Continental merger. As such, the Department proposes to evaluate proposals from eligible carriers that can effectively carry out the goals of that competition remedy, namely to provide price and service competition to United, the dominant hub carrier at EWR, and for FAA to approve the peak-hour schedule plans of the carrier chosen based on that evaluation. In order to maintain the effect of the 2010 competition remedy, the Department has tentatively concluded that the schedule plans to operate in the 16 peak-hour runway timings should be approved as a package to a single carrier able to provide the type and magnitude of competitive discipline at EWR contemplated by the DOJ remedy.

Previously, DOJ found that the divestiture to Southwest of 36 slots at Newark (*i.e.,* United's pre- merger holdings), including the 16 peak afternoon and evening period slots at issue in this notice, resolved its competition concerns with the transaction. By divesting all of the slots to a single carrier with a proven track record and the capability to provide a competitive pattern of frequent service in markets operated by United-Continental, DOJ was able to minimize the number of slots divested while maximizing the competitive impact of the remedy.

Based upon current competitive conditions, the Department finds that, in order to provide price discipline for the services of a hub carrier in particular, the LCC or ULCC approved to operate in the 16 peak-hour runway timings needs to have a sufficient pattern of service to achieve economies of scale in its operations at the airport consistent with its low-cost or low-fare business model, to protect itself from potential anticompetitive behavior from the dominant carrier(s), and to have sufficient incentive and ability to compete head to head with dominant carriers.[19] Furthermore, we have previously found that a single carrier offering a broader competitive alternative to the hub carrier's customer proposition at the airport can extend the benefits of the low-fare service even in markets without LCC or ULCC services by changing passengers' perception of what a fair price is for a particular itinerary.[20] When fares are substantially higher, customers tend to look for cheaper alternatives at other airlines or nearby airports to avoid paying ''above market'' prices. This ''halo effect'' tends to discipline high fares charged by the incumbent even in markets where the LCC does not operate, at the margin.

For these reasons, the Department proposes to approve, as a package to an eligible LCC or ULCC, schedule plans to operate in the 16 peak-hour runway timings previously approved for operation by Southwest. The Department seeks to finalize this process to enable a carrier to begin operations as soon as possible, as early as the start of the Winter 2021/2022 scheduling season. To determine eligibility, the Department is proposing several criteria, described below.

While approving an LCC or ULCC's schedule plans to operate in these 16 peak-hour runway timings is necessary to address ongoing competition issues at EWR, the Department is not concluding by virtue of this process that such action will be sufficient to resolve all of those issues. In addition, the Department notes that, aside from this proceeding to reassign 16 operations historically approved for operation by Southwest, usual policies and procedures for Level 2 schedule facilitation at EWR continue to apply.[21] The FAA intends to provide responses to all pending schedule requests for the Winter 2021/2022 scheduling season as soon as possible following issuance of this notice. Once this reassignment proceeding has been completed, the FAA will take action to approve the 16 additional operations for the benefit of the awarded carrier.

Eligibility and Evaluation Criteria

In airline transactions involving constrained markets, where market concentration is at issue, the Department has found that LCCs and ULCCs have the greatest competitive impact upon entry by their ability to dramatically lower fares and increase the volume of passengers in a market.[22] In the 2010 United/Continental divestiture, DOJ was satisfied that its competition concerns had been addressed by the transfer to Southwest, a LCC, of United's EWR slots and other assets.

Given competitive conditions at Newark—including United's ongoing dominance at EWR and the relatively small number of operating authorizations being reassigned—the Department tentatively believes that continuing to limit eligibility to LCC or ULCC carriers would best serve the public interest by providing the

[19] ''Restricting eligibility to these . . . carriers would assist new or small non-aligned carriers in defending themselves against increasingly dominant competitors, which, with the benefit of additional slot interests, could pursue anticompetitive strategies such as significantly increasing existing services in any new entrant/limited incumbent/low-cost/non-aligned carrier market.'' Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 FR 7306, February 18, 2010 at 7310.

[20] *See* Bennett, Randall D.; Craun, James M. (May 1993). The Airline Deregulation Evolution Continues: The Southwest Effect. Office of Aviation Analysis, U.S. Department of Transportation; and Wittman, Michael D.; Swelbar, William S. (August 2013). Evolving Trends of U.S. Domestic Airfares: The Impacts of Competition, Consolidation, and Low-Cost Carriers.

[21] *See e.g.,* Notice of Submission Deadline for Winter 2021/2022 Scheduling Season, 86 FR 24428 (May 6, 2021).

[22] *See* ''Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport'', 76 FR 63702, October 13, 2011 at 63705, and, Order 2016–11–2 at 21.

maximum level of competition with the available public assets.

In determining which LCC or ULCC would provide the maximum competition, the Department tentatively proposes to consider, among other factors, carriers' business model and track record to ensure that they have the ability and stamina to provide the level of competition required. The business model and track record will be determined by analysis of revenue, traffic, and schedule data. More specifically, the Department will consider:

- Business model and product offering that allow the carrier to effectively compete, including the extent to which offering low fares to large numbers of travelers is core to its business proposition across markets;
- Record of entering and effectively competing in markets like those served by dominant carrier(s) at Newark;
- Staying power and track record in highly competitive markets, especially vis-à-vis the specific hub carrier and at network carrier hubs and focus cities where the competitive responses from incumbent airlines to new entry by price competitors may be particularly aggressive; and
- Ability to appeal to a broad cross section of passengers by offering a competitive schedule with (at least) minimum levels of daily and weekly frequency appropriate for the market(s) at issue, along with reasonably competitive onboard products and services and the ability to deliver them to customers consistently over time.

The Department tentatively proposes to evaluate eligible carriers based on the above criteria.

Comments Requested

The Department requests comments on various aspects of the proposed process outlined in this notice. Specifically, the Department seeks comments on its tentative decision to approve schedule plans, for a single carrier, to operate in the 16 peak-hour runway timings as soon as possible; its tentative decision to limit eligibility to LCC and ULCC carriers; and its proposed evaluation criteria. The Department will consider comments outside of the scope of this request as nonresponsive. Comments must be filed in this docket and are due not later than September 27, 2021.

Since the issuance of the D.C. Circuit's decision, the Department has received letters from interested stakeholders. Any correspondence related to the specific issues discussed in this notice have been included in the docket.

The Department will consider all responsive comments received and issue a further notice finalizing its decision and soliciting proposals from eligible carriers. If no responsive comments are received, the Department may proceed directly to issuing a notice requesting proposals and providing instruction for doing so.[23]

Issued in Washington, DC, on September 16, 2021.

Carol Annette Petsonk,

Deputy Assistant Secretary for Aviation and International Affairs, U.S. Department of Transportation.

Virginia T. Boyle,

Vice President, System Operations Services, Federal Aviation Administration.

[FR Doc. 2021–20399 Filed 9–16–21; 4:15 pm]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final State Agency Actions Under 23 U.S.C. 327 on I–17, Anthem Way to Jct. SR 69 in Maricopa County and Yavapai County, AZ

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The FHWA, on behalf of the Arizona Department of Transportation (ADOT), is issuing this notice to announce actions taken by ADOT and other relevant Federal agencies that are final. The actions relate to the Categorical Exclusion (CE) d-list action for—Other qualified project individually documented and approved under paragraph (d)—for the proposed project I–17, Anthem Way to Jct. SR 69 in Maricopa and Yavapai County, AZ. The actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA, on behalf of ADOT, is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions with authority on the highway project will be barred unless the claim is filed on or before February 17, 2022. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Steven Olmsted, NEPA Assignment Manager, Environment Planning, Arizona Department of Transportation, 205 S 17th Avenue, MD EM02, Phoenix, Arizona 85007; telephone: (480) 202–6050, email: *solmsted@azdot.gov.* The Arizona Department of Transportation normal business hours are 8:00 a.m. to 4:30 p.m. (Mountain Standard Time).

You may also contact: Mr. Paul O'Brien, Environmental Planning Administrator, Arizona Department of Transportation, 205 S 17th Avenue, MD EM02, Phoenix, Arizona 85007; telephone: (480) 356–2893, email: *POBrien@azdot.gov.*

SUPPLEMENTARY INFORMATION: Effective April 16, 2019, the FHWA assigned and ADOT assumed environmental responsibilities for this project pursuant to 23 U.S.C. 327 and a Memorandum of Understanding executed by FHWA and ADOT.

Notice is hereby given that ADOT and other relevant Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following project in the State of Arizona: I–17, Anthem Way to Jct. SR 69 in Maricopa and Yavapai County, AZ. The actions by ADOT and other relevant Federal agencies and the laws under which such actions were taken, are described in the CE d-list action for—Other qualified project individually documented and approved under paragraph (d)—approved on May 26, 2021, and in other documents in the administrative record. The CE and other project records are available by contacting ADOT at the addresses provided above. Project information is also available online at: *https://azdot.gov/projects/central-district-projects/i-17-widening-and-improvement-project-anthem-way-sunset-point.*

This notice applies to all ADOT and other relevant Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the U.S. Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

[23] The Department will solicit proposals on a confidential basis given the sensitive commercial information that they are likely to contain.

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Water:* Clean Water Act 33 U.S.C. 1251–1387.

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: September 13, 2021.

Karla S. Petty,

Arizona Division Administrator, Phoenix, Arizona.

[FR Doc. 2021–20131 Filed 9–17–21; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2021–0082]

Draft General Conformity Determination for the California High-Speed Rail System Burbank to Los Angeles Section

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice; request for comment.

SUMMARY: FRA is issuing this notice to advise the public that a draft General Conformity Determination for the Burbank to Los Angeles Section of the California High-Speed Rail (HSR) System is available for public and agency review and comment.

DATES: Comments must be received on or before October 20, 2021.

ADDRESSES: Comments related to Docket No. FRA–2021–0082 may be submitted by going to *http://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number (FRA–2021–0082). All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information. Please see the *Privacy Act Statement* heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read the draft General Conformity Determination, background documents, or comments received, go to *https://www.regulations.gov* and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Andréa Martin, Senior Environmental Protection Specialist, Office of Railroad Policy and Development (RPD), telephone: (202) 493–6201, email: *Andrea.Martin@dot.gov;* or Marlys Osterhues, Chief Environment and Corridor Planning, RPD, telephone: (202) 493–0413, email: *Marlys.Osterhues@dot.gov.*

SUPPLEMENTARY INFORMATION:

Privacy Act Statement: FRA will post comments it receives, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, inclusion of names is completely optional. Whether commenters identify themselves or not, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Background: The California High-Speed Rail Authority (CHSRA) is advancing the environmental review of the Burbank to Los Angeles Section (Project) of the California HSR System pursuant to 23 U.S.C. 327, under which it has assumed FRA's environmental review responsibilities. However, under Section 327, FRA remains responsible for making General Conformity Determinations under the Clean Air Act. This draft General Conformity Determination documents FRA's evaluation of the Burbank to Los Angeles Section, consistent with the relevant section of the Clean Air Act and its implementing regulations.

FRA's analysis of the Project's potential emissions, completed in close collaboration with CHSRA and informed by CHSRA's coordination with U.S. Environmental Protection Agency, South Coast Air Quality Management District (SCAQMD) and the California Air Resources Board, found that Project-generated emissions will either be offset for its construction phase, or will be less than zero for its operational phase; and therefore, the Action's emissions can be accommodated in the Statewide Implementation Plan (SIP) for the South Coast Air Basin. FRA concludes that the Project, as designed, will conform to the approved SIP, based on a commitment from the CHSRA that construction-phase NO_X emissions will be offset consistent with the applicable federal regulations in the SCAQMD.

Next Steps

The draft General Conformity Determination for the California High-Speed Rail System, Burbank to Los Angeles Section is being issued for public review and comment for 30-days at Docket No. FRA–2021–0082. Comments related to Docket No. FRA–2021–0082 may be submitted by going to *http://www.regulations.gov* and following the online instructions for submitting comments. Although CHSRA is assisting FRA by disseminating notice of the availability of the draft General Conformity Determination through its usual outreach methods, CHSRA is not accepting comments on behalf of FRA. FRA cannot ensure consideration of any comment that is not submitted via *http://www.regulations.gov.* FRA will consider all relevant comments it

receives before issuing a final General Conformity Determination.

Issued in Washington, DC.

Jamie P. Rennert,

Director, Office of Infrastructure Investment, Federal Railroad Administration.

[FR Doc. 2021–20192 Filed 9–17–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Fiscal Year 2021 Competitive Funding Opportunity; Grants for Buses and Bus Facilities Program

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of Funding Opportunity (NOFO).

SUMMARY: The Federal Transit Administration (FTA) announces the opportunity to apply for approximately $409.59 million in fiscal year (FY) 2021 funds under the Grants for Buses and Bus Facilities Program (Federal Assistance Listing #20.526). As required by Federal public transportation law and subject to funding availability, funds will be awarded competitively to assist in the financing of capital projects to replace, rehabilitate, purchase or lease buses and related equipment, and to rehabilitate, purchase, construct or lease bus-related facilities. Projects may include costs incidental to the acquisition of buses or to the construction of facilities, such as the costs of related workforce development and training activities, and project administration expenses. FTA may award additional funds if they are made available to the program prior to the announcement of project selections.

DATES: Complete proposals must be submitted electronically through the *GRANTS.GOV* ''APPLY'' function by 11:59 p.m. Eastern Time on November 19, 2021. Prospective applicants should initiate the process by promptly registering on the *GRANTS.GOV* website to ensure completion of the application process before the submission deadline. Instructions for applying can be found on FTA's website at *http://transit.dot.gov/howtoapply* and in the ''FIND'' module of *GRANTS.GOV.* The *GRANTS.GOV* funding opportunity ID is FTA 2021–008–TPM–Bus. Mail and fax submissions will not be accepted.

FOR FURTHER INFORMATION CONTACT: Thomas Wilson, FTA Office of Program Management, 202–366–5279, or *thomas.wilson@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

A. Program Description

Federal public transportation law (49 U.S.C. 5339(b)) authorizes FTA to award grants for the Grants for Buses and Bus Facilities Program through a competitive process, as described in this notice. Grants under this program are for capital projects to replace, rehabilitate, purchase, or lease buses and related equipment, or to rehabilitate, purchase, construct, or lease bus-related facilities.

FTA will evaluate projects based on how they will address significant repair and maintenance needs and improve the safety of transit systems through timely and efficient investment in public transportation. FTA may prioritize projects that support FTA's strategic goals and objectives.

This program supports President Biden's Build Back Better initiative to mobilize American ingenuity to build a modern infrastructure and an equitable, clean energy future. In addition, this NOFO will advance the goals of the President's January 27, 2021, Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, and has the potential to enhance environmental stewardship and community partnerships, consistent with the goals of Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.

B. Federal Award Information

Federal public transportation law (49 U.S.C. 5338(a)(2)(M)) authorizes $289,044,179 in FY 2021 funds for the Grants for Buses and Bus Facilities Program. The Consolidated Appropriations Act, 2021, appropriated an additional $125,000,000 for the Grants for Buses and Bus Facilities Program. After the mandatory oversight takedown of $4,455,331, FTA is announcing the availability of $409,588,848 for the Grants for Buses and Bus Facilities Program through this notice. In FY 2020, the program received applications for 282 projects requesting a total of $1.8 billion. Ninety-six projects were funded at a total of $464 million.

As required by Federal public transportation law at 49 U.S.C. 5339(b)(5), a minimum of 10 percent of the amount awarded under the Grants for Buses and Bus Facilities Program will be awarded to projects located in rural areas. As required by 49 U.S.C. 5339(b)(8), no single grant recipient will be awarded more than 10 percent of the amount made available. FTA may further cap the amount a single recipient or State may receive as part of the selection process. There is no minimum grant award amount. FTA intends to fund as many meritorious projects as possible.

C. Eligibility Information

1. Eligible Applicants

Eligible applicants include designated recipients that allocate funds to fixed route bus operators, States or local governmental entities that operate fixed route bus service, and Indian tribes. Eligible subrecipients include all otherwise eligible applicants and also private nonprofit organizations engaged in public transportation.

States may submit a statewide application on behalf of public agencies or private nonprofit organizations engaged in public transportation in rural areas or for other areas to which a State allocates funds. Except for projects proposed by Indian tribes, all proposals for projects in rural (non-urbanized) areas must be submitted by a State, either individually or as a part of a statewide application. States and other eligible applicants also may submit consolidated proposals for projects in urbanized areas. The submission of a statewide or consolidated urbanized area application shall not preclude the submission and consideration of any application from other eligible recipients in an urbanized area in a State. Proposals may contain projects to be implemented by the recipient or its subrecipients.

To be considered eligible, applicants must be able to demonstrate the requisite legal, financial, and technical capabilities to receive and administer Federal funds under this program.

2. Cost Sharing or Matching

The maximum Federal share for projects selected under the Grants for Buses and Bus Facilities Program is 80 percent of the net project cost (*i.e.,* the non-Federal amount must be at least 20 percent of the net project cost, not 20 percent of the requested grant amount), unless any of the following exceptions applies:

The maximum Federal share is 85 percent of the net project cost of

acquiring vehicles (including clean-fuel or alternative fuel vehicles) for purposes of complying with or maintaining compliance with the Clean Air Act (CAA) or the Americans with Disabilities Act (ADA) of 1990.

The maximum Federal share is 90 percent of the net project cost of acquiring, installing or constructing vehicle-related equipment or facilities (including clean fuel or alternative-fuel vehicle-related equipment or facilities) for purposes of complying with or maintaining compliance with the CAA or ADA. The award recipient must itemize the cost of specific, discrete, vehicle-related equipment associated with compliance with the CAA or ADA to be eligible for the maximum 90 percent Federal share for these costs.

Eligible sources of non-Federal match include the following: Cash from non-Government sources other than revenues from providing public transportation services; revenues derived from the sale of advertising and concessions; amounts received under a service agreement with a State or local social service agency or private social service organization; revenues generated from value capture mechanisms; or funds from an undistributed cash surplus, replacement or depreciation cash fund or reserve, or new capital. In addition, transportation development credits or documentation of in-kind match may substitute for cash match if identified in the application.

If an applicant proposes a Federal share greater than 80 percent, the application must clearly explain why the project is eligible for the proposed Federal share.

3. Eligible Projects

Eligible projects are capital projects to replace, rehabilitate, purchase, or lease buses, vans, or related equipment; or to rehabilitate, purchase, construct, or lease bus-related facilities. A single application may include both vehicle and facility components, along with associated equipment and workforce development activities.

Recipients are permitted to use up to 0.5 percent of their requested grant award for workforce development activities eligible under Federal public transportation law (49 U.S.C. 5314(b)) and an additional 0.5 percent for costs associated with training at the National Transit Institute to pay not more than 80 percent of the cost of such activities (49 U.S.C. 5314(b)(4) and 49 U.S.C. 5314(c)(4)(A)). Applicants must identify the proposed use of funds for these activities in the project proposal and identify them separately in the project budget.

D. Application and Submission Information

1. Address To Request Application Package

A complete proposal submission consists of two forms: The SF–424 Application for Federal Assistance (downloaded from *GRANTS.GOV*) and the supplemental form for the FY 2021 Grants for Buses and Bus Facilities Program (downloaded from *GRANTS.GOV* or the FTA website at *www.transit.dot.gov/busprogram*).

2. Content and Form of Application Submission

Application submissions must include both the SF–424 Application for Federal Assistance and the FY 2021 Grants for Buses and Bus Facilities Program supplemental form. The supplemental form and any supporting documents must be attached to the ''Attachments'' section of the SF–424.

FTA will accept only one supplemental form per SF–424 submission. FTA encourages States and other applicants to consider submitting a single supplemental form that includes multiple activities to be evaluated as a consolidated proposal. If a State or other applicant chooses to submit separate proposals for individual consideration by FTA, each proposal must be submitted using a separate SF–424 and supplemental form.

Applicants may attach additional supporting information to the SF–424 submission, including but not limited to letters of support, project budgets, fleet status reports, or excerpts from relevant planning documents. Supporting documentation must be described and referenced by file name in the appropriate response section of the supplemental form, or it may not be reviewed.

A complete application must include responses to all sections of the SF–424 Application for Federal Assistance and the supplemental form, unless designated as optional. The information on the supplemental form will be used to determine applicant and project eligibility for the program, and to evaluate the proposal against the selection criteria described in part E of this notice. Information such as applicant name, Federal amount requested, local match amount, and description of areas served may be requested in varying degrees of detail on both the SF–424 and the supplemental form. Applicants must fill in all fields unless stated otherwise on the forms. Applicants should not place ''N/A'' or ''refer to attachment'' in lieu of typing in responses in the field sections. If information is copied into the supplemental form from another source, applicants should verify that pasted text is fully captured on the supplemental form and has not been truncated by the character limits built into the form. Applicants should use both the ''Check Package for Errors'' and the ''Validate Form'' validation buttons on both forms to check all required fields on the forms, and ensure that the Federal and non-Federal amounts specified are consistent.

The SF–424 Mandatory Form and the Supplemental Form will prompt applicants for information including:

- Applicant name
- Unique Entity Identifier/Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number
- Key contact information (including contact name, address, email address, and phone)
- A description, both quantative and qualitative, of the area and population served by the applicant, including ridership demographic information and the type of service provided
- Congressional district(s) where project will take place
- Project information (including title, an executive summary, and type)
- A detailed description of the need for the project
- A detailed description on how the project will support the Buses and Bus Facilities Program's objectives
- Evidence that the project is consistent with local and regional planning objectives
- Evidence that the applicant can provide the local cost share
- A description of the technical, legal and financial capacity of the applicant
- A detailed project budget
- An explanation of the scalability of the project
- Details on the local matching funds
- A detailed project timeline

Failure to submit the information as requested can delay review or disqualify the application.

3. Unique Entity Identifier and System for Award Management (SAM)

Each applicant is required to: (1) Be registered in SAM before submitting an application; (2) provide a valid unique entity identifier in its application; and (3) continue to maintain an active SAM registration with current information at all times during which the applicant has an active Federal award or an application or plan under consideration by FTA. FTA may not make an award until the applicant has complied with all applicable unique entity identifier and SAM requirements. If an applicant

has not fully complied with the requirements by the time FTA is ready to make an award, FTA may determine that the applicant is not qualified to receive an award and use that determination as a basis for making a Federal award to another applicant. These requirements do not apply if the applicant: (1) Is an individual, per 2 CFR 25.110(b); or (2) has an exception approved by FTA or the U.S. Office of Management and Budget under 2 CFR 25.110(c) or (d). SAM registration takes approximately 3–5 business days, but FTA recommends allowing ample time, up to several weeks, for completion of all steps. For additional information on obtaining a unique entity identifier, please visit *www.sam.gov.*

4. Submission Dates and Times

Project proposals must be submitted electronically through *GRANTS.GOV* by 11:59 p.m. Eastern on November 19, 2021. Mail and fax submissions will not be accepted.

FTA urges applicants to submit applications at least 72 hours prior to the due date to allow time to correct any problems that may have caused either *GRANTS.GOV* or FTA systems to reject the submission. Proposals submitted after the deadline will be considered only under extraordinary circumstances not under the applicant's control. Deadlines will not be extended due to scheduled website maintenance. *GRANTS.GOV* scheduled maintenance and outage times are announced on the *GRANTS.GOV* website.

Within 48 hours after submitting an electronic application, the applicant should receive an email message from *GRANTS.GOV* with confirmation of successful transmission to *GRANTS.GOV.* If a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the email notice, and resubmit before the submission deadline. If making a resubmission for any reason, applicants must include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

Applicants are encouraged to begin the process of registration on the *GRANTS.GOV* site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. Registered applicants may still be required to take steps to keep their registration up to date before submissions can be made successfully: (1) Registration in the System for Award Management (SAM) is renewed annually; and, (2) persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in *GRANTS.GOV* by the AOR to make submissions.

5. Funding Restrictions

Refer to Section C.3., Eligible Projects, for information on activities that are allowable in this grant program. Allowable direct and indirect expenses must be consistent with the Governmentwide Uniform Administrative Requirements and Cost Principles (2 CFR part 200) and FTA Circular 5010.1E.

Funds awarded under this notice cannot be used to reimburse applicants for expenses incurred prior to the pre-award authority effective date. FTA will issue pre-award authority to incur costs for selected projects beginning on the date that project selections are announced. FTA does not provide pre-award authority for competitive funds until projects are selected, and even then there are Federal requirements that must be met before costs are incurred. FTA will issue specific guidance to awardees regarding pre-award authority at the time of selection. For more information about FTA's policy on pre-award authority, please see the most recent Apportionment Notice on FTA's website.

Funds awarded under this notice will remain available for obligation for three Federal fiscal years, not including the year in which the funds are allocated to projects.

6. Other Submission Requirements

All applications must be submitted via the *Grants.Gov* website. FTA does not accept applications on paper, by fax machine, by email, or other means. For information on application submission requirements, please see Section D.1., Address to Request Application Package.

E. Application Review Information

1. Criteria

FTA will evaluate project proposals for the Grants for Buses and Bus Facilities Program based on the criteria described in this notice. Projects will be evaluated primarily on the responses provided in the supplemental form. Additional information may be provided to support the responses; however, any additional documentation must be directly referenced on the supplemental form, including the file name where the additional information can be found.

Applicants are encouraged to identify scaled funding options in case insufficient funding is available to fund a project at the full requested amount. If an applicant indicates that a project is scalable, the applicant must provide an appropriate minimum funding amount that will fund an eligible project that achieves the objectives of the program and meets all relevant program requirements. The applicant must provide a clear explanation of how the project budget would be affected by a reduced award. FTA may award a lesser amount whether or not a scalable option is provided.

If an applicant is proposing to acquire autonomous vehicles or other innovative motor vehicle technology, the application should demonstrate that all vehicles will comply with applicable safety requirements, including those administered by the National Highway Traffic Safety Administration (NHTSA) and Federal Motor Carrier Safety Administration (FMCSA). Specifically, the application should show that vehicles acquired will comply with applicable Federal Motor Vehicle Safety Standards (FMVSS) and Federal Motor Carrier Safety Regulations (FMCSR). If the vehicles may not comply, the application should either (1) show that the vehicles and their proposed operations are within the scope of an exemption or waiver that has already been granted by NHTSA, FMCSA, or both agencies or (2) directly address whether the acquisition will require exemptions or waivers from the FMVSS, FMCSR, or any other regulation and, if the acquisition will require exemptions or waivers, present a plan for obtaining them.

a. Demonstration of Need

Applications will be evaluated based on the quality and extent to which they demonstrate how the proposed project will address an unmet need for capital investment in bus vehicles or supporting facilities. For example, an applicant may demonstrate an excessive reliance on vehicles that are beyond their intended service life, insufficient maintenance facilities due to size or condition, a vehicle fleet that is insufficient to meet current ridership demands, or passenger facilities that are insufficient for their current use. Applicants should address whether the project represents a one-time or periodic need that cannot reasonably be funded from FTA formula program allocations and State or local resources. As a part of the response for demonstration of need, applicants should provide the following information.

For bus projects (replacement, rehabilitation or expansion): Applicants must provide information on the age

and mileage, condition, and performance of the assets to be replaced or rehabilitated by the proposed project. For service expansion requests, applicants must provide information on the proposed service expansion and for the reason that transit riders and the community need the new service. For all vehicle projects, the proposal must address how the project conforms to FTA's spare ratio guidelines.

For bus facility and equipment projects (replacement, rehabilitation, or expansion): Applicants must provide information on the age and condition of the asset to be rehabilitated or replaced relative to its useful life. For expansion requests, applicants must provide information on the proposed expansion and the reason that transit riders and the community need the expansion.

b. Demonstration of Benefits

Applications will be evaluated based on how well they describe how the proposed project will improve the condition of, or otherwise modernize, the transit system; improve the reliability of transit service for its riders; or enhance access and mobility within the service area.

System Condition: FTA will evaluate the potential for the project to improve the condition of the transit system by repairing or replacing assets that are in poor condition or have surpassed their minimum or intended useful life benchmarks, lowering the average age of vehicles in the fleet, or reducing the cost of maintaining outdated vehicles, facilities and equipment.

Service Reliability: FTA will evaluate the potential for the project to reduce the frequency of breakdowns or other service interruptions caused by the age and condition of the agency's bus fleet. Applicants should document their current service reliability metrics and benchmark goals, including their strategy for improving reliability with or without the award of Bus and Bus Facilities Program funds.

Enhanced Access and Mobility: FTA will evaluate the potential for the project to improve access and mobility for the transit riding public, such as through increased reliability, improved headways, creation of new transportation choices, or eliminating gaps in the current route network. Proposed benefits should be based on documented ridership demand and be well-described or documented through a study or route planning proposal.

c. Planning and Local and Regional Prioritization

Applicants must demonstrate how the proposed project will be consistent with local and regional long-range planning documents and local government priorities. This will involve assessing whether the project is consistent with the transit priorities identified in the long range plan, contingency or illustrative projects included in that plan, or the locally developed human services public transportation coordinated plan. Applicants are not required to submit copies of such plans, but should describe how the project will support regional goals.

Applicants may also address how the proposed project will impact overall system performance, asset management performance or specific performance measures tracked and monitored by the applying entity to demonstrate how the proposed project will address local and regional planning priorities.

Evidence of additional local or regional prioritization (*e.g.,* Statewide Transportation Improvement Plan and Long Range Transportation Plan) should include letters of support for the project from local government officials, public agencies (*e.g.,* Metropolitan Planning Organizations), or non-profit or other private sector partners.

d. Financial Commitment

Applicants must identify the source of the non-Federal cost share and describe whether such funds are currently available for the project or will need to be secured if the project is selected for funding. FTA will consider the availability of the non-Federal cost share as evidence of financial commitment to the project. Additional consideration will be given to those projects for which non-Federal funds have already been made available or reserved. Applicants should submit evidence of the availability of funds for the project, for example by including a board resolution, letter of support from the State, a budget document highlighting the line item or section committing funds to the proposed project, or other documentation of the source of non-Federal funds.

e. Project Implementation Strategy

Projects will be evaluated based on the extent to which the project is ready to implement within a reasonable period of time and whether the applicant's proposed implementation plans are reasonable and complete.

In assessing whether the project is ready to implement within a reasonable period of time, FTA will consider whether the project qualifies for a categorical exclusion, or whether the required environmental work has been initiated or completed for projects that require an environmental assessment or environmental impact statement under the National Environmental Policy Act of 1969 (NEPA). As such, applicants should submit information describing the project's anticipated path and timeline through the environmental review process.

The proposal must also state whether grant funds can be obligated within 12 months from time of award, and indicate the timeframe under which the Metropolitan Transportation Improvement Program or Statewide Transportation Improvement Program can be amended to include the proposed project. Additional consideration will be given to projects for which grant funds can be obligated within 12 months of the time of award.

In assessing whether the proposed implementation plans are reasonable and complete, FTA will review the proposed project implementation plan, including all necessary project milestones and the overall project timeline. For projects that will require formal coordination, approvals, or permits from other agencies or project partners, the applicant must demonstrate coordination with these organizations and their support for the project, such as through letters of support.

f. Technical, Legal, and Financial Capacity

Applicants must demonstrate that they have the technical, legal, and financial capacity to undertake the project. FTA will review relevant oversight assessments and records to determine whether there are any outstanding legal, technical or financial issues with the applicant that would affect the outcome of the proposed project. Applicants with outstanding legal, technical or financial compliance issues from an FTA compliance review or Federal Transit grant-related Single Audit finding must explain how corrective actions taken will mitigate negative impacts on the proposed project.

2. Review and Selection Process

In addition to other FTA staff that may review the proposals, a technical evaluation committee will perform an administrative and merit evaluation of proposals based on the published evaluation criteria. Members of the technical evaluation committee and other FTA staff may request additional information from applicants, if necessary.

After applying the above criteria, and in support of Executive Order 14008, FTA will give priority consideration to projects that support the government-

wide Justice40 Initiative with the goal of delivering 40 percent of the overall benefits of relevant Federal investments to disadvantaged communities. For the purposes of the Justice40 Initiative, a community is either a group of individuals living in geographic proximity to one another, or a geographically dispersed set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions. Furthermore, to determine whether a specific community is disadvantaged, factors include, but are not limited to, the following variables: Low income, high and/or persistent poverty; high unemployment and underemployment; racial and ethnic segregation; linguistic isolation; high housing cost burden and substandard housing; distressed neighborhoods; high transportation cost burden and/or low transportation access; transit dependency associated with income, disability, or lack of access to a private automobile; disproportionate environmental burden and high cumulative impacts; limited water and sanitation access and affordability; disproportionate climate impacts; and high energy cost burden and low energy access. If a project supports the Justice40 Initiative, the applicant should state the community definition used, including ridership demographic information relevant to the Justice40 definition of disadvantaged community, the variable(s) considered, and what immediate and long-term benefits will be provided by the project request. In support of the Justice40 Initiative, the applicant also should provide evidence of strategies that the applicant has used in the planning process to seek out and consider the needs of those traditionally disadvantaged and underserved by existing transportation systems, such as low-income and minority households. Examples should include, the number of meetings held, including a description of the audience of each meeting and documentation for how the input was considered for the proposed project. Applicants are encouraged to contact FTA if they have any questions or feedback on the implementation of the Justice40 Initiative.

In further support of Executive Order 14008, FTA will give priority consideration to applications that are expected to create significant community benefits relating to the environment, including those projects that incorporate low or no emission technology or specific elements to address greenhouse gas emissions and climate change impacts. FTA encourages applicants to demonstrate whether they have considered climate change and environmental justice in terms of the transportation planning process or anticipated design components with outcomes that address climate change (*e.g.,* resilience or adaptation measures). The application should describe what specific climate change or environmental justice activities have been incorporated, including whether a project supports a Climate Action Plan, whether an equitable development plan has been prepared, and whether tools such as EPA's EJSCREEN have been applied in project planning. The application should also describe specific and direct ways the project will mitigate or reduce climate change impacts including any components that reduce emissions, promote energy efficiency, incorporate electrification or low emission or zero emission vehicle infrastructure, increase resiliency, or recycle or redevelop existing infrastructure.

FTA also will give priority consideration to applications that encourage racial equity in two areas: (1) Planning and policies related to racial equity and overcoming barriers to opportunity; and (2) project investments that either proactively address racial equity and barriers to opportunity, including automobile dependence as a form of barrier, or redress prior inequities and barriers to opportunity. This objective has the potential to enhance environmental stewardship and community partnerships, and reflects Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.

FTA encourages the applicant to include sufficient information to evaluate how the applicant will advance racial equity and address barriers to opportunity. The applicant should describe any transportation plans or policies related to racial equity and barriers to opportunity they are implementing or have implemented in relation to the proposed project, along with the specific project investment details necessary for FTA to evaluate if the investments are being made either proactively to advance racial equity and address barriers to opportunity or redress prior inequities and barriers to opportunity. All project investment costs for the project that are related to racial equity and barriers to opportunity should be summarized.

In determining the allocation of program funds, FTA may consider geographic diversity, diversity in the size of the transit systems receiving funding, and the applicant's receipt of other competitive awards.

Due to funding limitations, projects that are selected for funding may receive less than the amount originally requested, even if an application did not present a scaled project option. In those cases, applicants must be able to demonstrate that the proposed projects are still viable and can be completed with the amount awarded.

3. Integrity and Performance Review

Prior to making an award, FTA is required to review and consider any information about the applicant that is in the Federal Awardee Performance and Integrity Information Systems (FAPIIS) accessible through SAM. An applicant may review and comment on information about itself that a Federal awarding agency previously entered. FTA will consider any comments by the applicant, in addition to the other information in FAPIIS, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 2 CFR 200.206.

F. Federal Award Administration Information

1. Federal Award Notice

Final project selections will be posted on the FTA website. FTA will also publish a list of the selected projects, a summary of final ratings for selected projects, Federal award amounts, and recipients in the **Federal Register**. Selected recipients should contact their FTA regional offices for additional information regarding allocations for projects under the Grants for Buses and Bus Facilities Program.

2. Administrative and National Policy Requirements

a. Grant Requirements

If selected, awardees will apply for a grant through FTA's Transit Award Management System (TrAMS). Recipients of Grants for Buses and Bus Facilities Program funding in urban areas are subject to the grant requirements of the Urbanized Area Formula Grant program (49 U.S.C. 5307), including those of FTA Circular ''Urbanized Area Formula Program: Program Guidance and Application Instructions'' (FTA.C.9030.1E). Recipients of funding in rural areas are subject to the grant requirements of the Formula Grants for Rural Areas Program (49 U.S.C. 5311), including those of FTA Circular ''Formula Grants for Rural Areas: Program Guidance and

Application Instructions'' (FTA.C.9040.1G). All recipients must accept the FTA Master Agreement and follow FTA Circular ''Award Management Requirements'' (FTA.C.5010.1E) and the labor protections required by Federal public transportation law (49 U.S.C. 5333(b)). Technical assistance regarding these requirements is available from each FTA regional office.

By submitting a grant application, the applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, directives, FTA circulars and other Federal administrative requirements in carrying out any project supported by the FTA grant. Further, the applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The applicant understands that Federal laws, regulations, policies and administrative practices might be modified from time to time and may affect the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The applicant must submit the Certifications and Assurances before receiving a grant, if it does not have current certifications on file.

b. Buy America and Domestic Preferences for Infrastructure Projects

All capital procurements must comply with FTA's Buy America requirements (49 U.S.C. 5323(j)), which require that all iron, steel, and manufactured products be produced in the United States, and imposes minimum domestic content and final assembly requirements for rolling stock. The cost of components and subcomponents produced in the United States must be more than 70 percent of the cost of all components, and final assembly of rolling stock must occur in the United States. Any proposal that will require a waiver must identify the items for which a waiver will be sought in the application. Applicants should not proceed with the expectation that waivers will be granted.

c. Disadvantaged Business Enterprise

Recipients of planning, capital, or operating assistance that will award prime contracts (excluding transit vehicle purchases), the cumulative total of which exceeds $250,000 in FTA funds in a Federal fiscal year, must comply with the Disadvantaged Business Enterprise (DBE) program regulations (49 CFR part 26).

To be eligible to bid on any FTA-assisted vehicle procurement, entities that manufacture transit vehicles or perform post-production alterations or retrofitting must be certified Transit Vehicle Manufacturers (TVM). If a vehicle remanufacturer is responding to a solicitation for new or remanufactured vehicles with a vehicle to which the remanufacturer has provided post-production alterations or retro-fitting (*e.g.,* replacing major components such as engine to provide a ''like new'' vehicle), the vehicle remanufacturer must be a certified TVM.

The TVM rule requires that, prior to bidding on any FTA-assisted vehicle procurement, manufacturers of transit vehicles submit a DBE Program plan and annual goal methodology to FTA. FTA then will issue a TVM concurrence and certification letter. Grant recipients must verify each manufacturer's compliance with these requirements before accepting its bid. A list of compliant, certified TVMs is posted on FTA's website at *www.transit.dot.gov/TVM.* Recipients should contact FTA before accepting a bid from a manufacturer not listed on this Web posting. In lieu of using a certified TVM, a recipient may establish project-specific DBE goals for its vehicle procurement. FTA will provide additional guidance as grants are awarded. For more information on DBE requirements, please contact Monica McCallum, Office of Civil Rights, 206–220–7519, email: *Monica.McCallum@dot.gov.*

d. Planning

FTA encourages applicants to notify the appropriate State Departments of Transportation and Metropolitan Planning Organizations (MPOs) in areas likely to be served by the project funds made available under this program. Selected projects must be incorporated into the long-range plans and transportation improvement programs of States and metropolitan areas before they are eligible for FTA funding.

3. Reporting

Post-award reporting requirements include the electronic submission of Federal Financial Reports and Milestone Progress Reports in FTA's electronic grants management system. Recipients of funds made available through this NOFO are also required to regularly submit data to the National Transit Database. Applicant should include any goals, targets, and indicators referenced in their application to the project in the Executive Summary of the TrAMS application.

As part of completing the annual certifications and assurances required of FTA grant recipients, a successful applicant must report on the suspension or debarment status of itself and its principals.

If the award recipient's active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds $10,000,000 for any period of time during the period of performance of an award made pursuant to this Notice, the recipient must maintain the currency of information reported to the System for Award Management (SAM) that is made available in the designated integrity and performance system (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)) about civil, criminal, or administrative proceedings in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government. See Appendix XII to 2 CFR part 200 for more information.

G. Federal Awarding Agency Contacts

For further information concerning this notice, please contact the Grants for Buses and Bus Facilities Program manager, Thomas Wilson, via email at *Thomas.wilson@dot.gov* or by phone at 202–366–5279. A TDD is available for individuals who are deaf or hard of hearing at 800–877–8339. In addition, FTA will post answers to questions and requests for clarifications on FTA's website at *http://transit.dot.gov/busprogram.* In support of the President's Justice40 Initiative, FTA staff will also conduct a webinar for potential applicants to learn more about the program, provide stakeholder engagement, and review the application submittal process. All interested stakeholders with questions regarding the implementation of the Justice40 Initiative in the Grants for Buses and Bus Facilities Competitive Program are encouraged to contact Thomas Wilson.

To ensure the receipt of accurate information about eligibility or the program, applicants with questions are encouraged to contact FTA directly, rather than through intermediaries or third parties.

H. Other Information

This program is not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Nuria I. Fernandez,

Administrator.

[FR Doc. 2021–20203 Filed 9–17–21; 8:45 am]

BILLING CODE P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meeting Notice; Unified Carrier Registration Plan Board of Directors Meeting

TIME AND DATE: September 23, 2021, from 12:00 p.m. to 3:00 p.m., Eastern time.

PLACE: This meeting will be accessible via conference call and screensharing. Any interested person may call 877–853–5247 (US toll free), 888–788–0099 (US toll free), +1 929–205–6099 (US toll), or +1 669–900–6833 (US toll), Conference ID 912 6596 1953, to participate in the meeting. The website to participate via Zoom meeting and screenshare is *https://kellen.zoom.us/j/91265961953.*

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the ''Board'') will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement. The subject matter of the meeting will include:

Agenda

I. Welcome and Call to Order—UCR Board Chair

The UCR Board Chair will welcome attendees, call the meeting to order, call roll for the Board, confirm the presence of a quorum, and facilitate self-introductions.

II. Verification of Meeting Notice—UCR Executive Director

The UCR Executive Director will verify publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by subsequent publication of the notice in the **Federal Register**.

III. Review and Approval of Board Agenda—UCR Board Chair

For Discussion and Possible Action

The proposed Agenda will be reviewed, and the Board will consider adoption.

Ground Rules

➢ Board actions taken only in designated areas on agenda

IV. Approval of Minutes of the August 12, 2021 UCR Board Meeting—UCR Board Chair

For Discussion and Possible Action

Draft Minutes of the August 12, 2021 UCR Board meeting will be reviewed. The Board will consider action to approve.

V. Report of the Federal Motor Carrier Safety Administration (FMCSA)—FMCSA Representative

The FMCSA will provide a report on any relevant activity.

VI. Updates Concerning UCR Legislation—UCR Board Chair

The UCR Board Chair will call for any updates regarding UCR legislation since the last Board meeting.

VII. Subcommittee Reports

Audit Subcommittee—UCR Audit Subcommittee Chair

A. Co-enforcement of IRP and UCR—UCR Audit Subcommittee Chair and DSL Transportation Services, Inc.

The UCR Audit Subcommittee Chair will lead a discussion, supported by DSL Transportation Services, Inc. regarding how states can hold (not issue) IRP or commercial registrations/renewals until the motor carrier has registered for UCR.

B. Supporting State Police to Enhance Education and Compliance with UCR—UCR Audit Subcommittee Chair and DSL Transportation Services, Inc.

The UCR Audit Subcommittee Chair and DSL Transportation Services, Inc. will lead a discussion on the importance of working with state police to provide education on the UCR Plan and the importance of citing unregistered motor carriers.

C. *Supporting Local FMCSA Offices to Enhance Education and Compliance with UCR*—UCR Audit Subcommittee Chair and DSL Transportation Services, Inc.

The UCR Audit Subcommittee Chair and DSL Transportation Services, Inc. will lead a discussion on the importance of working with local FMCSA offices to provide education on the UCR Plan and the importance of citing unregistered motor carriers during inspections and new entrant audits.

Finance Subcommittee—UCR Finance Subcommittee Chair

A. Maturing of Certificate of Deposit (CD)—UCR Depository Manager For Discussion and Possible Board Action

The UCR Depository Manager will provide an update on the CD that will mature on October 23, 2021. The Board may take action to reinvest the proceeds.

Education and Training Subcommittee—UCR Education and Training Subcommittee Chair

A. Update on Audit Training Modules in Development—UCR Education and Training Subcommittee Chair and UCR Operations Director

The UCR Education and Training Subcommittee Chair and the UCR Operations Director will provide an update on the development of the Basic Audit Training Module and the Step-by-Step Approach to a UCR Audit, which is the second training model currently in development.

B. Update on Future Training Initiatives—UCR Education and Training Subcommittee Chair and UCR Operations Director

The UCR Education and Training Subcommittee Chair and the UCR Operations Director will provide an update on the planned future training initiatives for the UCR Plan.

VIII. Contractor Reports—UCR Executive Director

- UCR Executive Director's Report

The UCR Executive Director will provide a report covering recent activity for the UCR Plan.

- DSL Transportation Services, Inc.

DSL Transportation Services, Inc. will report on the latest data from the Focused Anomaly Reviews program, discuss motor carrier inspection results, and other matters.

- Seikosoft

Seikosoft will provide an update on recent/new activity related to the National Registration System.

- UCR Administrator Report (Kellen)—UCR Operations Director and UCR Depository Manager

The UCR staff will provide a management report covering recent activity for the Depository, Operations, and Communications.

IX. Other Business—UCR Board Chair

The UCR Board Chair will call for any other items Board members would like to discuss.

X. Adjournment—UCR Board Chair

The UCR Board Chair will adjourn the meeting.

This agenda will be available no later than 5:00 p.m. Eastern time, September 16, 2021 at: *https://plan.ucr.gov.*

CONTACT PERSON FOR MORE INFORMATION: Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305–3783, *eleaman@board.ucr.gov.*

Alex B. Leath,

Chief Legal Officer, Unified Carrier Registration Plan.

[FR Doc. 2021–20388 Filed 9–16–21; 4:15 pm]

BILLING CODE 4910–YL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0012]

Agency Information Collection Activity: Application for Cash Surrender or Policy Loan

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 November 19, 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. 2900–0012'' 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. 2900–0012'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Application for Cash Surrender or Policy Loan (VA Form 29–1546).

OMB Control Number: 2900–0012.

Type of Review: Reinstatement with change of a previously approved collection.

Abstract: The Application for Cash Surrender or Policy Loan solicits information needed from Veterans to apply for cash surrender value or policy loan on his/her insurance. The information on this form is required by law, 38 U.S.C. 1906 and 1944, 38 CFR 6.115, 6.116, 6.117, 8.27, 6.100, 6.101 and 8.28.

Affected Public: Individuals and households.

Estimated Annual Burden: 4939 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Upon request.

Estimated Number of Respondents: 29,636.

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. 2021–20295 Filed 9–17–21; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Amended Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that a virtual meeting of the Advisory Committee on Disability Compensation (Committee), which was previously scheduled for Tuesday, September 28, 2021; has been rescheduled to begin and end on Tuesday, November 9, 2021 from 9:00 a.m. to 12:00 p.m. Eastern Standard Time. The virtual meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities.

The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The agenda will include review and discussion of the 2020 Biennial Report and report recommendation training.

No time will be allocated at this virtual meeting for receiving oral presentations from the public. The public may submit 1–2 page summaries of their written statements for the Committee's review. Public comments may be received no later than October 26, 2021, for inclusion in the official meeting record. Please send these comments to Sian Roussel of the Veterans Benefits Administration, Compensation Service at *sian.roussel@va.gov.*

Members of the public who wish to obtain a copy of the agenda should contact Sian Roussel at *Sian.Roussel@va.gov* and provide his/her name, professional affiliation, email address and phone number. The call-in number for those who would like to attend the meeting is 1–404–397–1596; access code: 199 738 1753.

Dated: September 14, 2021.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2021–20206 Filed 9–17–21; 8:45 am]

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FEDERAL REGISTER

Vol. 86 Monday,
No. 179 September 20, 2021

Part II

Department of Commerce

International Trade Administration

19 CFR Part 351

Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws; Final Rule

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 210813–0162]

RIN 0625–AB10

Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: Pursuant to its authority under Title VII of the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) is modifying its regulations to improve administration and enforcement of the antidumping duty (AD) and countervailing duty (CVD) laws. Specifically, Commerce is modifying its regulation concerning the time for submission of comments pertaining to industry support in AD and CVD proceedings; modifying its regulation regarding new shipper reviews; modifying its regulation concerning scope matters in AD and CVD proceedings; promulgating a new regulation concerning circumvention of AD and CVD orders; promulgating a new regulation concerning covered merchandise referrals received from U.S. Customs and Border Protection (CBP); promulgating a new regulation pertaining to Commerce requests for certifications from interested parties to establish whether merchandise is subject to an AD or CVD order; and is modifying its regulation regarding importer reimbursement certifications filed with CBP. Finally, Commerce is modifying its regulations regarding service lists, entries of appearance, and importer filing requirements for access to business proprietary information in AD and CVD proceedings.

DATES: *Effective date:* The amendments to §§ 351.203, 351.214, 351.228, and 351.402(f)(2) in instructions 3, 4, 8, and 10, respectively, are effective October 20, 2021. The amendments to §§ 351.103(d), 351.225, 351.226, 351.227, and 351.305(d) in instructions 2, 5, 6, 7, and 9, respectively, are effective November 4, 2021.

For information concerning applicability dates, see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Scott McBride at (202) 482–6292; David Mason at (202) 482–5051; or Jessica Link at (202) 482–1411.

SUPPLEMENTARY INFORMATION:

Applicability Dates

- Amendments to § 351.203 apply to segments of the proceeding for which a petition is filed on or after October 20, 2021.
- Amendments to § 351.214 apply to new shipper reviews for which a new shipper review request is filed on or after October 20, 2021.
- Amendments to § 351.225 and corresponding amendments to §§ 351.103(d) and 351.305(d) apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after November 4, 2021. For information on specific applicability dates for amendments to § 351.225(l), please see section 12 in the preamble under ''Scope—§ 351.225.''
- Added § 351.226 and corresponding amendments to § 351.103(d) and § 351.305(d) apply to circumvention inquiries for which a circumvention request is filed, as well as any circumvention inquiry self-initiated by Commerce, on or after November 4, 2021. For information on specific applicability dates for § 351.226(l), please see section 12 in the preamble under ''Circumvention—§ 351.226.''
- New § 351.227 and corresponding amendments to § 351.103(d) and § 351.305(d) apply to covered merchandise inquiries for which a covered merchandise referral determined to be sufficient is received on or after November 4, 2021. For information on specific applicability dates for § 351.227(l), please see section 8 in the preamble under ''Covered Merchandise Referrals—§ 351.227.''
- Added § 351.228 is applicable on or after October 20, 2021.
- Amendments to § 351.402(f)(2) are applicable on or after October 20, 2021.

General Background

On August 13, 2020, Commerce published proposed amendments to its existing regulations, 19 CFR part 351, to strengthen and improve the administration and enforcement of the AD/CVD laws.[1] Relevant to this final rule are the AD/CVD statutory and regulatory provisions in general, as well as those pertaining to industry support, new shipper reviews, scope inquiries, circumvention inquiries, covered merchandise inquiries, certifications, and certain procedures, which we briefly summarize below.

Title VII of the Act vests Commerce with authority to administer the AD/CVD laws.[2] In general, the AD/CVD laws are intended to provide relief to domestic industries, including businesses, workers, farmers, and ranchers from the injurious effects of unfairly traded imports through the imposition of AD/CVDs.[3]

Title VII allows for a domestic interested party to file a petition seeking an AD or CVD order, and corresponding duties, on certain imports. If the petition meets all the elements necessary for initiation, Commerce will initiate and conduct an AD or CVD investigation. Similarly, the U.S. International Trade Commission (ITC) will conduct a separate investigation concerning material injury or threat of material injury to the domestic industry. Section 731 of the Act directs Commerce to impose an AD order on merchandise entering the United States when it determines that a producer or exporter is selling a class or kind of foreign merchandise into the United States at less than fair value (*i.e.,* dumping), and material injury or threat of material injury to that industry in the United States is found by the ITC. Section 701 of the Act directs Commerce to impose a CVD order when it determines that a government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise that is imported into the United States, and material injury or threat of material injury to that industry in the United States is found by the ITC.[4]

[1] *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 85 FR 49472 (August 13, 2020) (*Proposed Rule*).

[2] *See generally* Title VII of the Act (19 U.S.C. 1671 *et. seq.*); *see also* titles I, II, and IV of the Uruguay Round Agreements Act (URAA), Public Law 103–465, 108 Stat. 4809 (1994) (implementing into law the World Trade Organization (WTO) agreements, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping (AD) Agreement) and the Agreement on Subsidies and Countervailing Measures ((SCM) Agreement)); and Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 (1994) (SAA).

[3] *See Guangdong Wireking Housewares & Hardware Co.* v. *United States,* 745 F.3d 1194, 1203 (Fed. Cir. 2014) (*Guangdong Wireking*) (''The congressional intent behind the enactment of countervailing duty and antidumping law generally was to create a civil regulatory scheme that remedies the harm unfair trade practices cause.'').

[4] A countervailable subsidy is further defined under section 771(5)(B) of the Act as existing when: A government or any public entity within the territory of a country provides a financial contribution; provides any form of income or price support; or makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from

After issuance of an AD/CVD order, Commerce directs CBP to ''suspend liquidation'' [5] and collect cash deposits, or estimated amounts of duties, on appropriate entries subject to the scope of the order corresponding to the margins of dumping established under an AD order and the CVD rates established under a CVD order.[6] On a yearly basis, interested parties may request that Commerce conduct an administrative review to determine the appropriate dumping margin or CVD rate for entries subject to the order during the previous review year.[7] Pursuant to its administrative review procedures, Commerce instructs CBP to ''lift the suspension of liquidation'' and assess AD/CVDs at the appropriate amount.[8]

With respect to industry support, once an AD petition under section 732(b) of the Act or a CVD petition under section 702(b) is filed, the statute provides Commerce with 20 days in which to determine whether the elements necessary for initiation of an investigation have been satisfied, including the requirement to demonstrate industry support. In exceptional circumstances, Commerce may extend the 20-day period to a maximum of 40 days solely for purposes of determining industry support. In the *Proposed Rule,* Commerce proposed to modify § 351.203 to provide for the establishment of a deadline by which parties may file comments on industry support. As discussed below, we are adopting the modifications from the *Proposed Rule.*

Regarding new shipper reviews, section 751(a)(2)(B) of the Act and § 351.214 provide a procedure by which exporters or producers who did not export the product during the original AD or CVD investigation can obtain their own individual dumping margin or countervailing duty rate on an accelerated basis (referred to as a ''new shipper review'').[9] Commerce explained in the *Proposed Rule* that in 2016 the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was signed into law, which contains title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title ''Enforce and Protect Act of 2015'' or ''EAPA'').[10] Section 433 (entitled ''Addressing Circumvention by New Shippers'') added two key provisions to the new shipper procedures under section 751(a)(2)(B) of the Act.[11] First, section 433 removed the ability for importers to post AD/CVD-specific bonds or security in lieu of AD/CVD cash deposits by striking this provision from section 751(a)(2)(B) of the Act.[12] Second, section 433 added a provision that the individual dumping margin or countervailing duty rate determined for a new shipper must be based on *bona fide* sales in the United States and codified the factors that Commerce has historically used to determine whether a sale is *bona fide.*[13] Accordingly, in the *Proposed Rule,* Commerce proposed conforming amendments to § 351.214, which are adopted in this final rule. The modifications to § 351.214 clarify the circumstances under which Commerce will grant a new shipper review and establish specific factors to be considered in determining whether the sales at issue constitute *bona fide* sales for purposes of the AD and CVD laws.

With respect to scope inquiries, upon issuance of an AD or CVD order, the Act requires Commerce to provide a description of the class or kind of merchandise subject to the order at issue (*i.e.,* subject merchandise).[14] That description is known as the scope of the AD/CVD order. Because the statute ''does not require Commerce to define the class or kind of foreign merchandise in any particular manner[,] Commerce has the authority to fill that gap and define the scope of an order consistent with the countervailing duty and antidumping duty laws.'' [15] Further, ''under the statutory scheme, Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition.'' [16]

Under the statutory framework, as recognized by the U.S. Court of International Trade (CIT) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit), Commerce is the agency charged with establishing and interpreting the scope of AD/CVD orders,[17] and CBP is the agency charged with applying and enforcing the AD/CVD orders.[18] As part of its statutory responsibility ''to fix the amount of duty owed on imported goods[,]'' CBP ''is both empowered and obligated to determine in the first instance whether goods are subject to existing [AD/CVD orders].'' [19] Pursuant to 19 U.S.C. 1514(b) (section 514 of the Act), this ''determination is then 'final and conclusive' unless an interested party seeks a scope ruling from Commerce (which ruling would then be reviewable pursuant to [19 U.S.C. 1516a]).'' [20]

Commerce retains discretion to define the scope of the order to ensure that all imports causing injury have been addressed, and, additionally, may take into account potential circumvention and duty evasion concerns in crafting

practices normally followed by governments; and a benefit is thereby conferred. To be countervailable, a subsidy must be specific within the meaning of section 771(5A) of the Act.

[5] ''Liquidation'' is the point at which CBP ascertains and assesses the final rate and amount of duty on an entry. *See generally* 19 U.S.C. 1500.

[6] *See generally* section 706 of the Act; section 736 of the Act; *see also* 19 CFR 351.211.

[7] *See* section 751(a)(1) of the Act; *see also* 19 CFR 351.212–213.

[8] 19 CFR 351.212–213.

[9] Section 751(a)(2)(B) of the Act was enacted in the URAA in 1994. *See* SAA at 816 (''Article 9.5 [of the AD Agreement] establishes special procedures for imposing antidumping duties on exporters or producers who did not export the product to the importing country during the original period of investigation (so-called 'new shippers').''). Section 351.214 was subsequently adopted pursuant to a rulemaking in 1997. *See Antidumping Duties; Countervailing Duties, Proposed Rule,* 61 FR 7308, 7317–18 (Feb. 27, 1996) (*1996 Proposed Rule*) (discussing the proposed new shipper review regulation); *Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27318–19 (May 19, 1997) (*1997 Final Rule*) (discussing the finalized new shipper review regulation).

[10] Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114–125, 130 Stat. 122 (2016) (TFTEA).

[11] *See* Public Law 114–125, section 433, 130 Stat. at 171. *See also* H.R. Rep. No. 114–114, at 89 (2015) (''The Committee is concerned that the ability of new exporters and producers to obtain their own individual weighted average dumping margins or individual countervailing duty rates from the Department of Commerce on an expedited basis (known as 'new shipper reviews') has been abused to avoid antidumping and countervailing duties.'')

[12] *See* Public Law 114–125, section 433, 130 Stat. at 171. *See also* H.R. Rep. No. 114–114, at 89; H.R. Rep. No. 114–376, at 192 (2015) (Conf. Rep.).

[13] *See* Public Law 114–125, section 433, 130 Stat. at 171. *See also* Conf. Rep., H.R. Rep No. 114–376 at 192–193.

[14] *See* section 706(a)(2) of the Act; section 736(a)(2) of the Act; section 771(25) of the Act.

[15] *Canadian Solar, Inc.* v. *United States,* 918 F.3d 909, 917 (Fed. Cir. 2019) (internal citations and punctuation omitted) (*Canadian Solar*).

[16] *Ad Hoc Shrimp Trade Action Committee* v. *United States,* 637 F. Supp. 2d 1166, 1174 (CIT 2009).

[17] *See Xerox Corp.* v. *United States,* 289 F.3d 792, 795 (Fed. Cir. 2002) (''Commerce should in the first instance decide whether an antidumping order covers particular products, because the order's meaning and scope are issues particularly within the expertise of that agency.'') (internal citations and punctuation omitted).

[18] *See Sunpreme Inc.* v. *United States,* 946 F.3d 1300, 1303 (Fed. Cir. 2020) (*Sunpreme*) (holding that ''it is within Customs's authority to preliminarily suspend liquidation of goods based on an ambiguous [AD or CVD] order, such that the suspension may be continued following a scope inquiry by Commerce.''); and *Fujitsu Ten Corp.* v. *United States,* 957 F. Supp. 245, 248 (CIT 1997) (*Fujitsu*) (''The statute recognizes Customs makes the initial determination that an existing antidumping order applies to a specific entry of merchandise. The statute states that such a decision is 'final and conclusive' unless it is appealed by petition to Commerce.'' (citations omitted)).

[19] *Id.,* 946 F.3d at 1317 (citing 19 U.S.C. 1500(c)).

[20] *See TR International Trading Co.* v. *United States,* 433 F. Supp. 3d 1329, 1341 (CIT 2020) (citing *Sunpreme,* 946 F.3d at 1318) (*TR International*) (appeal pending) (referencing section 516 of the Act); *see also Fujitsu,* 957 F. Supp. at 248.

the scope language.[21] Because the scope of an AD/CVD order is written in general terms, questions may arise as to whether a certain product is covered by the scope of an order. Beyond a general recognition that Commerce may issue ''class or kind of merchandise'' determinations,[22] the statute is otherwise silent regarding the procedures and standards that Commerce may apply in issuing a scope ruling. Therefore, Commerce's regulation, § 351.225, describes the applicable procedures and standards concerning ''scope rulings'' that Commerce will issue upon application of an interested party, or by initiating a ''scope inquiry.'' In the *Proposed Rule,* Commerce proposed numerous revisions to § 351.225, many of which are further revised or adopted in this final rule.

Concerning circumvention inquiries (considered another type of ''class or kind determination'' under the jurisdictional provisions of the statute), section 781 of the Act identifies four types of products that may be found circumventing an AD/CVD order, and, therefore, may be included within the scope of the order. The legislative history accompanying the Omnibus Trade and Competitiveness Act of 1988 provides that ''[a]n order on an article presumptively includes articles altered in minor respects in form or appearance[,]'' and that the purpose of the circumvention statute ''is to authorize the Commerce Department to apply AD and [CVD] orders in such a way as to prevent circumvention and diversion of U.S. law.'' [23] Further, the legislative history indicates that Congress was concerned with the existence of ''loopholes,'' *i.e.,* foreign companies evading orders by making slight changes in their method of production, because such scenarios ''seriously undermine the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings, and frustrated the purposes for which these laws were enacted.'' [24] Congress also recognized that ''aggressive implementation of [the circumvention statute] by the Commerce Department can foreclose these practices.'' [25] With the implementation of the URAA, the SAA expressed similar concerns about scenarios limiting the effectiveness of the AD duty law (*i.e.,* completion or assembly in a country other than the subject country).[26] Accordingly, Commerce ''has been vested with authority to administer the antidumping laws in accordance with the legislative intent'' and, thus, ''has a certain amount of discretion [to act] . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.'' [27] In the *Proposed Rule,* Commerce proposed to adopt a new regulation, § 351.226, to address circumvention inquiries and determinations. After making some revisions from the *Proposed Rule,* Commerce is adopting § 351.226 in this final rule.

Pertaining to covered merchandise inquiries, title IV of the TFTEA (referred to as EAPA), section 421, added section 517 to the Act,[28] which establishes a formal process for CBP to conduct civil administrative investigations of potential duty evasion of AD and CVD orders on the basis of an allegation by an interested party or upon referral by another Federal agency (referred to herein as an ''EAPA investigation''). Pursuant to section 517(b)(4)(A) of the Act, if CBP is conducting an EAPA investigation based on an allegation from an interested party, and is unable to determine whether the merchandise at issue is ''covered merchandise'' within the meaning of section 517(a)(3) of the Act, it shall refer the matter to Commerce to make a covered merchandise determination (referred to herein as a ''covered merchandise referral'').[29] Although Congress did not require that Commerce promulgate regulations with respect to section 517 of the Act, in the *Proposed Rule,* Commerce proposed to adopt § 351.227, a new regulation to address procedures and standards specific to Commerce's consideration of covered merchandise referrals. In particular, this new regulation would govern Commerce's receipt of a covered merchandise referral, Commerce's initiation and conduct of a covered merchandise inquiry, and Commerce's covered merchandise determination, pursuant to section 517(b)(4) of the Act. With some revisions, Commerce is adopting § 351.227 in this final rule.

Regarding certifications, in the *Proposed Rule,* Commerce proposed to adopt § 351.228, a regulation to codify and enhance Commerce's existing authority and practice to require certifications by importers and other interested parties as to whether merchandise is subject to an AD/CVD order. With minor revisions, Commerce is adopting § 351.228 in this final rule.

Another form of certifications relates to importer reimbursement certifications as provided for under § 351.402(f)(2). In the *Proposed Rule,* Commerce proposed to amend § 351.402(f)(2) regarding importer certifications for the payment or reimbursement of AD/CVDs on entries subject to AD orders to account for updated procedures. With minor revisions, Commerce is adopting the amendments to § 351.402(f)(2) in this final rule.

To implement the substantive changes in the final rule, Commerce is also adopting proposed changes to two procedural regulations. First, in conducting its administrative proceedings, the statute directs Commerce to make certain information generally available on a public record.[30] Pursuant to § 351.103(d)(1), with some exceptions, parties that wish to be served with public information on a segment of a proceeding must file an entry of appearance on that record to be placed on the relevant segment-specific public service list.[31] In the *Proposed Rule,* Commerce proposed to amend § 351.103(d)(1) to reflect that certain interested parties need not file an entry of appearance to be placed on the segment-specific service list for the

[21] *See Canadian Solar,* 918 F.3d at 921–22 (''It is unnecessary for Commerce to engage in a game of whack-a-mole when it may reasonably define the class or kind of merchandise in a single set of orders, and within the context of a single set of investigations, to include all imports causing injury.'').

[22] *See* section 516A(a)(2)(B)(vi) of the Act (referencing, in the judicial review provision of the statute, ''[a] determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding or dumping our antidumping or countervailing duty order.'')

[23] Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 100–71, at 101 (1987).

[24] *Id.*

[25] *Id.*

[26] *See* SAA at 892–95.

[27] *Tung Mung Development Co., Ltd.* v. *United States,* 219 F. Supp. 2d 1333, 1343 (CIT 2002) (*Tung Mung*) (quoting *Mitsubishi Elec. Corp.* v. *United States,* 700 F. Supp. 538, 555 (CIT 1988) (*Mitsubishi I*), *aff'd* 898 F.2d 1577, 1583 (Fed. Cir. 1990) (*Mitsubishi II*)).

[28] *See* Public Law 114–125, 421, 130 Stat. at 161–69.

[29] *See* H.R. Rep. No. 114–376, at 190 (''If the Commissioner is unable to determine whether the merchandise at issue is covered merchandise, the Commissioner shall refer the matter to the Department of Commerce to determine whether the merchandise is covered merchandise. The Department of Commerce is to make this determination pursuant to its applicable statutory and regulatory authority, and the determination shall be subject to judicial review under 19 U.S.C. 1516a(a)(2). The Conferees intend that such determinations include whether the merchandise at issue is subject merchandise under 19 U.S.C. 1677j.'' (referencing sections 516 and 781 of the Act)).

[30] *See generally* section 777(a) of the Act. *See also* 19 CFR 351.104 (describing the official record of AD/CVD proceedings).

[31] Section 351.303(b)(2) contains procedures regarding the filing of documents through Commerce's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).

relevant segment. With a minor revision, these changes are adopted in this final rule. Additionally, § 351.103(d) contains a cross-reference to the service list procedures for scope ruling applications, which are further described in § 351.225(n). This language has been updated to include reference to service list procedures for requests for circumvention inquiries, which are further described in § 351.226(n).

Second, because of the nature of Commerce's proceedings, which frequently require Commerce to rely on non-public information such as business proprietary information (BPI) in issuing its determinations, the statute also requires Commerce to make BPI available to interested parties who have been authorized to receive such information under an administrative protective order (APO).[32] Section 351.305(d) provides specific filing requirements for importers to access BPI in Commerce's proceedings, including certain requirements for importers in scope inquiries. In the *Proposed Rule,* Commerce proposed to amend § 351.305(d) to add reference to importers in circumvention inquiries and to exempt importers identified by CBP in a covered merchandise referral from these specific filing requirements. These changes are adopted in this final rule.

Explanation of Modifications From the Proposed Rule to the Final Rule and Responses to Comments

In the *Proposed Rule* published on August 13, 2020, Commerce invited the public to submit comments.[33] Commerce received 37 submissions providing comments and 17 rebuttal submissions from interested parties, including domestic producers, exporters, importers, surety companies, and foreign governments. We have determined to make certain modifications to the *Proposed Rule* in response to issues and concerns raised in those comments and rebuttal comments. We considered the merits of each submission and on many of the issues and concerns raised, we analyzed the legal and policy arguments in light of both our past practice, as well as our desire to strengthen the administration and enforcement of our AD/CVD laws.

As we explained in the *Proposed Rule,*[34] the purpose of these modifications and additions to our regulations is to strengthen the administration and enforcement of AD/CVD laws, make such administration and enforcement more efficient, and to create new enforcement tools for Commerce to address circumvention and evasion of trade remedies. These modifications allow Commerce to better fulfill the Congressional intent behind the AD/CVD laws—namely, to remedy the injurious effects of unfairly traded imports. In addition, these regulations promote the Administration's objective to strongly enforce and efficiently administer the AD/CVD laws rigorously.

The preamble to the *Proposed Rule* provides extensive background, analysis, and explanation which are relevant to these regulations. With some modifications, as noted, this final rule codifies those proposed on August 13, 2020. Accordingly, to the extent that parties and the public wish to have a more detailed and comprehensive interpretation of these regulations, we advise not only considering the preamble to these final regulations, but also the analysis and explanations in the preamble to the *Proposed Rule.*

In drafting this final rule, Commerce carefully considered each of the comments received. The following sections generally contain a brief discussion of each regulatory provision, a summary of the comments we received (if any) and Commerce's responses to those comments. In addition, these sections contain an explanation of any changes Commerce has made to the *Proposed Rule,* either in response to comments or that it deemed necessary for conforming, clarifying, or providing additional public benefit. The final section discusses other comments received not related to the regulations covered in this final rule.

Comment Period on Industry Support Prior to Initiation Determination—§ 351.203(g)

Section 351.203(g) establishes a deadline for comments on industry support no later than five business days before the scheduled date of initiation, and rebuttal comments no later than two calendar days thereafter. We received several comments and rebuttal comments both in support and in opposition to the *Proposed Rule.* In addition, some commenters proposed that the final rule should impose additional requirements for parties filing comments in opposition to the petitioning party's claims of industry support.

After considering the comments and rebuttal comments, we have not adopted the suggested modifications to the *Proposed Rule* and, therefore, have left unchanged proposed § 351.203(g). We believe the *Proposed Rule* to establish a deadline for industry support comments and rebuttal comments is reasonable because it provides sufficient time for parties to submit comments and rebuttal comments, while balancing the need for Commerce to have sufficient time to consider and analyze the comments and information on the record within the normal timeframe established by Congress. We also believe the deadlines, as set forth in the *Proposed Rule,* recognize the importance of giving parties adequate time to prepare meaningful comments. Last, we recognize that establishing regulatory deadlines is a reasonable exercise of Commerce's authority to implement the statutory provisions the agency is responsible for administering.

1. Time Limits for Comments

Several commenters understand Commerce's desire to have adequate time to consider comments on industry support, and several commenters support and agree with Commerce's proposal to set a new deadline. Other commenters contend that Commerce's justification about needing time to review industry support comments does not outweigh the importance of giving parties time to prepare meaningful comments because the issue cannot be revisited after initiation.

In particular, one commenter asserts that adding a limitation on the timeline for filing comments on industry support is contrary to the Act because the Act does not permit Commerce to limit the period for comments on industry support and the statute is unambiguous in allowing comments any time before Commerce initiates the investigation. The commenter further argues that even

[32] Pursuant to section 777(c)(1)(A) of the Act, Commerce must make BPI submitted to it during the course of an AD/CVD proceeding available to interested parties who have been authorized to receive such information under an APO. Additionally, section 777(d) of the Act requires that parties submitting BPI to Commerce which is covered by an APO must serve such information on ''all interested parties who are parties to the proceeding'' that are subject to the APO. ''Interested party'' is defined under section 771(9) of the Act and 19 CFR 351.102(b)(29); ''party to the proceeding'' is defined under 19 CFR 351.102(b)(36).

[33] On September 10, 2020, in response to concerns raised by interested parties, Commerce determined that it would benefit ''the public and the agency'' if parties had ''the opportunity to submit rebuttal comments in response to comments filed by other parties on the proposed rule.'' *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws; Extension of Comment Period to Allow Submissions of Rebuttal Comments and Requirement of Electronic Submission of Comments and Rebuttal Comments,* 85 FR 55801 (Sept. 10, 2020). Accordingly, Commerce granted ''an extension of time solely for the purpose of allowing the public to file such rebuttal comments.'' *Id.*

[34] *Proposed Rule,* 85 FR 49472 at 49472–73.

if the Act were silent on this issue, Commerce's interpretation is arbitrary and capricious and not based on a permissible construction of the statute. Another commenter disagrees, arguing that the commenter's statutory analysis is flawed. The rebutting commenter contends the Act does not set forth an explicit timeline for submitting comments on industry support and further that the Act allows Commerce to promulgate regulations such as this one. Moreover, the rebutting commenter states, this proposed regulation is neither arbitrary nor capricious because Commerce's proposal provides sufficient time for interested parties to challenge the industry support claim provided in the petition for relief.

Response:

Contrary to the commenter's argument that the statute prohibits Commerce from limiting the time for comments on industry support, there is nothing in the statute that precludes Commerce from adopting a rule that provides parties with specific deadlines for submission of comments or rebuttal comments on the issue of industry support. The sole commenter advancing the statutory argument did not cite to any express language in the statute for support. To the contrary, sections 702(c)(4)(E) and 732(c)(4)(E) of the Act provide that, before the administering authority makes a determination with respect to initiating an investigation, any person who would qualify as an interested party may submit comments or information on the issue of industry support. The Act does not set forth an explicit timeline for submitting comments, provided it is before Commerce makes its determination. Thus, based upon its authority to promulgate regulations, Commerce may establish a reasonable timeframe for when industry support comments are to be submitted. Nothing in the Act restricts Commerce from doing so. Indeed, the Act allows for, and Commerce has set, deadlines for most other types of submissions in its AD and CVD proceedings.

2. Sufficiency of Time for Comment

Several commenters claim that shortening the time to file comments on industry support would prejudice interested parties because respondents do not have advanced notice of new petitions and, therefore, a limited time to prepare comments. Commenters also allege that there is a delay in obtaining access to the petitions because the respondents must obtain APO approval to access BPI in the petition, although other commenters contradict this claim, arguing that interested parties have notice of the petitioner's industry support claims on the first day the petition is filed.

Other commenters raise concerns about the rebuttal comment deadline, arguing that this is an insufficient amount of time. These commenters suggest expanding the rebuttal deadline from two days to five days and recommend that Commerce revise the rule to restrict the deadline for industry support comments further, to ten days before the date of initiation, rather than five business days, as Commerce proposed. Another commenter wonders how Commerce would take rebuttal claims into account if due only two days before the scheduled date of the initiation decision. Alternatively, some commenters propose that Commerce should work with Congress to amend the Act and expand the timeframe for initiation decisions from 20 days to 40 days.

Response:

We have not accepted these proposed changes. With respect to the arguments of insufficient time for parties to provide information and comment, we disagree. The *Proposed Rule* provides parties with, at a minimum, more than a week, and in many cases a longer period, for preparation of comments. This amount of time should be sufficient. As a general rule, we believe the deadlines proposed for the submission of comments and rebuttal comments on the sole issue of industry support provide a sufficient and reasonable amount of time for interested parties to address industry support issues.

With respect to the point made by certain commenters regarding insufficient notice, we disagree. Subsections 702(b)(4) and 732(b)(4) of the Act state that, upon receipt of a petition, the administering authority is required to notify the government of any exporting country named in the petition by delivering a public version of the petition to an appropriate representative of such country. Thus, the government of the exporting country receives notice of the petition on or about the day of receipt by Commerce. The commenters seem to imply there should be advance notice of a petition filing. This is incorrect, and in any case, it is not possible to provide advance notice before a petition is filed. Nonetheless, we are mindful that in establishing due dates for submissions, Commerce must balance the interests of parties to submit information and comment with Commerce's ability to consider fully such information and comments and to make a decision on initiation supported by evidence on the record.

With respect to the claim that there may be delays in obtaining access to the petitions because the parties must first obtain APO approval to access the BPI contained in such petitions, we do not believe this will be an issue. First, based on Commerce's years of experience with petitions and the arguments parties have advanced against industry support in the past, we find that, in general, the types of claims made against the petitioner's establishment of industry support tend to focus on the scope of subject merchandise as defined in petitions, the domestic like product, the methodology the petitioner uses to calculate industry support, and whether U.S. producers within the industry are left out of the industry support calculation. Our experience has been that these types of arguments in opposition to the petitioner's industry support claims generally can be advanced based on the public information provided in the petitions. Therefore, obtaining access to BPI is generally not needed for submission of comments and information on the issue of industry support.

Second, in the instance in which APO access is needed in order for parties to comment on the industry support claim contained in a petition, we do not believe obtaining such access will be an impediment to a timely submission of comments. We note that while obtaining APO access has the potential to delay access to BPI, the APO/Dockets Unit of Enforcement & Compliance issues an APO and routinely expedites the approval process once an APO application is filed. We, therefore, believe obtaining APO access to BPI will not be an impediment to parties seeking to comment on industry support.

With respect to the comment as to how Commerce would take rebuttal claims into account if due only two days before the scheduled date of the initiation decision, we note that, under the current rule, Commerce must take into account comments that are filed up to and including the day of the scheduled decision. Thus, we believe the commenter's point highlights the issue with the current situation and recognizes that a procedural improvement is necessary, and one that is aimed at providing Commerce with sufficient time to make an informed initiation decision in accordance with the statute's 20-day period. Providing two days for Commerce to consider any rebuttal comments is a significant improvement over the current process which allows comments and rebuttal comments to be submitted up to the close of business on the scheduled date of the decision.

3. Additional Requirements

Two commenters suggest that Commerce include a regulatory provision that requires parties objecting to industry support to: (1) If they are domestic producers, provide their affiliation status and whether they are related to a foreign producer; and (2) identify the sources of industry data and indicate why the data is more accurate than the data in the petition. Other commenters disagree with the suggested additions to the proposed regulation and argue that, pursuant to the Act, the petitioner bears the burden of establishing industry support, and not for opposing parties to establish a lack of industry support.

Response:

We have not adopted the proposed additions. The suggestion to impose new requirements on parties that object to a petition would establish a substantive change beyond the scope of the procedural rule Commerce has proposed. In addition, in our view, the suggested requirement is unnecessary. The petitioners are responsible for establishing industry support of the petition. To the extent industry support is not established in accordance with the Act, or is unclear from the evidence on the record, Commerce has authority to address these situations as they arise, such as through polling the industry or otherwise determining whether there is sufficient industry support to initiate an AD or CVD investigation.

4. Pre-Initiation CVD Consultations

One commenter expressed concern that shortening the time period for industry support comments may prevent parties from requesting pre-initiation consultations pursuant to the SCM Agreement.

Response:

With respect to CVD consultations, we do not see how the new procedural deadlines for comments ''may prevent parties from requesting pre-initiation consultations'' under the SCM Agreement, nor did the commenter explain the basis for its concern on this point. To clarify, Commerce does not wait for the government of the exporting country to make a request for consultations. Instead, in every instance in which a CVD petition is filed, consistent with subsection 702(b)(4)(A)(ii) of the Act, Commerce invites the government of the exporting country to engage in consultations, if it wishes.

New Shipper Reviews—§ 351.214

After considering the comments and rebuttal comments, Commerce is removing §§ 351.214(b)(2)(iv)(A), 351.214(k)(3), and 351.214(k)(4). Commerce is also modifying § 351.214(b)(2)(iv)(A) and (B) of the *Proposed Rule* to clarify that the exporter or producer requesting the new shipper review will provide certifications pertaining to necessary information related to the unaffiliated customer in the United States and the unaffiliated customer's willingness to participate in the new shipper review, and provide information relevant to the new shipper review, if requested by Commerce or an explanation by the producer/exporter of why such certification from the unaffiliated customer cannot be provided. With the elimination of §§ 351.214(k)(3) and (k)(4), §§ 351.214(k)(5) and (k)(6) are now designated as §§ 351.214(k)(3) and (k)(4), respectively; and §§ 351.214(k)(5) and (k)(6) are eliminated.

In addition, Commerce is modifying § 351.214(b)(2)(v)(B) by adding the terms ''shipment'' and ''any'' to this provision, for consistency with the language utilized in § 351.214(b)(v)(C) and to clarify that a new shipper is required to provide documentation establishing the volume of any subsequent shipments where subsequent shipments have occurred. Commerce is also modifying § 351.214(b)(v)(C) by removing the ''and'' at the end of the clause and placing it at the end of § 351.214(b)(v)(D)(*4*) to grammatically conform with the additions of § 351.214(b)(v)(D) and (E) to the regulation. Next, Commerce is modifying § 351.214(b)(2)(v)(E)(4) by replacing the term ''unrelated'' with the term ''unaffiliated'' to conform more closely to the terms of sections 772(a) and (b) of the Act.

Last, we note that in § 351.214(k) of the *Proposed Rule,* Commerce inadvertently cited to section 752(a)(2)(B)(iv) of the Act. Commerce, however, intended to cite to section 751(a)(2)(B)(iv) of the Act in this provision of the *Proposed Rule.* Accordingly, Commerce is correcting this error in its final rule.

1. The Requirements for Requesting a New Shipper Review (§ 351.214(b))

(a) Certification Requirements for Unaffiliated Purchasers

To obtain a new shipper review, § 351.214(b) of the *Proposed Rule* sets forth documentation requirements for an exporter or producer requesting a new shipper review. In particular, § 351.214(b)(2)(iv)(A) and (B) of the *Proposed Rule* establish the requirements that the producer or exporter requesting the review provide certifications from the unaffiliated customer in the United States certifying that (1) it did not purchase the subject merchandise from the producer or exporter during the period of investigation; and (2) it will provide necessary information requested by Commerce regarding its purchase of subject merchandise.

Several commenters oppose Commerce's additional requirements. One commenter asserts that these requirements are contrary to the intent of the statute and Commerce's authority to conduct new shipper reviews. Both this commenter and several others argue these requirements deprive a requestor the option of filing a new shipper review where an unaffiliated customer chooses not to certify.

Two commenters argue that requiring unaffiliated customer certifications is burdensome and may discourage meritorious new shipper claims. One commenter points out that the concern raised here is similar to the concern Commerce articulated when it previously considered and rejected a proposal to require unaffiliated customer certifications in the *1997 Final Rule.*[35] The commenter further argues that the requirement in § 351.214(b)(2)(iv)(B) risks use of adverse facts available if the customer is not forthcoming, particularly with a requestor's limited control over an unaffiliated customer. Similarly, another commenter argues that applying an adverse inference based on an unaffiliated party's failure to cooperate is ''potentially unfair'' to a respondent, while another commenter asserts this requirement is too burdensome on a requestor. Another commenter argues there are legitimate circumstances where a new shipper has no sales to unaffiliated customers in the United States, such as when a multinational company sells a component to its U.S. subsidiary for purposes of later selling a downstream product.

By contrast, two commenters support the new standards and documentation requirements for requesting new shipper reviews in the *Proposed Rule.* One commenter asserts that other commenters have vastly overstated the burden of providing customer certifications to demonstrate *bona fide* sales because (1) no customer has commented that it could not comply with Commerce's requirements; (2) providing customer certifications is a limited burden given that often only a

[35] *1997 Final Rule,* 62 FR 27296 at 27319 (discussing the finalized new shipper review regulation).

small number of sales and customers are involved; and (3) the certifications are limited to information pertaining to the customer's purchase of the subject merchandise. The commenter, therefore, concludes that Commerce's proposed certification requirements are not unduly burdensome.

Response:

We have made changes to the *Proposed Rule* with respect to the unaffiliated customer certifications. In particular, we have removed the certification requirements contained in § 351.214(b)(2)(iv)(A) and (B) of the *Proposed Rule* and have replaced the certification requirements with additional exporter or producer certifications, as explained further below.

As an initial matter, we disagree with the commenters that assert the certification requirements in § 351.214(b)(2)(iv)(A) and (B) are contrary to the intent of the statute and Commerce's authority to conduct new shipper reviews. Section 751(a)(2)(B)(i) of the Act provides that if Commerce receives a request from an exporter or producer of subject merchandise establishing that the requestor (1) did not export subject merchandise during the period of investigation, and (2) is not affiliated with any exporter or producer who exported the subject merchandise during the period of investigation, Commerce shall conduct a new shipper review to establish an individual weighted average dumping margin or countervailing duty rate. These certification requirements are consistent with the requirements a new shipper review requestor must satisfy in order for Commerce to conduct a new shipper review, as identified in this section of the Act.

However, in the interest of eliminating unnecessary requirements, the final rule modifies § 351.214(b)(2) of the *Proposed Rule* by removing the requirement in § 351.214(b)(2)(iv)(A) that requires the producer or exporter requesting the review to submit certifications from the unaffiliated customer in the United States that it did not purchase the subject merchandise from the producer or exporter during the period of investigation. Upon further consideration, we find this certification to be unnecessary given the certification requirement from the requestor in § 351.214(b)(2)(i) and (ii) that it did not sell the subject merchandise to the United States during the period of the investigation.

In response to comments concerning the burden of obtaining the unaffiliated customer's certification, we have replaced both § 351.214(b)(2)(iv)(A) and (B). The final rule replaces § 351.214(b)(2)(iv)(A) of the *Proposed Rule* with the requirement that the exporter/producer certify that it will provide during the course of the new shipper review, and to the fullest extent possible, necessary information related to the unaffiliated customer in the United States.

Additionally, the final rule modifies § 351.214(b)(2)(iv)(B) of the *Proposed Rule* to clarify that the exporter/producer will provide a certification by the unaffiliated customer of its willingness to participate in the new shipper review and provide information relevant to the new shipper review, if such information is requested by the Secretary. To the extent the unaffiliated customer cannot provide its certification, the exporter/producer is required to provide, in the alternative, an explanation of why the unaffiliated customer cannot provide its certification.

Section 351.214(b) of the *Proposed Rule* provides further guidance, consistent with section 751(a)(2)(B)(i) of the Act, on the requirements necessary for Commerce to conduct a new shipper review. We consider the new certification requirement in § 351.214(b)(2)(iv)(B) of the *Proposed Rule* to be a necessary supplement to a new shipper review request that comports with the requirements in section 751(a)(2)(B)(i) of the Act which requires a new shipper to establish that it did not export subject merchandise during the period of investigation and that such exporter or producer is not affiliated with any exporter or producer who exported the subject merchandise to the United States during the period of investigation. In particular, this requirement addresses concerns that Congress expressly identified involving abuse of the new shipper review procedures where a new shipper ''enter[s] into a scheme to structure a few sales to show little or no dumping or subsidization when those sales are reviewed . . . resulting in a low or zero antidumping or countervailing duty rate for that producer or exporter.'' [36]

In response to commenters' concerns that the requirements in § 351.214(b)(2)(iv)(A) and (B) are overly burdensome, we clarify that the aim of these provisions is to ensure that Commerce can obtain the necessary information for Commerce to determine whether the sales at issue are *bona fide,* consistent with the intent of Congress pursuant to section 751(a)(2)(B)(iv) of the Act. In balancing the aim of these provisions consistent with the intent of Congress with the burdens imposed, we have crafted these amended certifications in as least burdensome a manner as possible, while ensuring that Commerce obtains all of the necessary information to conduct the *bona fide* sale analysis intended by Congress. As explained in the *Proposed Rule,* at the time Commerce rejected the proposal to require such certifications in 1997, Commerce had limited experience dealing with new shipper reviews.[37] In light of the more than 20 years of agency experience involving new shipper reviews, and in particular given concerns over abuse of procedures expressed by Congress, as discussed in the *Proposed Rule,* we believe these additions to the requirements are necessary to ensure that Commerce is able to conduct a proper new shipper review consistent with the intent of Congress.

Further, one commenter expressed concern that there may be legitimate circumstances in which an exporter or producer does not sell subject merchandise to an unaffiliated customer and, therefore, cannot obtain a certification from such a customer.

The aim of a new shipper review, however, is to establish an individual margin of dumping or countervailing duty rate for each qualified new shipper. To establish an individual margin, for example, Commerce needs to obtain sales data pertaining to the sale from the foreign exporter or producer to the first unaffiliated customer in the United States in order to calculate the new shipper's margin of dumping. Contrary to the commenter's contention, the sale to the first unaffiliated customer is a necessary element for Commerce to provide a new shipper with its own antidumping duty or countervailing duty rate.

(b) Documentation Requirements Related to the Issue of Whether Sales Are Bona Fide

Sections 351.214(b)(2)(v)(A) through (E) of the *Proposed Rule* sets forth specific documentation a requestor must provide to Commerce in its request for a new shipper review. In particular, § 351.214(b)(2)(v)(D) requires that a new shipper establish the circumstances surrounding the sales, including the price, any expenses arising from such sales, whether the subject merchandise was resold at a profit, and whether such sales were made on an arms-length basis. Section 351.214(b)(2)(v)(E) provides that a new shipper submit documentation regarding the business

[36] H.R. Rep. No. 114–114 at 89; *see also Proposed Rule,* 85 FR 49472 at 49473.

[37] *Proposed Rule, id.* at 49474.

activities of the producer or exporter. These include the producer's or exporter's offers to sell merchandise in the United States, identification of the complete circumstances surrounding sales to the United States, any home market, or third country sales, identification of the producer or exporter's relationship to the first unrelated United States purchaser, and with respect to non-producing exporters, an explanation of the non-producing exporter's relationship with its supplier.

Two commenters support the new documentation requirements in § 351.214(b)(2)(v)(D) through (E) for a new shipper to obtain a review. One commenter argues that Commerce should not require the documentation in § 351.214(b)(2)(v)(D) through (E) at the time of the new shipper *request,* but rather Commerce should ask for more information from the producers or exporters requesting a new shipper review before determining whether to initiate. Similarly, one commenter argues that requiring this additional documentation to establish a *bona fide* sale is inconsistent with Article 9.5 of the AD Agreement [38] because these are additional preconditions to conducting a new shipper review that expand beyond what was provided for in that agreement. Another commenter opposes the *Proposed Rule's* new documentation requirements for new shipper review requests which, the commenter argues, are likely to unfairly discourage legitimate requests because ''new shipper reviews are often the only alternative for producers and exporters who would otherwise face high all other rates, separate rates, or country-wide rates.''

Response:

We have left unchanged § 351.214(b)(2)(v)(D) through (E). Commerce explained in the *1996 Proposed Rule* that it was requiring certain certifications from the requestor ''demonstrating that the party is a *bona fide* new shipper.'' [39] Consistent with this earlier discussion, and in light of the concerns related to circumvention and abuse of new shipper review procedures expressed by Congress in enacting section 751(a)(2)(B)(iv) of the Act, the *Proposed Rule* limits initiations of new shipper reviews to where there is a reasonable likelihood of *bona fide* sales for Commerce to review. Further, as clarified in section 1(e) below, normally, when a requestor of a new shipper review submits all of the documentation necessary for Commerce to perform a *bona fide* sales analysis, as outlined in the *Proposed Rule* § 351.214(b)(2)(i) through (v), and (vi) for countervailing duty new shipper reviews, the requestor has demonstrated a reasonable likelihood that there are *bona fide* sales for Commerce to base its initiation of a new shipper review. These requirements, as contained in § 351.214(b)(2)(v)(D) through (E), are consistent with Commerce's statutory obligation to provide new shipper reviews to those exporters and producers with *bona fide* sales of subject merchandise to the United States.[40] The documentation requirements in § 351.214(b)(2)(v)(A) through (E) assist Commerce in determining whether a party qualifies as a new shipper and whether a new shipper review should, therefore, be conducted, consistent with Commerce's statutory obligation to calculate a dumping margin or countervailing duty rate based solely on *bona fide* United States sales.[41] Accordingly, we find it reasonable for the agency to require that a requestor for a new shipper review provide the required *bona fide* sales documentation necessary for Commerce to perform the *bona fide* sales analysis in the review.

For these reasons, we also disagree that this regulatory modification is inconsistent with the United States' international obligations under the AD and SCM Agreements.[42] While Articles 9.5 and 19.3 of the AD and SCM Agreements, respectively, identify broad qualifications for conducting a new shipper review, the requirements identified in § 351.214(b)(2)(v)(D) through (E) are consistent with U.S. law, which is consistent with our obligations under the AD and SCM Agreements.

Further, historically, new shipper reviews have involved very few sales. In such cases, Commerce must fully understand the circumstances surrounding these limited number of transactions as these provide the basis for a new shipper's future selling of subject merchandise into the United States and the level of dumping or subsidization, if any.

(c) Documentation Requiring Volume of the Sale and Subsequent Sales

Paragraphs (B) and (C) of § 351.214(b)(2)(v) of the *Proposed Rule* require that a new shipper provide in its new shipper review request information regarding the volume of its shipment(s), including whether such shipments were made in commercial quantities, and the date of sales to an unaffiliated customer in the United States.

One commenter argues that requiring documentation establishing that sales are of ''commercial quantities'' in § 351.214(b)(2)(v)(B) is inconsistent with Article 9.5 and 19.3 of the AD Agreement and the SCM Agreement, respectively, which only require that a new shipper not have exported subject merchandise during the period of investigation and is not related to any of the investigated exporters and/or producers. Further, another commenter argues that the criteria requiring ''the date of any subsequent sales'' when requesting a new shipper review is ''unrealistic in a commercial context'' because the commercial reality renders few importers with the financial position to import multiple shipments of products that are subject to high antidumping duty margins.

Response:

With respect to the issue of requiring documentation pertaining to whether the sales were made in commercial quantities under § 351.214(b)(2)(v)(B), we disagree with the commenter's objection. Section 751(a)(2)(B)(iv)(II) of the Act requires Commerce to consider, depending on the circumstances surrounding such sales, whether the sales were made in commercial quantities. Section 351.214(b)(v)(B) of the *Proposed Rule* is intended to implement this provision of the statute.

Regarding the commenters' concerns that Commerce is requiring requestors to establish that ''subsequent shipments'' and ''subsequent sales'' occurred under § 351.214(b)(2)(v)(B) and (C) of the *Proposed Rule* in order to obtain a new shipper review, these concerns are misplaced. The *Proposed Rule* does not establish such requirements. Rather, Commerce simply requires that a producer or exporter requesting a new shipper review provide documentation of any subsequent sales or shipments and the dates of such sales to the extent such sales or shipments were made. Thus, there is no requirement to make subsequent sales or shipments in order to obtain a new shipper review. In addition, we note the requirement to provide such information was not added to the Proposed Rule, but rather exists in the current regulations. Under this same requirement, Commerce previously initiated new shipper reviews where subsequent shipments or

[38] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).

[39] *See 1996 Proposed Rule,* 61 FR 7308 at 7317–18.

[40] *See* section 751(a)(2)(B) of the Act.

[41] *See* section 751(a)(2)(B)(iv) of the Act.

[42] Agreement on Subsidies and Countervailing Measures (SCM Agreement).

sales did not occur.[43] However, as identified above, for consistency with the language utilized in § 351.214(b)(v)(C) and for further clarity, Commerce is modifying § 351.214(b)(v)(B) for consistency with the language utilized in § 351.214(b)(v)(C) and to clarify that a new shipper is required to provide documentation establishing the volume of any subsequent shipments where subsequent shipments have occurred.

(d) Proposal for Documentation Requiring Proof of Multiple Sales in the New Shipper Request

Paragraph (b) of § 351.214 outlines the requirements for requesting a new shipper review. Several commenters propose that Commerce amend § 351.214(b) of the *Proposed Rule* to require that requestors demonstrate they have made multiple *bona fide* sales, as opposed to a singular ''sale'' in their request for purposes of initiating a new shipper review. These commenters argue that by using the plural term ''sales,'' as opposed to the singular term ''sale'' in section 751(a)(2)(B)(iv), Congress expressed its clear intent to require multiple *bona fide* sales as a pre-requisite to obtain a new shipper review. In their view, such single-sale reviews should be prohibited because Commerce lacks the statutory authority to conduct a new shipper review based on a singular sale. To support their interpretation of the statute, the commenters point out that only the plural term ''sales'' is consistent with the legislative history and language of the TFTEA, and section 751(a)(2)(B)(iv) of the Act. In their view, Commerce should therefore clarify in the final rule that proof of multiple *bona fide* sales is required to obtain a new shipper review.

Response:

We disagree and have not accepted the suggested interpretation of the statute or its legislative history, and, therefore, have left § 351.214(b) unchanged with respect to this issue. The *Proposed Rule* pertaining to new shipper reviews does not require proof of more than one sale for a requestor to obtain a new shipper review. Declining to create a regulatory bar to the new shipper review process for singular sales is consistent with the proper construction of the TFTEA[44] and section 751(a)(2)(B)(iv) of the Act, as amended, in accordance with federal law.

Interpretative canons guide statutory construction because the language used by Congress in the making of laws is often ambiguous with respect to meaning. Title 1 of the United States Code codified the interpretative canons that govern the construction of federal statutory law.[45] Section 1 of Title 1 specifies that, ''[i]n determining the meaning of any Act of Congress, [. . .] words importing the plural include the singular[.]'' *Id.* The text, context, and structure of TFTEA and section 751(a)(2)(B)(iv) do not compel a departure from this interpretative canon.[46]

Therefore, although Congress used the word ''sales'' in section 433 of EAPA in the TFTEA, and as a result, the plural ''sales'' appears in section 751(a)(2)(B)(iv) of the Act, the use of the plural form of the word ''sale'' does not support the conclusion that the statute should be construed to mean multiple sales are required for a new shipper review. Pursuant to 1 U.S.C. 1, the plural ''sales'' includes the singular ''sale.'' Congress has not indicated to Commerce that it intended to exclude single sales with its use of plural ''sales'' and, therefore, Commerce believes that a single sale could be subject to review. Moreover, a single sale could, for example, include substantial quantities such as thousands or even hundreds of thousands of units, and thus does not, by itself, provide a basis to bar new shipper reviews of such sales or create a *per se* rule that such sales are not *bona fide* sales for purposes of the AD and CVD laws.

Consistent with federal law governing the construction of federal statutes, Commerce's proposed new shipper review regulation does not impose a regulatory bar to review of singular sales. While Commerce will not act contrary to federal law in construing the meaning of a statute, the agency believes that other practical considerations support the position that a regulatory bar to new shipper reviews for singular sales is unnecessary. First, the number of sales continues to be a factor which Commerce considers in its *bona fide* sales analysis conducted in a new shipper review. At the same time, as noted, Commerce looks to the volume and quantity of the sales as a factor to consider in the context of determining whether the sales or sale is *bona fide* for purposes of the AD and CVD laws.

Historically, new shipper reviews have often involved the review of few or singular sales because the new shipper review provides a path for a new entrant to the U.S. market to receive its own rate based on its individual activity on an expedited basis. Commerce's *Proposed Rule,* as adopted in this final rule, does not intend to limit a new shipper's eligibility for review based on whether the applicant can demonstrate one (as opposed to more than one) sale, provided the sale at issue is *bona fide* for purposes of the AD and CVD laws.

(e) The Appropriate Standard for Initiating New Shipper Reviews

One commenter requests that Commerce clarify whether the ''reasonable indication'' standard (*i.e.,* the same standard applied by the ITC in its preliminary material injury determinations) is intended to be the legal threshold which respondents must satisfy in order to obtain a new shipper review. This commenter requests that if Commerce intends to use this legal standard, then Commerce should include language that reflects that standard in the final rule.

Response:

We have left unchanged § 351.214(b) with respect to this issue. The *Proposed Rule* did not apply the ITC's ''reasonable indication'' standard for material injury determinations to the required showing for the initiation of a new shipper review. Commerce intends to initiate new shipper reviews, as stated in the *Proposed Rule,* where there is a ''*reasonable likelihood* that there ultimately will be a *bona fide* sale for Commerce to review.''[47] Additionally, Commerce intends to initiate new shipper reviews, as stated in the *Proposed Rule,* unchanged in this final rule, where ''there is a *reasonable likelihood* that the unaffiliated customer will participate in the review.''[48] Therefore, the standard articulated by Commerce in the *Proposed Rule* is the ''reasonable likelihood'' standard which imposes a burden on the new shipper review requestor to demonstrate that there is a reasonable likelihood that the request for review involves *bona fide* sales. As outlined in the *Proposed Rule* §§ 351.214(b)(2)(i) through (v), and (vi) for countervailing duty new shipper reviews, unchanged in this final rule,

[43] *See, e.g., Polyethylene Terephthalate Film, Sheet and Strip from India: Initiation of Antidumping Duty and Countervailing Duty New Shipper Reviews,* 75 FR 10758 (March 9, 2010); *see also Hardwood Plywood Products from the People's Republic of China: Initiation of Antidumping New Shipper Review; 2019,* 84 FR 44862 (Aug. 27, 2019).

[44] *See* Public Law 114–125, section 433, 130 Stat. at 171 (enacting modifications to the Act, including section 751(a)(2)(B)(iv), ''Determinations Based on *Bona fide* Sales,'' in the context of new shipper reviews to address circumvention).

[45] 1 U.S.C. 1.

[46] *See Life Techs. Corp.* v. *Promega Corp.,* 137 S. Ct. 734, 742. 580 US____(2017) (asserting that the Court's departure from 1 U.S.C. 1 that ''words importing the plural include the singular'' resulted from the statute's text, context and structure).

[47] *See Proposed Rule,* 85 FR 49472 at 49474 (emphasis added).

[48] *Id.* (emphasis added).

when a requestor of a new shipper review submits all of the documentation necessary for Commerce to perform a *bona fide* sales analysis, the requestor has demonstrated a reasonable likelihood that there are *bona fide* sales for Commerce to base its initiation of a new shipper review.

2. Enumerated Factors for Commerce's Bona Fide Sales Analysis (§ 351.214(k))

(a) Sections 351.214(k)(2), (k)(3), and (k)(4)

The elements outlined in § 351.214(k)(2) through (4) identify additional factors that Commerce shall consider in determining whether a new shipper requestor's sales are *bona fide,* consistent with section 751(a)(2)(B)(iv)(VII) of the Act. These sections provide that Commerce shall consider whether an exporter, producer, or customer has lines of business unrelated to the subject merchandise; whether there is an established history of duty evasion or circumvention with respect to new shipper reviews under the relevant order; and whether there is an established history of evasion or circumvention with respect to new shippers under any order in the same or similar industry.

One commenter opposes § 351.214(k)(2) of the *Proposed Rule,* arguing that whether the producer, exporter, or customer has lines of business unrelated to the subject merchandise is not relevant for a *bona fide* sales analysis. Oppositely, another commenter supports Commerce's proposed § 351.214(k)(2), a factor to analyze a new shipper's line of businesses that are not subject merchandise, because new shipper reviews have been in the past misused to engineer low dumping margins. This commenter argues that looking to whether the subject merchandise is sold in the new shipper's existing line of business can provide insight into whether the sale was made in the normal course of business. Another commenter similarly opposes Commerce's requirement that the ''full operations'' of a producer or exporter requesting a new shipper review be examined as part of the *bona fide* sales analysis. This commenter argues that Commerce should limit its review to the actual sales transactions and relationship between the requestor and importer.

Additionally, two commenters oppose factors related to the history of duty evasion which Commerce will consider as part of the *bona fide* sales analysis listed in § 351.214(k)(3) and (4) of the *Proposed Rule.*[49] These commenters argue that whether there is an established history of duty evasion with respect to new shipper reviews or circumvention under the relevant antidumping or countervailing duty order or any antidumping or countervailing duty order in the same or similar industry is not relevant for a *bona fide* sales analysis. One of these commenters asserts that unless Commerce finds collusion at play, any wrongdoing that may have occurred in the past is not pertinent to the review because there is no nexus between the current shipper and any past wrongdoing. Contrary to this opposition, one commenter supports the *Proposed Rule* which considers the history of duty evasion of an antidumping duty order because it would prevent further harm to the domestic industry, particularly in cases where Commerce has not applied a circumvention ruling on a country-wide basis.

Response:

We have modified the mandatory factors to be considered for purposes of the final rule. First, § 351.214(k)(2) is retained in the final rule. Commerce's consideration of the lines of business in which the producer, exporter, or customer is engaged can be telling as to the *bona fide* nature of the sales involved in a new shipper review. For example, Commerce's consideration of the lines of business unrelated to the subject merchandise may indicate that sales of subject merchandise are entirely unrelated to the company's primary business, that it has little or limited knowledge and expertise in the subject merchandise, and, thus, may be indicative of whether the sale or sales are considered *bona fide,* in conjunction with other relevant factors. Section 351.214(k)(2) of the *Proposed Rule,* unchanged in this final rule, will assist Commerce in developing a consistent practice of evaluating typical behavior of new shippers and more clearly identifying unmeritorious claims of *bona fide* sales based on schemes to engineer low dumping margins involving companies not engaged in the relevant business for purposes of the AD and CVD laws.

While we have retained § 351.214(k)(2), the factors pertaining to the history of duty evasion found in paragraphs (k)(3) and (4) are removed from the final rule solely on the ground that these factors need not be considered in every case. However, where the evidence compels consideration, Commerce continues to be authorized to consider the issue of duty evasion under an order and industry-wide basis. While the evidence may not be specific to the particular new shipper, and, thus, cannot by itself be considered sufficient to determine whether the sales at issue are *bona fide,* such evidence may be indicative of a pattern of behavior under an order or in an industry that is generally reflective of activity of a contrived nature and, thus, may contribute to a finding of sales being non-*bona fide* for purposes of the AD and CVD laws (*e.g.,* where actors within an industry tend to engage in similar conduct and are generally faced with similar facts and circumstances, such as low barriers to entry, a high degree of changes in ownership, or where an industry is typified by a high degree of turnover of companies). In such cases, an established history of duty evasion or circumvention may be relevant and, therefore, may be considered by Commerce in making its determination. Because the enumerated factors are not exhaustive, these types of factors, where relevant, should be considered in determining whether the sales at issue are *bona fide* for purposes of the AD and CVD laws.

(b) Section 351.214(k)(6)

Section 351.214(k)(6) provides that Commerce shall consider ''any other factor'' it determines relevant with respect to the future selling behavior of a new shipper, including indicia that the sale was not commercially viable. Several commenters support the *Proposed Rule* as reflecting the 2016 statutory changes in the TFTEA which require an exporter or producer to demonstrate that its sale(s) is *bona fide* pursuant to the *bona fide* sales factors in section 751(a)(2)(B)(iv) of the Act. One commenter opposes § 351.214(k)(6) of the *Proposed Rule,* asserting that this section of the regulation provides ''vague and unlimited authority'' to reject new shipper requests. Accordingly, this commenter argues that Commerce should remove § 351.214(k)(6) from its final rule to ''ensure Commerce doesn't exceed its statutorily granted authority'' or, in the alternative, define the circumstances in the regulations as to the factors it may consider in determining whether or not to reject a request for a new shipper review.

Response:

We have left unchanged § 351.214(k)(6). Contrary to the commenter's assertion that paragraph (k)(6) provides Commerce unlawful and unlimited authority in analyzing a request for a new shipper review, section 751(a)(2)(B)(iv) of the Act

[49] *Id.* at 49495.

provides that Commerce may consider ''any other factor'' it determines relevant with respect to the future selling behavior of the producer or exporter. This may include any other indicia that indicate whether the sale was or was not commercially viable, and, thus, *bona fide* for purposes of the AD and CVD laws. Accordingly, this section of the *Proposed Rule* conforms to the intent of Congress for purposes of examining whether the sales at issue are *bona fide* for purposes of the AD and CVD laws.

Regarding the commenter's request that Commerce define the circumstances in the regulations as to the factors it may consider in determining whether it will initiate on a request for a new shipper review, Commerce has three clarifications. First, regarding the request to clarify what Commerce will consider in determining whether to initiate a new shipper review, Commerce clarifies that normally Commerce will initiate a new shipper review where a requestor submits the required documentation necessary for Commerce to perform a *bona fide* sales analysis, as outlined in § 351.214(b)(2)(i) through (v), and (vi) in the countervailing duty context. By providing such documentation, the requestor is able to demonstrate a reasonable likelihood that the sales subject to the review are *bona fide* sales for purposes of initiation and that the unaffiliated customer will participate in the review.

Second, Commerce notes that the factors enumerated in § 351.214(k)(1) and (2) provide further clarity as to the other factors Commerce will look to, pursuant to section 751(a)(2)(B)(iv)(VII) of the Act.

Third, Commerce clarifies that, regarding the factors it may consider beyond those enumerated in the final rule, such additional factor or factors to be considered may vary based on the facts and circumstances in a given case. Congress provided Commerce with the authority to consider ''any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review,'' affording Commerce the flexibility to evaluate additional factors based on the facts and circumstances of a given case.[50] Thus, consistent with its statutory authority, Commerce will continue to consider factors that it determines, based on the facts and circumstances in a given case, are relevant with respect to the future selling behavior of the producer or exporter, including any other indicia that the sales were not commercially viable.

(c) Whether Commerce Should Require Documentation of Genuine Negotiations and/or Order Inquiries From an Unrelated Purchaser

Several commenters propose that Commerce add an additional factor to the *bona fide* sales requirements of § 351.214(k) that would require producers or exporters requesting a new shipper review to provide documentation of ''genuine negotiations or order inquiries,'' such as emails or internal sales approval documentation from the unaffiliated purchaser, to further ensure that new shippers have not coordinated with purchasers to ''engineer'' lower margins.

Response:

We have not changed § 351.214(k) with respect to the proposed change. The *Proposed Rule* requires documentation establishing the circumstances surrounding such sale(s), including the producer or exporter's offers to sell merchandise in the United States under § 351.214(b)(v)(E)(*1*). This includes the offers made to the unaffiliated purchaser in the United States, along with information on price, expenses, and whether such merchandise was resold at a profit under § 351.214(b)(v)(D). We believe the requirements established for a new shipper review request are sufficient for purposes of the request. In addition, Commerce is not precluded from requesting additional documentation, as needed, during the course of the review, including documents typically examined during verification. For these reasons, Commerce's final rule captures the additional documentation we believe necessary to prevent meritless new shipper review claims.

(d) Discussion of a Single or Low Number of Sales in the Bona Fide Analysis

One commenter argues that Commerce should explain in the preamble to the final rule that ''a single or low number of sales, particularly a single sale, will rarely be found to be *bona fide,* unless the shipper can establish that a low number of sales is typical for the merchandise in question in the U.S. market for the period covered by a new shipper review.'' Further, this commenter asserts that should Commerce find that a ''multiple sales'' requirement cannot be implemented in every case, Commerce should modify § 351.214(k)(5) to read: ''the quantity and number of sales; and . . . .''

Response:

We have not adopted the commenter's proposal that a single or low number of sales will rarely be found to be *bona fide* or the commenter's proposed modification to § 351.214(k)(5) concerning the quantity and number of sales. Commerce makes its *bona fide* sales determinations on a case-by-case basis. Any statement, therefore, concerning the frequency of affirmative or negative *bona fide* sales determination would be inappropriate. However, Commerce clarifies that the language in § 351.214(k)(5) identifying ''the quantity of sales'' as a factor Commerce will consider in accordance with section 751(a)(2)(B)(iv)(VII) of the Act, means the same as ''number of sales.'' Therefore, the suggested change is unnecessary.

(3) Rescission of Initiated New Shipper Reviews

(a) Rescission if Information To Establish Multiple Sales Is Missing From the Record

Section 351.214(f) of the *Proposed Rule* describes the circumstances under which Commerce may rescind a new shipper review. One commenter argues that Commerce should amend § 351.214(f) to state that Commerce shall rescind a new shipper review if it finds that information to establish *bona fide* sales, plural, are missing from the new shipper review request to alleviate administrative burdens.

Response:

As an initial matter, the commenter's position that rescission based on lack of *bona fide* ''sales''—plural, is addressed at length in comment 1(d). To reiterate, there is no statutory or regulatory bar to the new shipper review process based on the existence of only one, as opposed to more than one, *bona fide* sale. Therefore, Commerce declines to adopt the commenter's proposal that § 351.214(f) be amended to reflect a requirement that multiple sales are required for a new shipper review to proceed in regular course.

As Commerce explained in the *Proposed Rule,* the purpose of the conforming amendments to § 351.214 pertaining to new shipper reviews is to implement the modifications to section 751(a)(2)(B) of the Act enacted by Congress in 2016.[51] Therefore, we do not amend the *Proposed Rule's* rescission provision to require Commerce to rescind a review where proof of multiple sales is absent from the record.

[50] *See* section 751(a)(2)(B)(iv)(VII) of the Act.

[51] *See* Public Law 114–125, section 433, 130 Stat. at 171.

(b) Rescission as a Bar to Future New Shipper Review Requests

One commenter requests that Commerce include in its final rule a new paragraph (f)(5) that states: ''[i]f the Secretary rescinds a new shipper review pursuant to § 351.214(f)(3), then the party that requested the rescinded new shipper review may not subsequently request a further new shipper review, but must instead request an administrative review as provided in § 351.213(b)'' to prevent a party from filing a new shipper review request if it failed to establish its sales are *bona fide*.

Response:

We are not adopting this commenter's suggestion to add a new paragraph (f)(5) to § 351.214. To clarify, if Commerce rescinds a review of specific sales pursuant to § 351.214(f)(3), we will not revisit that determination with respect to those particular sales as there is finality with respect to Commerce's determinations. However, a new shipper will not be barred from requesting a new shipper review, consistent with § 351.214(c), for later, unreviewed, sales made within one year of the date referred to in § 351.214(b)(2)(v)(A).

(4) Procedure for Parties To Challenge a Decision Not To Initiate a New Shipper Review at the Administrative Level

One commenter argues that the *Proposed Rule* is not clear regarding what a respondent is required to provide to Commerce in order to obtain a new shipper review, and that the *Proposed Rule* grants ''unfettered discretion'' to Commerce on whether to initiate a new shipper review. This commenter argues that because the *Proposed Rule* indicates Commerce will determine whether the information provided in a new shipper request will reasonably indicate a *bona fide* sale occurred in order to initiate a new shipper review, Commerce will open itself up to litigation over any determination not to initiate. Therefore, this commenter asserts that Commerce should amend its proposed regulation and provide for a preliminary determination by Commerce on whether to initiate a new shipper review, providing opportunities for parties to comment and submit additional factual information, before making a final decision on initiation. Relatedly, this commenter requests that Commerce establish ''specific objective thresholds'' that a requestor needs to satisfy in order to obtain a new shipper review.

Several commenters oppose the former commenter's proposal to establish a preliminary determination, briefing, and comment process regarding Commerce's decision whether to initiate a new shipper review because, these commenters assert, doing so would needlessly use additional Commerce resources and provide an avenue for arbitrary appeals of Commerce's preliminary determinations to the CIT.

Response:

We have left unchanged § 351.214 with respect to this issue. Contrary to the commenter's concern that the *Proposed Rule* grants ''unfettered discretion'' to Commerce as to whether to initiate a new shipper review, Commerce's determinations whether to initiate a new shipper review are limited by the requirements identified in the final rule, including whether the documentation submitted in a new shipper review request indicates a reasonable likelihood of *bona fide* sales for Commerce to review. Additionally, as clarified in this preamble, if a new shipper review requestor provides Commerce with the documentation identified in the proposed § 351.214(b)(2)(i) through (v), and (vi) in the countervailing duty context, then the requestor will normally be able to demonstrate a reasonable likelihood that there ultimately will be a *bona fide* sale for Commerce to review and base its determination. Thus, in such cases, Commerce will initiate a new shipper review.

Further, the *Proposed Rule* provides additional clarity as to the specific requirements of a producer and/or exporter when requesting a new shipper review. Such clarity, as provided in § 351.214(b)(iv) and (v), offers producers and exporters ''specific objective threshold'' requirements that a new shipper review requestor needs to provide Commerce in order to seek a new shipper review. In addition, the procedure we have adopted provides that Commerce will not initiate a new shipper review where the information submitted with the request pursuant to the documentation requirements outlined in § 351.214(b) is insufficient. In the event that Commerce determines that the requirements for a request for a new shipper review have not been satisfied, in denying the request, Commerce will provide a written explanation of the reasons for the denial. In this way, the requestor has an understanding of the deficiencies of the request and the basis for Commerce's decision. We see no reason to add further procedural steps. These decisions are analogous to the requirement that Commerce not initiate an AD or CVD investigation where the petition fails to provide support for the necessary elements for initiation. In those cases, Commerce determines not to initiate the investigation. Here, where a request for a new shipper review fails to meet the requirements outlined in § 351.214(b), Commerce expects to deny the requestor a new shipper review.

(5) Whether the Proposed Rule Permits Commerce Up to 6 Months To Initiate a New Shipper Review

Promulgated in 1997 with the new shipper review regulations, § 351.214(d)(1) outlines the specific times when Commerce will initiate a new shipper review under a relevant order: In the calendar month immediately following the anniversary month or in the calendar month immediately following the semiannual anniversary month, depending on when a new shipper request is received.[52]

One commenter requests that Commerce confirm whether the *Proposed Rule* will continue to permit up to six months for Commerce to initiate a new shipper review and whether the goods would be subject to the residual duty during this period.

Response:

The *Proposed Rule* makes no change to the current regulation pertaining to the time limits for the initiation of a new shipper review (with the exception of a minor grammatical edit in paragraph (d)(2)). As required by the current and proposed § 351.214(d)(1), Commerce will initiate a new shipper review in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the six-month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).[53] The regulation thus requires Commerce to initiate a new shipper review pertaining to an order during two months in a calendar year: (1) In the month after the order's anniversary month; and (2) in the month after the order's semiannual anniversary month. Given that the two months in which Commerce may initiate a new shipper review are separated by six months, the rule does permit six months for Commerce to initiate a new shipper review. However, the time permitted depends on when the new shipper requests a review. For example, the rule provides for a much shorter time period for the initiation of a new shipper review based on the proximity to the anniversary and semiannual anniversary of the relevant order.

[52] *1997 Final Rule,* 62 FR 27296 at 27395.

[53] *See Proposed Rule,* 85 FR 49472 at 49494.

With respect to the comment to confirm whether the merchandise would be subject to a duty, in accordance with § 351.214(e) of the *Proposed Rule,* Commerce will direct the suspension or continued suspension of liquidation for any unliquidated entries of subject merchandise from the relevant exporter or producer at the applicable cash deposit rate upon its initiation of the new shipper review.

(6) Whether the New Documentation Requirements Identified in § 351.214(b) of the Proposed Rule Applies to Expedited Reviews

One commenter requests that Commerce clarify that expedited reviews in CVD proceedings for non-investigated exporters do not impose the new documentation requirements listed in the *Proposed Rule* pertaining to the initiation of a new shipper review. This commenter asserts that there is no reason to apply such requirements to expedited reviews based on the current language of § 351.214(l)(3).

Response:

The *Proposed Rule* addressed new shipper review requests, and was not intended to, and does not, impose new documentation requirements for requesting expedited reviews. Apart from the request, however, in the context of an expedited review, as with administrative reviews, a respondent may be subject to a *bona fide* sales analysis, where the facts or circumstances warrant examination.

Scope—§ 351.225

Section 351.225 covers procedures in which Commerce addresses scope-related matters following the issuance of an AD or CVD order, most frequently through a scope inquiry and scope ruling. We received many comments and rebuttal comments on the proposed provisions under this regulation. Below, we briefly discuss each provision, address any comments received, and, where appropriate, explain any changes to the *Proposed Rule* in response to comments. In addition, we explain additional modifications to the *Proposed Rule* where we have determined that such amendments brought § 351.225 into greater conformity with circumvention and covered merchandise regulations §§ 351.226 and 351.227, or otherwise provided greater clarity to these regulations.

1. Section 351.225(a)—Introduction

Section 351.225(a) is the general provision set forth in the beginning of the scope regulations, in which Commerce has explained that it will conduct a scope ruling at the request of an interested party or on Commerce's initiative. One of the proposed modifications is the addition of Commerce's understanding that a scope ruling that a product is covered by the scope of an order is a determination that the product in question has always been covered by the scope of that order. Commerce also explained in the preamble to the *Proposed Rule* that it was removing the term ''clarify'' from the existing regulations because scope inquiries are ''intended to cover a wide variety of scope questions, and are not intended to be restrictive to only those scenarios in which certain language in the scope requires 'clarification.' '' [54]

Commerce received multiple comments on this provision. Several commenters express complete support for the provision as written, emphasizing that concerns about evasion and duty collection should be one of the primary drivers Commerce considers in designing and implementing its revised scope regulations. Those commenters also stress that the Federal Circuit has issued multiple holdings which support Commerce's interpretation of its scope rulings that a determination in a scope ruling that a product is covered by the scope of an order means that a product has always been covered by the scope of an order.[55]

Other commenters challenge that understanding of scope coverage. They argue that such an interpretation of a scope ruling would have an unfair effect on importers and sureties, with one commenter citing to a 1999 scope ruling in which Commerce modified a scope after a scope ruling, as an example in which importers were unfairly forced to pay duties when they did not believe their entries were subject merchandise, and could not have been expected to know their merchandise was covered by an order.[56]

In rebuttal comments, some challenge Commerce's removal of the word ''clarify'' and argue that scope rulings should only apply retroactively when the scope is ''clear'' and not ''ambiguous,'' while others disagree that importers would be penalized by the proposed modifications to the regulations. It was pointed out that in the *1997 Final Rule,* Commerce expressed concerns that ''[i]t would be extremely unfair to importers and exporters to subject entries not already suspended to suspension of liquidation and possible duty assessment with no prior notice and based on nothing more than a domestic interested party's allegation,'' [57] but that such concerns never came to fruition, and, in fact, the primary users of scope proceedings have been importers and foreign exporters. Those commenters went on to argue in their rebuttal comments that any arguments based on the innocence of importers is misplaced, as concerned importers have appropriate tools available to them through scope rulings to determine whether a product may be covered by the order.

Response:

When Commerce initiates a scope inquiry, the purpose of that inquiry is to determine whether a product is covered by the language of the scope of an AD/CVD order. The scope of an order (*i.e.,* the description of the class or kind of merchandise subject to the order) is established during the investigation and published in the **Federal Register** notice of the final determination and order.[58] As explained further below in the discussion of § 351.225(l), the publication of the scope of an order in the **Federal Register** generally provides notice to producers, exporters, and importers that their products may be covered by the scope of the order. The fact that an importer did not declare merchandise as subject to an AD and/or CVD order for a period of time before Commerce issued a scope ruling, for whatever reason, does not mean the product was not covered by the scope up until the scope ruling was issued. If a product is found to be covered by the language of the scope, then the product has always been covered by that language. As some commenters note, the

[54] *Id.,* at 49476–77.

[55] *See, e.g., Bell Supply Co.* v. *United States,* 888 F.3d 1222, 1229 (Fed. Cir. 2018) (*Bell Supply*) (stating that extending the reach of a scope determination backwards is consistent with the Federal Circuit's finding that a determination of origin of imported merchandise for the purposes of a scope ruling necessarily precedes a circumvention inquiry); *AMS Associates, Inc.* v. *United States,* 737 F.3d 1338, 1343–1344 (Fed. Cir. 2013) (*AMS*); *Sunpreme,* 946 F.3d at 1316–1322; *United Steel and Fasteners, Inc.* v. *United States,* 947 F.3d 794, 801–803 (Fed. Cir. 2020) (*Fasteners*).

[56] *See Notice of Scope Rulings and Anticircumvention Inquiries,* 65 FR 41957, 41958 (July 7, 2000) (''pasta in packages weighing (or labeled as weighing) up to and including five pounds, four ounces is within scope; May 24, 1999.''); *see also Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review,* 65 FR 77852, 77853 (Dec. 13, 2000) (''On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the antidumping and countervailing duty orders. On May 24, 1999 we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the antidumping and countervailing duty orders.'').

[57] *1997 Final Rule,* 62 FR 27296 at 27328.

[58] *See* section 706(a)(2) of the Act; section 736(a)(2) of the Act; section 771(25) of the Act.

Federal Circuit has stated through a variety of cases that the current regulations do not adequately acknowledge this fact.[59] Accordingly, we are adopting proposed paragraph (a), with some minor modifications to more clearly emphasize this point.

Further, as discussed above, the statute is silent regarding the procedures and standards that Commerce may apply in issuing a scope ruling. In the absence of any such statutory guidance, Commerce's position is that a factual determination that a product is covered by the scope of the order amounts to a determination that the product has always been covered by the scope of the order. With respect to issues concerning the application of such a determination to certain entries of products and notice to exporters and importers, those issues are addressed below in response to comments under § 351.225(l). As discussed below, the purpose of these modifications is not to penalize companies acting in good faith, but to ensure that scope rulings are properly applied to products that are covered by the scope of an order.

Additionally, as we also explained in the preamble to the *Proposed Rule,* Commerce's scope rulings frequently do more than merely clarify the language of a scope, and we do not believe the degree of ambiguity or clarity of the coverage of a particular product in the language of a scope should support or detract from the fact that a product which is determined to be covered by an order has always been covered by an order, and a product which Commerce determines is not covered by the scope of an order was not covered by the scope of that order before the scope ruling was issued.

Furthermore, we agree with the commenters who explain that any concerned importer who believes a scope is unclear or is uncertain whether its entries may be covered by an AD/CVD order has the appropriate tools available to it, through these regulations, to request a scope ruling.

With respect to the 1999 scope ruling raised by one of the commenters which modified the text of a scope, the Federal Circuit in several subsequent holdings explained that Commerce does not have the authority to outright change the scope of an order through reinterpretation in a scope ruling.[60] There are other means, such as changed circumstances reviews under section 751(b) of the Act, through which the scope may be modified, but with respect to scope rulings, Commerce will not modify the text of a scope in the context of a scope inquiry.[61] In addition, Commerce may conduct a circumvention inquiry under section 781 of the Act to determine whether certain types of products are covered by the scope of the order.

Finally, to bring this provision into conformity with language used in other provisions under § 351.225, as well as language which was already contained in proposed § 351.225(a), we have replaced references to a product being ''within'' the scope of an order to a description of the product at issue being ''covered by the scope of an order.'' This change is made only to use consistent terminology, and not to modify the meaning of the provision.

2. Section 351.225(b)—Self-Initiation of Scope Inquiry

Section 351.225(b) addresses Commerce's authority to self-initiate a scope ruling. In the *Proposed Rule,* Commerce indicated that if it self-initiated a scope inquiry, it would notify all parties on the annual inquiry service list. The only comments that Commerce received on this provision pertained to notice of the agencies' decision to initiate. Specifically, commenters worry that producers, exporters, importers, sureties, and foreign governments who were not on the annual inquiry service list might not get sufficient notice under that procedure should Commerce self-initiate a scope ruling. They, therefore, suggest that Commerce publish its self-initiation in the **Federal Register**.

Response:

In response to those comments, we have revised our notice requirements for self-initiation. The regulation now provides that if Commerce self-initiates a scope inquiry, it will publish a notice of initiation in the **Federal Register**, as suggested by certain commenters. We believe this will satisfy all notice concerns raised by the commenters pertaining to this provision.

3. Section 351.225(c)—Scope Ruling Application

Section 351.225(c) sets forth the requirements for an interested party[62] to submit a standardized scope ruling application. This is a significant change from Commerce's current procedures, which do not require a detailed standardized application. Commerce explained in the preamble to the *Proposed Rule* that it was now requiring an application, with specific information required in that application, as a result of various concerns, including the fact that ''scope ruling requests do not always include the requisite sufficient description and supporting information necessary for Commerce to complete an analysis.''[63]

Several commenters indicate their strong support for the standardized application procedure, and both they, and other commenters, provide suggestions to modify the application requirements. One commenter argues that Commerce should provide further guidance on what the phrase ''to the extent reasonably available'' means, while others complain that requests for ''narrative history of the production of the product'' and the ''volume of annual production of the product for the most recently completed fiscal year'' would be too burdensome for certain parties. Others complain that the application would seem to require more data from producers, exporters, and importers of certain merchandise than a requesting domestic industry, and one claims that Commerce seemed to request unnecessary or ''superfluous'' data, such as ''past models of products.''

Certain commenters also suggest that the application require further detailed quantity and value data, including a disclosure of how much scope inquiry merchandise was imported or shipped to the United States without the payment of duties. Further, they argue

[59] *AMS,* 737 F.3d at 1343–1344; *Sunpreme,* 946 F.3d at 1316–1322; *Fasteners,* 947 F.3d at 801–803.

[60] *See Notice of Scope Rulings and Anticircumvention Inquiries,* 65 FR 41957, 41958 (July 7, 2000) (''pasta in packages weighing (or labeled as weighing) up to and including five pounds, four ounces is within scope; May 24, 1999.''); *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review,* 65 FR 77852, 77853 (Dec. 13, 2000); *Duferco Steel, Inc.* v. *United States,* 296 F.3d 1087, 1095 (Fed. Cir. 2002) (*Duferco*) (''Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.'') (*citing Eckstrom Indus., Inc.* v. *United States,* 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

[61] This is distinguished from a scope clarification, found in the new provision section 225(q). A scope clarification does not change the scope of an order but does clarify the scope—frequently through a footnote to the scope of the order.

[62] The term ''interested party'' is defined in section 771(9) of the Act, and pertains, for example, to ''foreign manufacturers,'' ''producers,'' ''exporters,'' or ''United States importers'' ''of subject merchandise.'' However, the nature of a scope ruling is to determine whether the merchandise produced, imported by, or exported by a party is subject to an AD or CVD order. Thus, in many cases, the question of whether a party is an ''interested party'' depends in part on whether the merchandise at issue is subject merchandise. Accordingly, for purposes of these scope regulations, the term ''interested party'' includes a party that would meet the definition of ''interested party'' under section 771(9) of the Act, if the merchandise at issue in the scope inquiry is in fact in-scope. This clarification of the term ''interested party'' for purposes of this regulation is in no way intended to weaken the requirement that the product is, or has been, in actual production as of the filing of the scope ruling application, as required by paragraph (c)(1).

[63] *Proposed Rule,* 85 FR 49472 at 49477.

that Commerce should request the identity of an importer's U.S. customer or customers if the product was already imported into the United States. They argue that the provision of the quantity and value information, as well as the customer lists, would provide further enforcement tools to Commerce in administering and implementing its scope rulings.

In addition, another commenter argues that Commerce should require that a scope applicant indicate in the application if any of its imports are currently subject to suspension of liquidation and cash deposits.

Another commenter suggests that Commerce insert this clause at the end of § 351.225(c)(2)(i)(C): ''. . . and copies of any Customs rulings relevant to the tariff classification,'' because it claims that such additional information would permit Commerce and other interested parties to verify the scope requestor's classification as accurate. The same commenter also voices concerns about Commerce's proposed requirement of a ''concise public description of the product,'' in § 351.225(c)(2)(ii), without any details about what would be included in that description, claiming that the lack of clarity in that respect could lead to confusion, manipulation by the party filling out the application, and litigation concerns.

Furthermore, another party expresses its concerns that once a certain number of years have passed since an investigation or earlier administrative review segments, and certain proprietary versions of the requested information once available to the requestor are no longer available to interested parties under the terms of an APO, Commerce should consider adopting a procedural mechanism to allow parties access to such data, or at least provide a procedure by which Commerce itself could place the proprietary versions of documents on the record of the scope inquiry.

In rebuttal comments, one commenter disagrees that Commerce should request additional quantity and value information, or customer lists, noting that such information requests would be unduly burdensome to respond to and completely unnecessary to Commerce's determination if a product is subject to an AD or CVD order.

Response:

We have considered all of the comments received on this provision and have determined to make certain modifications to the proposed § 351.225(c); some in response to the comments raised and others to clarify the information which Commerce needs from a requestor to initiate a scope inquiry.

First, as explained in more detail in the discussion of § 351.225(j) below, Commerce continues to recognize that, in addressing country of origin issues in the context of Commerce proceedings, Commerce is not bound by the country of origin determinations of other agencies, such as CBP.[64] That said, such determinations may be informative to our analysis, and are identified as relevant secondary interpretive sources under § 351.225(k)(1), discussed below. Therefore, we agree with the commenter that proposes requesting copies of any Customs rulings relevant to a given tariff classification. Such rulings would be beneficial to our analysis, and we have included that request in our regulation.

Second, we also agree with the same commenter that there should be some clarification as to the requirements of the concise public summary, and have modified the regulation to reflect that the physical characteristics of the product, the countries where the product is produced and from which it is exported, the declared country of origin (if imported and known to the requestor), and the product's tariff classification should all be included in that concise public summary of the product's description. Because Commerce sometimes conducts scope inquiries on merchandise that is already in commercial production but has not yet been exported to the United States, we recognize that there may be cases in which there is no declared country of origin to report under § 351.225(c)(2)(i)(B).

Third, we realize that the proposed regulations neglected to note that we need parties to identify the countries of production, export, and declared origin, both in the detailed description of the product, as well as the concise public summary of the product's description, for our scope inquiry analysis. Accordingly, we have added those requirements to the list of necessary information requested in the application.

Fourth, we are no longer requiring the names and addresses of the producers, exporters, and importers in the public summary, but we still need such information in the detailed description of the product in the application, so we have modified the language to reflect that change.

Fifth, we recognize that the term ''physical characteristics'' is a term used in Commerce's current regulations, and includes not only chemical and technical characteristics, but dimensional characteristics, as well (such as the height, length, circumference, and width of a product). We have, therefore, revised the regulations to once again use the term ''physical characteristics'' and noted that the term ''physical characteristics'' includes all of those additional descriptive terms. It is our understanding that the term ''technical characteristics,'' which is not defined, covers a wide array of characteristics, such as the mass or weight of the product, the volume of the product, the buoyancy, conductivity, and aerodynamic properties of product, and even various mechanical characteristics and properties of the product, such as elasticity, tensile strength, elongation, ductility, brittleness, malleability, plasticity, and hardness of the product. Furthermore, we wish to be clear that by using the term ''including'' in this description, we are expressly indicating that we do not believe these descriptors are exhaustive. Frequently, the physical characteristics relevant to a scope ruling are almost entirely dependent on the language used in the scope of an order to describe the particular product, as well as the additional descriptions provided in the petition or during the underlying investigation. Accordingly, our use of this term is meant to be broadly interpreted and adaptable to the facts of a given scope and inquiry.

Sixth, and finally, we have clarified in § 351.225(c)(2)(vi) that, for imported merchandise that an importer has declared to be subject to an order, or for merchandise which has been determined by CBP to be subject to an order, we need the applicant to provide an explanation for either situation in the application. The language provided in proposed § 351.225(c)(2)(v) was unclear in that regard, appearing to only request information if CBP had determined the entry was covered by the scope of the applicable order and not if the importer had declared it to be subject to an order upon importation.

On the other hand, we do not believe that quantity and value data, or customer lists, should be provided to Commerce in every scope application, as requested by certain domestic producers. Although we agree that such information might be of value to Commerce's analysis in certain situations, we do not believe that in most scope rulings such information would inform our determination as to whether a product at issue is covered by

[64] While the ''Department may consider the decisions of Customs, it is not obligated to follow, nor is it bound by, the classification determinations of Customs. . . .'' *Wirth Ltd.* v. *United States,* 5 F. Supp. 2d 968, 973 (CIT 1998) (*Wirth*) (''Commerce, not Customs, has authority to clarify the scope of AD/CVD orders and findings.'').

the scope of an order. Instead, in those cases in which Commerce determines that quantity and value data, or customer lists, might be of value to Commerce's analysis, Commerce retains the authority to request that information of the applicant or other interested parties to the scope inquiry. Accordingly, we will not include this additional data request in the scope application.

In addition, although we do request that an applicant making a request for a scope inquiry on a product already imported into the United States as of the date of the scope ruling application indicate whether an entry of the product has been declared by an importer, or determined by CBP, as subject to an order, under § 351.225(c)(2)(vi), we do not believe it is necessary to also request that the applicant inform us if imports of the merchandise at issue are currently subject to suspension and cash deposits. We agree with the commenter that such information might be relevant at some point in our inquiry, for example, for purposes of our CBP instructions under § 351.225(l).[65] However, for purposes of evaluating a scope application to determine if a product is covered, or not covered, by the scope of an AD/CVD order, it is only whether the product has been previously declared by an importer, or determined by CBP, as subject to an order which is relevant to our analysis under § 351.225(k). Notably, if a producer, exporter, or petitioner is the party filing the scope inquiry application, unlike the importer, they may not even know if the product at issue is currently subject to suspension and cash deposits.

In response to the concerns expressed by some of the commenters that they would be unable to obtain all of the information listed, that is the reason we have included the words ''to the extent reasonably available to the applicant'' in this paragraph. Whether or not information is reasonably available to an applicant will be a determination made on a case-by-case basis. We understand that interested parties requesting a scope ruling may not have access to all the information that is listed, and despite the criticisms of some of the commenters, it is a fact that domestic industries will likely have less information about a particular exporter and its production experience, for example, than the producer, exporter, and possibly importer of that product. Accordingly, Commerce will allow applicants to explain the reasons they do not have certain information when filling out the scope application. Further, Commerce retains the authority to either issue supplemental questions about those explanations if necessary, or reject a scope ruling application entirely, if Commerce determines that it cannot conduct a scope inquiry in the absence of the missing information at issue.

Accordingly, the information identified in the *Proposed Rule* for the scope application has remained largely the same in this final rule, as we believe those data requests, including information as to the history of earlier versions of the product if this is not the first model of the product under § 351.225(c)(2)(C)(iv), are important to our scope analysis. Again, if a party is unable to provide certain information, and can provide a reasoned explanation as to why those data are unavailable, Commerce will consider such claims in determining whether to accept or reject an application or issue supplemental questionnaires.

Finally, with respect to the request that Commerce create a procedure to place proprietary information on the record of a scope inquiry from proceedings which are a few years old, or make such data generally available to a scope applicant, we have determined not to implement such a procedure in these regulations. To the extent that information is relevant for a scope application, we believe public data will likely usually suffice. We do not believe that Commerce should establish a whole new regulatory exception to the APO procedures for what we foresee as a rare occurrence in which an interested party seeks access to proprietary data no longer available for use in a scope application.

4. Section 351.225(d)—Initiation of a Scope Inquiry and Other Actions Based on a Scope Ruling Application

Section 351.225(d) of the modified regulations provides for the process by which a scope inquiry may be initiated based on a scope application. Certain commenters indicate that they support Commerce's determination to deem a scope inquiry automatically initiated if no further action is taken within 30 days, while another commenter requests that Commerce publish notice of its scope applications and initiations in the **Federal Register** to provide notice to interested parties who may not be on the annual inquiry service list. In addition, another commenter argues that Commerce should provide surety companies with notice of scope initiations so that they can participate in scope inquiry proceedings that are relevant to their interests.

In related comments, several commenters argue that Commerce should allow interested parties an opportunity to submit comments and factual information prior to initiation of a scope inquiry.

Response:

As explained above, Commerce has modified its self-initiation procedures under § 351.225(b) to publish notice of the self-initiation in the **Federal Register**. However, given deadlines and complications in scope inquiry procedures initiated pursuant to a scope application, consistent with our current procedures, we will not publish notices of initiations of scope inquiries in the **Federal Register** under § 351.225(d). Instead, we will, as requested by a commenter, under § 351.225(d)(2), publish on a monthly basis a notice in the **Federal Register** that lists scope applications from the past couple of months filed with Commerce. It is our expectation that usually that list will reflect most, if not all, of the scope applications filed over the past month, but we also recognize that given certain timing constraints, issues frequently arise which make that goal impractical—such as when an application has been filed after the monthly notice has been sent to the **Federal Register** for publication. In that situation, it would be understood that the scope application would be included in the following month's **Federal Register** notice.

We have added this requirement to ensure adequate notification is provided via the **Federal Register** to interested parties not on the annual inquiry service list. By listing the applications received by Commerce requesting a scope inquiry, it is our expectation that the descriptions of the applications will give all interested parties an opportunity to consider if the scope inquiry request is relevant to them and their interests, and allow them the opportunity to file a notice of appearance with Commerce on the record of that scope inquiry. To the extent that surety companies wish to have notice of Commerce's scope inquiries, although they are not interested parties under section 771(9) of the Act (as discussed further below regarding § 351.225(l), comment 12(f)),

[65] As discussed further below, Commerce is modifying § 351.225(l) to provide that Commerce normally will apply a scope ruling that a product is covered by the scope of an order to unliquidated entries not yet suspended which entered prior to the date of initiation of the scope inquiry, with certain exceptions. One of those exceptions would allow for a party to timely request that Commerce consider whether to direct CBP to suspend liquidation and collect cash deposits at an alternative date. Such request must be based on a specific argument supported by evidence establishing the appropriateness of that alternative date, as explained further below.

this monthly published list will also provide them with that notice.

It is our expectation that the **Federal Register** list will include, where appropriate, for each scope application the following data: (1) Identification of the AD and/or CVD orders at issue; (2) a concise public summary of the product's description, including the physical characteristics (including chemical, dimensional and technical characteristics) of the product; (3) the country(ies) where the product is produced and the country from where the product is exported; (4) the full name of the applicant; and (5) the date that the scope application was filed with Commerce. We anticipate that Commerce may include additional information in the monthly **Federal Register** list at its discretion and may leave off the list references to applications which have been rejected and not properly resubmitted.

In addition, Commerce has revised § 351.225(d) to explain that deemed initiation will only occur if Commerce has neither rejected the scope application nor initiated the scope inquiry at an earlier date, and that after 30 days the scope application will be deemed accepted and the scope inquiry will be deemed initiated.

In response to complaints that Commerce should permit parties a greater amount of time in which they can submit comments on the scope application before initiation, we have declined to modify our regulations in that manner. Interested parties on the annual inquiry service list, as provided under § 351.225(n), will be electronically notified soon after an application is filed with Commerce, and the applicant will otherwise serve the application on those interested parties in accordance with § 351.225(c) and (n). Those parties will, therefore, have an opportunity to file arguments with Commerce before initiation.[66] Nonetheless, even if they do not file comments on the application before it is deemed accepted and the scope inquiry is initiated, they will also have an opportunity afterward to comment on the application and provide responsive facts and arguments on the record, in accordance with § 351.225(f). This is true for interested parties who received notice of the filing of the scope application in the **Federal Register** as well, as described in this provision.

We recognize that under Commerce's current practice, interested parties frequently submit comments prior to the initiation of a scope inquiry in order to provide Commerce with additional factual information that rebuts or clarifies a scope ruling request. However, we believe that, under the new scope inquiry procedures, the need for such an opportunity to submit comments/additional factual information pre-initiation will be largely alleviated with Commerce's proposed standardized scope ruling application because use of the scope ruling application should result in more fulsome and complete information being filed at the outset.

We continue to believe that requiring a more fulsome standardized scope application (rather than what is required in the current regulation), and having a scope application deemed accepted and a scope inquiry commenced after 30 days, is reasonable and will speed up Commerce's scope ruling procedures. If we were to extend that time longer, as requested by several commenters, that goal would be less likely to be achieved. Therefore, we have made no modification to the timetable spelled out in § 351.225(d) from that set forth in the *Proposed Rule*.

Finally, we have also added a provision to § 351.225(d) that if Commerce determines upon review of a scope ruling application that the scope issue should be addressed in another, ongoing segment of the proceeding, such as a circumvention inquiry, then Commerce will notify the applicant, within 30 days after the scope ruling application has been filed, that the agency will not initiate the scope inquiry, but address the scope issue in that other segment.

5. Section 351.225(e)—Deadlines for Scope Rulings

Section 351.225(e) provides that Commerce shall issue a final scope ruling within 120 days after the date on which the scope inquiry was initiated, although it may be extended up to an additional 180 days for good cause (for a fully-extended total of 300 days). This was a change from the 45-day deadline in the current regulations, which Commerce explained in the preamble to the *Proposed Rule* has been a ''difficult and frequently unworkable deadline.'' [67] Commerce explained that the shorter deadline led to ''unnecessary delay and questions on the part of outside parties,'' and if Commerce had to solicit and ''receive new factual information and comments from numerous parties,'' it left ''little time to consider the evidence and arguments and reach a well-reasoned decision within the time allotted.'' [68] Therefore, Commerce frequently had to extend deadlines in a large number of its scope inquiries. Accordingly, Commerce revised these regulations to provide for a more realistic and manageable timetable.

We received many comments and rebuttal comments on this provision. One commenter argues that the current 45-day deadline is already too long for certain simple and non-controversial scope rulings. If Commerce has the authority to extend the 45-day deadline for good cause, the elimination of the importers' ability to obtain a scope ruling within 45 days is unnecessary because the agency can already achieve a short delay when necessary under its current regulations. The same commenter also opposes removing the distinction between an informal and formal scope ruling under the current regulations, arguing that, in fact, such a change would slow down the scope ruling process rather than speed it up and the 120-day deadline would become the automatic default in every case. That commenter, therefore, argues Commerce should make no changes to its scope inquiry procedures in the modified regulations.

Other commenters argue that Commerce should not just have a deadline for final scope rulings, but should also have a deadline for preliminary scope rulings, *i.e.,* when Commerce determines to issue a preliminary scope ruling. They express concern that there could be a period of time between the initiation and the preliminary scope ruling where potential subject merchandise is being liquidated without regard to duties, given that entries are deemed liquidated by operation of law after one year. The commenters suggest that Commerce should establish a deadline for preliminary scope rulings of no later than 150 days after initiation. They argue that this would be consistent with Commerce's proposed circumvention regulations, which identify a 150-day deadline for preliminary circumvention determinations.

Furthermore, one commenter argues that Commerce should inquire into whether an importer has entries of the merchandise at issue subject to suspension of liquidation or cash deposit requirements under the AD or CVD order at issue, and if that entity's imports are not currently being suspended or subject to cash deposits, the regulations should mandate that Commerce issue a preliminary scope ruling no later than 120 days after

[66] Given the short turn-around of scope initiations, at its discretion, Commerce may, but is not required to, consider such arguments before a scope inquiry is initiated.

[67] *Proposed Rule,* 85 FR 49472 at 49478.

[68] *Id.*

initiation of the scope inquiry, to ensure relief to the injured domestic industry.

In addition, two other commenters express concern over the fully extended deadline of 300 days. They argue that such a deadline is excessive, inconsistent with other provisions in the proposed regulations, and that providing Commerce with six more months to consider a scope ruling request would increase burdens on U.S. companies in terms of legal and business uncertainty.

In their rebuttal submissions, certain commenters agree with the request for a 150-day deadline for preliminary scope rulings, and strongly disagree with the argument that Commerce should retain its 45-day deadline. They point out that the proposed regulations do not preclude Commerce from issuing its scope ruling before the 120-day deadline, only that the 120-day deadline is a maximum deadline. Indeed, certain domestic industry commenters state that they believe that the 120-day deadline will result in more predictable, and possibly shorter, deadlines than under the current system, where they claim there have been too many extensions, and that each day Commerce does not initiate or issue a scope ruling is another day where injury to the domestic industry occurs.

Further, in their rebuttal submissions, certain commenters challenge the idea that the length of a scope inquiry is unfair to importers, arguing that if an importer conducts proper due diligence, it will have the appropriate tools to analyze whether its product may or may not be covered by an order, and if it does not, it should request a scope ruling sooner rather than later. Due diligence, they argue, is a best practice and should not be seen as an unreasonable burden or unfairness to importers.

Response:

After considering the submitted comments regarding scope segment deadlines, we have determined not to modify the deadlines set forth in the proposed § 351.225(e). For all of the reasons we explained in the preamble to the *Proposed Rule,* the current system is unwieldy and forces Commerce to issue multiple extensions. We also disagree that the current system of an informal and formal scope ruling dichotomy is a preferable way to conduct our scope rulings. As we also explained in the Preamble to the *Proposed Rule,* the distinction between those two procedures sometimes causes confusion and adds unnecessary delay to our proceedings; accordingly, we believe the burden resulting from the current system outweighs the benefit of a simpler, single scope inquiry procedure.[69]

Furthermore, we believe the use of a standardized scope application and a 120-day deadline is reasonable, and if a case is complicated and good cause exists to warrant an extension, allowing Commerce to extend its scope inquiry proceedings up to an additional 180 days is also reasonable. As one of the commenters argues, this does not mean that Commerce will always take 120 days to issue scope rulings, especially when a scope ruling is fairly simple, straightforward, and/or uncontested. In those cases, it is not unreasonable to expect that Commerce might issue a scope ruling in a shorter time frame. Similarly, it does not mean that every time Commerce extends the proceeding, it will automatically extend the full 180 days.

Moreover, we do not agree with the commenter who argues that Commerce should be mandated by the regulations to: (1) Request that every applicant that imports the product subject to the scope inquiry inform us whether liquidation of its entries of the particular product are currently being suspended and if it is paying cash deposits on those entries; and (2) if the requestor responds that the imports at issue are not being suspended or that the importer is not paying cash deposits on those entries, Commerce must issue a preliminary scope ruling within 120 days after initiation of the scope inquiry. We do not believe such a requirement is appropriate. We agree with the commenter that such information might be relevant at some point in our inquiry, for example, for purposes of our CBP instructions under § 351.225(l), but, for the reasons explained above in the discussion of § 351.225(c), such information normally is not relevant for our scope analysis under § 351.225(k).

In addition, we do not agree with the parallels drawn to preliminary circumvention determinations. Preliminary circumvention determinations are issued in every circumvention inquiry, but Commerce does not issue a preliminary scope ruling in all scope inquiries. When Commerce determines that a preliminary scope ruling is warranted, we do not believe it should be restricted by a specific deadline in the regulations. Instead, we believe that Commerce should have the flexibility to determine when to issue a preliminary scope ruling and request comments from participating interested parties. Thus, it would be unreasonable to require Commerce to issue a preliminary scope ruling when the facts on the record are simple and clear enough for Commerce to issue a final scope ruling before or on 120 days after initiation of the scope inquiry. Therefore, we have not modified § 351.225(e) to mandate the issuance of preliminary scope rulings within 120 days, or even 150 days as suggested by some, after initiation of the scope inquiry.

We also disagree with the commenter expressing concerns regarding the prolonged uncertainty for U.S. importers as to the ultimate status of products subject to a scope inquiry under the 300-day deadline, when coupled with the potential for retroactive suspension of liquidation. As other commenters have argued, all importers of merchandise to the United States are required to conduct their business affairs with due diligence and should be informed as to the potential trade remedies that may be applied to imported merchandise when they decide to import that merchandise. If a party is concerned that its products might be covered by an AD or CVD order, it is the party's responsibility to request a scope ruling at the earliest possible time. We do not believe the potential 120-day or fully-extended 300-day deadlines set forth in § 351.225(e) are unnecessarily lengthy or burdensome on importers, and we do not believe that the firm deadlines in the regulations will result in uncertainty or unpredictability, as some commenters asserted. In fact, we find the opposite to be true. Commerce will now be required by regulation to issue scope rulings no later than 300 days after initiation—a requirement not found in the current regulations.

Finally, we have revised the heading of this section to ''Deadlines for scope rulings'' from ''Time limits,'' to better reflect the provisions covered by this section of the regulation, and we have moved the provision allowing for alignment of scope rulings with other segments of a proceeding from proposed § 351.225(i)(2) to this section to clarify that all of the deadlines described in this section may be adjusted if the scope inquiry is aligned with another segment.

6. Section 351.225(f)—Scope Inquiry Procedures

Section 351.225(f) provides the deadlines for rebuttal comments and factual information and other procedural matters. We received multiple comments specifically on the various deadlines contained within the proposed procedures. All of those comments requested more time, claiming that the deadlines as proposed were too short for interested parties and

[69] *Id.* at 49478.

Commerce to effectively analyze questionnaire responses and other submissions prior to the deadline for responses and rebuttal submissions.

Furthermore, one commenter argues that Commerce should not indicate in § 351.225(f)(3) that it may limit issuance of questionnaires to a reasonable number of respondents, because such a limitation would also have the effect of limiting verification of those respondents to whom questionnaires had been issued. That commenter argues that it would be inappropriate to decline gathering information via questionnaire from all potential respondents.

Finally, certain commenters express their support for § 351.225(f)(6), which acknowledges that Commerce maintains the ability to rescind a scope inquiry if it determines it is appropriate to do so. One of those commenters points to the *Proposed Rule* where Commerce explained that it might ''rescind a scope inquiry, for example, if an interested party has failed to provide information necessary for Commerce to issue a scope ruling,'' [70] in ''instances in which a scope matter may be addressed in another segment of a proceeding'' or in ''instances in which a new scope inquiry or scope ruling is unnecessary because of a related or prior scope ruling.'' [71] That commenter requests that Commerce codify those examples in the regulation. Further, that same commenter notes that Commerce stated in a footnote in the preamble to the *Proposed Rule* that it ''maintains the discretion to apply facts available pursuant to section 776 of the Act, as appropriate, rather than rescind a scope inquiry,'' and argues that Commerce should, therefore, codify its authority to apply facts available with an adverse inference when an interested party has failed to supply requested necessary information.

Response:

Upon consideration of the various comments about Commerce's proposed deadlines, as well as consideration of our own practice in other circumstances, we have determined to modify our proposed deadlines under § 351.225(f) to allow interested parties additional time to provide responses and new factual information as follows:

- Under § 351.225(f)(1), parties will have 30 days, rather than 20 days, to submit comments and factual information after Commerce self-initiates a scope inquiry;
- Under § 351.225(f)(1), parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties;
- Under § 351.225(f)(2), parties will have 30 days, rather than 20 days, to submit comments and factual information after Commerce initiates a scope inquiry pursuant to a scope application;
- Under § 351.225(f)(2), the applicant will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information in response to the interested parties' submissions;
- Under § 351.225(f)(3), interested parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information contained in a questionnaire response;
- Under § 351.225(f)(3), the original submitter will have seven days, rather than five days, to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification, or correction;
- Under § 351.225(f)(4), interested parties will have 14 days, rather than 10 days, after the preliminary scope ruling to submit comments; and
- Under § 351.225(f)(4), interested parties will have seven days, rather than five days, to submit rebuttal comments thereafter.

With respect to the commenter's argument that we should codify our ability to apply facts available, pursuant to section 776(a) of the Act, and an adverse inference, pursuant to section 776(b) of the Act, we have declined to do so because Commerce already has the authority to apply adverse facts available when an interested party fails to provide necessary information in all of its proceedings, including scope inquiries.

Furthermore, we have also declined to list the scenarios under which Commerce would rescind a scope inquiry in § 351.225(f)(6) because such a determination to rescind a scope inquiry is made on a case-by-case basis, and, although the examples provided in the preamble of the *Proposed Rule* were illustrative, they were by no means exhaustive. Accordingly, we do not believe it would be beneficial in this case to codify a non-exhaustive list of examples in the final regulations in which we would rescind a scope inquiry. We acknowledge that we have provided some common examples in the circumvention inquiry (§ 351.226) and covered merchandise inquiry (§ 351.227) regulations in which we may rescind those inquiries, but again, even those examples are not exhaustive.

With respect to Commerce's authority to rescind a scope inquiry, we have made some additional changes to conform this section with parallel or similar language in the circumvention inquiry (§ 351.226) and covered merchandise inquiry (§ 351.227) regulations. Specifically, we have edited § 351.225(f)(6) to clarify that rescission of scope rulings can be in whole or in part. This is consistent with Commerce's current practice. For example, Commerce may conduct a scope inquiry in which a single importer has filed six scope applications covering six different products from the same producer and exporter. Commerce may determine in that situation to conduct a single segment of the proceeding covering all six products, but then later in the combined scope inquiry segment determine to rescind the inquiry with respect to three or four of the products. In another example, Commerce may determine to consider and analyze in one segment of the proceeding scope inquiries covering products with the same physical characteristics produced and exported by different entities and imported by different importers. As with the segment covering multiple products, Commerce may rescind in whole or in part a segment covering different combinations of producers, exporters, and/or importers. The language of § 351.225(f)(6) is meant to cover various scenarios, including examples such as these.

In response to the commenter's argument that Commerce should not be permitted to limit issuance of questionnaires to a reasonable number of respondents under § 351.225(f)(3), we disagree. In the context of a scope inquiry, such situations most frequently arise when a domestic producer requests a scope ruling covering certain products produced and exported by multiple entities. If Commerce had unlimited resources, we agree that the best-case scenario would have Commerce never limiting the number of questionnaires it issues and respondents that it considers. However, in reality, Commerce conducts its administrative proceedings with limited resources and under specific time constraints. Accordingly, and in consideration of Commerce's authority to limit respondents under section 777A(c)(2) of the Act for investigations, we continue to believe that it is appropriate to retain the language in our regulations that clarifies that we may limit the issuance of questionnaires to a reasonable number of respondents if the record of

[70] *Id.* at 49479.

[71] *See id.*

the scope inquiry warrants such a limitation.

Finally, for greater clarity, we have made some minor edits to § 351.225(f)(7) to explain that Commerce can both alter or extend time limits if it determines it is appropriate to do so on a case-by-case basis.

7. Section 351.225(g)—Preliminary Scope Ruling

Section 351.225(g) would authorize Commerce to issue a preliminary scope ruling as to whether there is a reasonable basis to believe or suspect that the product is covered by the scope of the order. Additionally, § 351.225(g) would continue to allow Commerce to use its discretion in issuing a preliminary scope ruling at the same time Commerce initiates a scope inquiry. Pursuant to § 351.225(n)(4), Commerce will notify interested parties on the segment-specific service list of the issuance of the preliminary scope ruling.

One commenter argues that notification of a preliminary scope ruling only to the parties participating in the scope inquiry is insufficient and might be inconsistent with U.S. obligations under the AD and SCM Agreements. The commenter, therefore, argues that Commerce should publish its preliminary scope ruling in the **Federal Register**, rather than just notify the parties on the segment-specific service list.

In their rebuttal comments, several commenters disagree with this argument, arguing that Commerce's implementation and use of an annual inquiry service list and segment-specific service list is fully consistent with U.S. international obligations, and that Commerce is not required to publish preliminary scope rulings in the **Federal Register**.

Response:

As explained above, Commerce is modifying its regulations under § 351.225(b) and (d), such that we will publish in the **Federal Register** notices of self-initiation and monthly lists describing scope applications which have recently been filed with Commerce. We believe both types of those **Federal Register** notices, which we anticipate will identify the product, AD or CVD order, and country of production and export (the latter where the product has already been imported), will provide adequate notification to the public. Following such publication, however, it will be incumbent upon interested parties to take the necessary steps to participate in Commerce's proceedings in accordance with § 351.225(n)(4) by filing an entry of appearance to stay apprised of the status of a scope inquiry. The final rule is in compliance with U.S. international obligations under the AD and SCM Agreements, and we do not believe there is any additional requirement that Commerce publish preliminary scope rulings in the **Federal Register**. Accordingly, we have declined to make the commenter's suggested modification to our regulations.

8. Section 351.225(h)—Final Scope Ruling

Under proposed § 351.225(h), Commerce would convey final scope rulings to interested parties who are parties to the scope inquiry proceeding in accordance with the requirements of section 516A(a)(2)(A)(ii) of the Act. Such interested parties would be required to have legal standing to appeal the final scope ruling. Additionally, under proposed § 351.225(n), all parties on the segment-specific service lists would be notified of the final scope ruling through Commerce's electronic ACCESS system.

One commenter observes that currently scope mailings are ''conveyed'' by first class mail, and advocates that Commerce revise that requirement in its regulations to have ''conveyance'' be made solely through ACCESS.

Response:

With respect to the commenter's request, we agree that conveying our scope rulings to interested parties who are parties to the scope inquiry proceeding through first class mail or common carriers, such as Federal Express, is largely superfluous and unnecessary in light of the notification they receive through ACCESS. However, section 516A(a)(2)(A)(ii) of the Act states that judicial review of ''class or kind'' determinations, such as scope rulings, are based off the ''date of mailing'' of the determination.[72] The CIT has explicitly held that it ''refuses to extend the definition of 'mailing' to include email messages,'' faxes, or other such electronic conveyances for purposes of this provision.[73] For that reason, we believe that Commerce is required to continue to convey its final scope rulings through first class mail or common carriers at this time. Should Congress eventually modify this statutory provision and allow for conveyance of scope rulings through electronic means, our use of the term ''conveyance'' in the modified regulation will allow us to convey scope rulings through electronic means, without further revision of the regulation.

Additionally, we note that Commerce's current regulations under part 356 of Title 19 (current §§ 356.6 and 356.7) contain specific notification requirements for ''scope determinations'' made by Commerce applicable to producers and exporters from a free trade agreement (FTA) country to the governments of those FTA countries. We have, therefore, added a clause to § 351.225(h) in the final regulations which acknowledges that scope rulings applicable to FTA countries are governed, where relevant, by those provisions.

9. Section 351.225(i)—Other Segments of the Proceeding

Section 351.225(i) recognizes that Commerce may make a scope determination in the context of another segment of the proceeding, such as an administrative review under section 751(a) of the Act, and acknowledges the flexibility Commerce has to modify deadlines and other actions to ensure that its scope analysis is complete in those other segments.

One commenter indicates its support for this provision, and stresses the importance of Commerce's ability to request further information concerning a product subject to a scope inquiry in other segments of the proceeding, set forth in proposed § 351.225(i)(3).

Another commenter requests that Commerce clarify how it will notify entities when it opts to address scope issues within the context of a segment of the proceeding that is not a scope inquiry, and suggests that Commerce do so by notifying entities on the annual inquiry service list under § 351.225(n)(3).

Response:

Section 351.225(i)(1), which has been slightly modified, applies to at least two scenarios in which Commerce might address a scope issue in another segment of the proceeding. First, if a scope issue is raised for the first time in the context of another segment and we determine that it would be illogical to self-initiate a new scope inquiry under § 351.225(b), Commerce may address the scope issue in that other segment without following the procedures of a scope inquiry under § 351.225. This could happen, for instance, in a circumvention inquiry under § 351.226, a covered merchandise inquiry under § 351.227, or in an administrative review under § 351.213. The parties to that segment of the proceeding would be notified of the pending scope issue

[72] *Id.* at 49479.

[73] *Medline Industries, Inc.* v. *United States,* 911 F. Supp. 2d 1358, 1361 (CIT 2013); *see also Bond St., Ltd.* v. *United States,* 521 F. Supp. 2d 1377, 1381 (CIT 2007).

through a variety of means. For example, the issue would likely be raised by the parties, and they would have the opportunity to provide new factual information or comment, as appropriate, or Commerce may request additional information of the parties. In addition, parties not already participating in that segment of the proceeding would be notified of the scope issue in Commerce's preliminary results (in the case of an administrative review under § 351.213) or preliminary determination (in the case of a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227), which would be published in the **Federal Register**. At that time, interested parties not yet participating in that segment of the proceeding could file a notice of appearance and submit case briefs.[74]

Second, where a scope inquiry has already been initiated and is ongoing, but Commerce determines that it would be best addressed in another segment which is also ongoing or just beginning, Commerce would rescind the scope inquiry under § 351.225(f)(6) and conduct its scope analysis solely in that other segment and notify interested parties.

Additionally, § 351.225(i)(2) (proposed § 351.225(i)(3)) provides that during the pendency of a scope inquiry or upon issuance of a final scope ruling, Commerce may take any further action, as appropriate, with respect to another segment of the proceeding. As referenced by a commenter, this means that Commerce has the ability to request further information concerning a product subject to a scope inquiry in other segments of the proceeding, such as an administrative review under § 351.213.

Furthermore, at any point during an ongoing segment of a proceeding, Commerce retains the ability to self-initiate a separate scope inquiry in accordance with § 351.225(b), rather than address the scope issue in the context of the other segment of the proceeding.

Finally, as already noted above, to provide clarity with regard to scope ruling deadlines, we have moved what was proposed § 351.225(i)(2) to § 351.225(e)(3), and as a result of that modification, prior § 351.225(i)(3) is now § 351.225(i)(2).

[74] In addition, if those interested parties wished to submit new factual information, they would follow the procedures in § 351.301 to request permission to do so.

10. Section 351.225(j)—Country of Origin Determinations

Section 351.225(j) addresses Commerce's country of origin analysis, and in particular provides the factors Commerce considers when applying its ''substantial transformation'' test. Each scope contains a description of the physical class or kind of merchandise covered by that order, while Commerce's country of origin analysis determines at what point in the production and processing of the product the country of origin of the class or kind of merchandise is established. The country of origin determined through this analysis applies to all merchandise in the production and processing chain of the product meeting the physical descriptions of the scope originating in that country, regardless of the point in the production and processing chain of the product at which the country of origin is established. We received several comments on this provision.

One commenter points out that Commerce indicates that it ''may'' consider relevant factors on a case-by-case basis in the regulation, rather than stating that it ''will'' consider the listed factors in every case. That commenter stresses that Commerce should state clearly that not all of the numbered factors are necessarily required to be considered in every case.

A second commenter suggests that Commerce should take into consideration the activities of tollers in the production chain when it conducts a substantial transformation analysis. That commenter argues that Commerce does not consider tollers to be ''manufacturers'' or ''producers'' if they do not acquire ownership and control the relevant sale of subject merchandise, but nothing prevents exporters or importers from declaring foreign processors to be tollers, thereby evading Commerce's country of origin analysis. That commenter argues that to prevent such manipulation of Commerce's country of origin analysis, Commerce should codify a consideration of whether or not a toller is a toller or foreign processor as part of its substantial transformation test.

Other commenters express concerns that Commerce does not explain in its regulations the scenarios in which it will use an alternative to the substantial transformation test, and appears to give Commerce wide discretion in applying the factors in the regulation when determining the country of origin of a product. They request that for both the substantial transformation and the alternative options, Commerce codify further guidance in the regulations.

The proposed regulation states that Commerce is not ''bound'' by the country of origin ''determinations of any other agency.'' One commenter argues that Commerce should be required to justify its determination when it departs from the country of origin determinations of CBP or other agencies.

That same commenter also argues that Commerce should not conduct a country of origin analysis in a scope ruling, but instead should conduct that analysis in its third country processing circumvention analysis, under § 351.226(i). That comment appears to reflect a misunderstanding of the relationship between Commerce's country of origin analysis pursuant to investigations, administrative reviews and scope rulings, and the separate analysis conducted pursuant to third country processing circumvention inquiries. Accordingly, we address this argument below, with respect to comments on § 351.226(i).

In rebuttal submissions, some commenters respond that Commerce's country of origin analysis is fundamental to determining if a particular product is covered by the scope of an order, that the *Proposed Rule* simply codifies Commerce's longstanding use of the substantial transformation test, and that the *Proposed Rule* recognizes that on a case-by-case basis Commerce should retain the flexibility to address other case-specific factors or the need for an entirely different test when the facts on the record warrant such an analysis. They argue that because country of origin determinations can be complex, especially when complicated global supply chain sourcing issues arise, the language as proposed in § 351.225(j) should not be changed, as that language provides Commerce with the tools to adequately determine the country of origin based on relevant characteristics of the particular product at issue.

In addition, in their rebuttal submissions, certain parties challenge the idea that Commerce must justify its determinations when those determinations come to a different conclusion as to the country of origin from CBP. The commenters argue that, just as the proposed language states, Commerce is not bound by the determinations of other agencies when conducting a country of origin analysis, since Commerce's analysis is ultimately made independently of CBP and is based upon the information on the record of the proceeding.

Finally, in their rebuttal submissions, some commenters express their

agreement that Commerce should add consideration of the facts surrounding reported toll processors as a factor to the substantial transformation test, stressing that foreign producers have increasingly used toll processors to escape affiliation issues and avoid duties, such as contracting with tollers that are former employees or tollers that are located within their own facilities.

Response:

We have made changes from the language published in the *Proposed Rule.* First, we have adopted minor renumbering changes. Second, we have revised the terminology of § 351.225(j)(1)(ii) to cover ''physical characteristics (including chemical, dimensional and technical characteristics)'' to bring that language into conformity with other provisions of the regulations. Third, we have turned the listed five factors into six factors, separating the intended end-use of the downstream product from the physical characteristics factor. We believe this better reflects the distinct factors which Commerce considers when applying its substantial transformation analysis.

With respect to the comments we received on this provision, we agree with those commenters who explain that the factors listed in the proposed regulation are not exhaustive. We understand the arguments that it would bring more certainty to certain parties if we set forth definitive factors that we would apply in every case, but as some commenters explain, every product is different and every supply chain and production process is different, as well. Accordingly, the listed factors are not exhaustive, because Commerce must retain the flexibility to adjust its country of origin analysis when the facts on the record warrant such an adjustment. The listed factors represent the factors we normally apply in most cases, but as we explained in the preamble to the *Proposed Rule,* there have been ''different iterations'' of Commerce's substantial transformation analysis and Commerce has ''considered other factors in applying its substantial transformation analysis when necessary.'' [75]

Furthermore, as Commerce also explained in the preamble to the *Proposed Rule,* this provision states that Commerce ''may'' conduct its substantial transformation analysis, but is not required to apply that analysis if it determines ''for some reason'' that ''the substantial transformation test is not appropriate for purposes of determining the country of origin of a particular product.'' [76] In those circumstances, as the Federal Circuit has affirmed, Commerce continues to have the authority to apply a different, reasonable test to determine the country of origin of a particular product.[77]

With respect to the argument that Commerce must justify its country of origin determinations when they differ from that of CBP's country of origin analysis, conducted pursuant to 19 CFR 134.1(b), it is well established that different Federal agencies apply different country of origin tests, depending on the context and purpose of the test. Commerce's country of origin analysis in the context of AD and CVD proceedings differs from that of CBP in its own proceedings.

As the CIT explained in *Venus Wire Industries,*[78] Commerce has applied its own country of origin analysis for over 40 years. It is an analysis which has been litigated and upheld by the Federal Circuit.[79] That Commerce has a different county of origin analysis from CBP is not surprising, given that Commerce's analysis has a different purpose from that of CBP and is applied specifically to determine the relevant point in a production and processing chain where the country of origin of the products described in AD/CVD orders is established.[80] If there is tension between the two analyses, for purposes of Commerce's proceedings, Commerce's analysis applies. As the Federal Circuit held in *Mitsubishi (1994),*[81] CBP's role in liquidating AD duties is ''ministerial'' and CBP ''cannot modify Commerce's determinations, their underlying facts, or their enforcement.'' Accordingly, we disagree with the commenter which argued that if Commerce determines the country of origin of a product for purposes of an AD or CVD order in a scope ruling, and that determination is different from the country of origin established by CBP for its purposes, Commerce must take an additional step to justify the distinction. Such an additional analysis in making a country of origin determination is generally unnecessary and unwarranted.

In addition, it would be illogical for Commerce to remove its country of origin analysis from these scope regulations. As other commenters have noted, Commerce frequently conducts a country of origin test as a part of its scope rulings, and there is no reason to change this practice. As we have explained, the commenter who argued for this change cites to Commerce's third country processing circumvention proceedings in relation to § 351.226(i) and we have, therefore, addressed its arguments in this regard with our response to other comments on that provision below.

Finally, we understand the arguments from the various commenters that in certain cases Commerce may need to consider toll processors, the role of tollers in the production and supply chain, and the affiliations and relationships of those tollers with other processers, in considering the country of origin of a particular product. However, we do not believe it is necessary to codify such a requirement in this final rule. Based on experience, most prior scope rulings/substantial transformation analyses have not involved tollers or toll processors. In addition, Commerce's primary focus in a country of origin analysis is the location of the production and/or processing of the product in an effort to determine the specific point in the production chain where the product's origin is established, regardless of whether the production and/or processing are conducted by a toller, and regardless of whether the toller is affiliated with the producer or processor. We do not wish to overwhelm our country of origin analysis in most cases with processor and toller affiliation analyses if such an analysis is not helpful to determining the country of origin of a particular product. Furthermore, nothing in the final regulation prevents Commerce from conducting such an analysis if warranted.

[75] *Proposed Rule,* 85 FR 49472 at 49480.

[76] *Id.*

[77] *See Canadian Solar,* 918 F.3d at 918–20. At issue in *Canadian Solar* was a situation in which Commerce applied its substantial transformation test in one investigation, and as a result, exporters evaded the payment of duties by shifting the country of production of solar cells to a third country. Thus, in the context of the second investigation claiming solar panels continued to cause the petitioners injury, Commerce determined the use of its substantial transformation test again would be ill-advised, as it would not provide a meaningful remedy to the injured petitioners. Accordingly, Commerce applied a second test, which the Federal Circuit affirmed as in accordance with law, focusing on the country where solar panels were completed, thereby granting the injured petitioners relief from dumped and subsidized Chinese solar panels. *Id.,* 918 F.3d at 915–20.

[78] *Venus Wire Industries Pvt. Ltd.* v. *United States,* 471 F. Supp. 3d 1289, 1299 (CIT 2020) (*Venus Wire Industries*).

[79] *See, e.g., Bell Supply,* 888 F.3d at 1227.

[80] To be clear, physically described products in the scope produced or processed in the country of origin, whether produced or processed before or after the point at which the country of origin is established, are subject to the scope of an AD/CVD order.

[81] *Mitsubishi Electronics America, Inc.,* 44 F.3d 973, 977 (Fed. Cir. 1994) (*Mitsubishi (1994)*). *See also Wirth,* 5 F. Supp. at 973 (''Commerce, not Customs, has authority to clarify the scope of AD/CVD orders and findings. Although the Department may consider the decisions of Customs, it is not obligated to follow, nor is it bound by, the classification determinations of Customs . . .'').

11. Section 351.225(k)—Scope Rulings

Section 351.225(k) provides the analysis Commerce utilizes in the conduct of a scope inquiry to determine whether a product at issue is covered by the scope of an order. We received many comments and rebuttal comments on this provision, which we address herein. Furthermore, we have determined to make certain edits to the proposed regulation to provide greater clarity to this provision.

The comments which Commerce received on § 351.225(k) focused on topics relevant to individual paragraphs (k)(1) through (3).

(a) Section 351.225(k)(1)

In the proposed revision of § 351.225(k), Commerce significantly revised § 351.225(k) introductory text and (k)(1). Commerce added a chapeau to the beginning of the provision which articulated that Commerce will first and foremost consider the language contained in the scope of an AD or CVD order in determining whether or not a product is covered by that AD or CVD order. Commerce explained that it was adding this language to § 351.225(k) to reflect an additional analysis that Commerce had applied in multiple cases, and was then affirmed by the Federal Circuit, which is that ''`a predicate for the interpretive process is language in the order that is subject to interpretation.' The scope of the order can be clarified but it cannot be changed by the interpretive process'' and that scope ''orders are interpreted under [§ 351.225(k)] with the aid of the antidumping petition, investigation, and preliminary order.'' [82]

In the preamble to the *Proposed Rule,* Commerce explained that other traditional interpretive tools, such as industry usage of a particular word or phrase, dictionaries or other record evidence, could be used to interpret a scope as well, but, ''in the event of a conflict between these interpretive tools or other record evidence and the sources identified in paragraph (k)(1), Commerce would adopt the interpretation supported by the (k)(1) sources.'' [83]

Notably, there appear to be differing views in the Federal Circuit as to whether the sources under the current § 351.225(k)(1) are used to interpret the ''plain meaning'' of the text of the scope,[84] or whether the plain meaning analysis comes first, and only once a determination on the plain meaning is determined, then the current § 351.225(k)(1) sources are considered.[85] Those differing views appear to be reflected, as well, in the comments that we received on this paragraph. Accordingly, we have modified this provision to provide greater clarity on this point in this final rule.

Several commenters in their comments and rebuttal comments indicate their support for Commerce's inclusion in the proposed § 351.225(k) that the language of the scope is paramount in its scope analysis. They also agree with Commerce that, in most straightforward cases, the agency is not required to consider the four listed (k)(1) interpretive sources if such an analysis would waste agency time and resources.

One commenter argues that Commerce should apply the four sources listed under paragraph (k)(1) in every case, no matter the straightforward nature of the language in the scope, because such an application would bring predictability to Commerce's scope rulings. That commenter objects to Commerce's removal of the language ''will take into account'' from the current paragraph (k)(1). Several commenters in their rebuttal comments disagree with this argument, saying consideration of those sources in simple cases would be a waste of time and resources for everyone.

With respect to the arguments about secondary interpretive sources, such as Customs rulings and industry usage, one commenter points out that subsequent to Commerce's issuance of the proposed regulations, the Federal Circuit issued its holding in *OMG,* which interpreted the current regulation in the reverse—finding that under the current regulatory hierarchy, dictionaries and other traditional interpretive tools should be considered in interpreting the scope of an order before the sources in the current paragraph (k)(1).[86] The commenter stresses that such an interpretation ignores the intentions of those who have initially drafted the scope language and the petition—the injured domestic producers, as well as the understandings of Commerce, the ITC, and the domestic producers expressed throughout the underlying investigation. Accordingly, it advocates that, rather than just mention the hierarchy of interpretive sources in the preamble, Commerce should codify that hierarchy in the regulation itself. The commenter argues that the ''primacy of the (k)(1) factors over other interpretive tools should be clearly articulated in the revised'' § 351.225(k)(1) ''to avoid any confusion among parties as to the importance of other interpretive tools in defining a scope and to provide clarity for courts of review of Commerce's intended policy in scope inquiries.'' The commenter states that if Commerce does not codify such a hierarchy, a court might ignore the fact that terms defined in a dictionary or other interpretive tools might not align with the interpretation of those terms as used in the industry at issue.

In their rebuttal submissions, several other commenters voice their agreement that Commerce should codify its hierarchy of interpretive tools in the regulation, so that in the future, scopes will not be ''voided by dictionary definitions and trade usage, contrary to the plain language of the scope and (k)(1) sources.'' They argue that such an interpretation would be consistent with the Federal Circuit's rejection of the primacy of ''external interpretive tools'' such as a dictionary over the (k)(1) sources in *Meridian Products,* where the Federal Circuit held that the lower court improperly narrowed the scope of the antidumping order by relying on its own findings as to the ''common and commercial meaning'' of the term ''fastener'' using the dictionary.[87]

Finally, another commenter in its rebuttal comments challenges the majority of commenters who recommend codifying the hierarchy of interpretive sources in the regulation, arguing that the ''dictionary definitions and industry usage'' should be given more weight, not less, than the (k)(1) interpretive sources, as they ''ensure'' an ''objective assessment of the manner in which the trade community understands the product subject to the Order.'' They note that sometimes the proposed scope language in a petition is not the same as the ultimate language memorialized in an AD or CVD order, and that if that language is given greater weight by Commerce in a scope inquiry than the actual language of the scope, as interpreted by a dictionary, such an analysis would allow domestic producers to create an ''alternate

[82] *See Tak Fat Trade Co.* v. *United States,* 396 F.3d 1378, 1382–1383 (Fed. Cir. 2005) (citing *Duferco,* 296 F.3d at 1097).

[83] *Proposed Rule,* 85 FR 49472 at 49481.

[84] *See Fedmet Res. Corp.* v. *United States,* 755 F.3d 912, 918 (Fed. Cir. 2014) (*Fedmet*). Under the Federal Circuit's holding in *Fedmet,* because the plain language is ''paramount,'' in ''reviewing the plain language of a duty order,'' ''Commerce must consider the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior determinations) and the Commission.'' *See id.*

[85] *See OMG, Inc.* v. *United States,* 972 F.3d 1358, 1363–66 (Fed. Cir. 2020) (*OMG*).

[86] *See OMG,* 972 F.3d at 1363–66.

[87] *See Meridian Prods., LLC* v. *United States,* 890 F.3d 1272, 1280–1281 (Fed. Cir. 2018) (*Meridian Products*).

reality,'' arguing interpretations of the scope language which were not adopted by Commerce in the scope of the order.

Response:

We agree with the commenters that Commerce should have the discretion to not consider the current § 351.225(k)(1) sources in cases in which it determines that the language of the scope is clear and dispositive. However, we also agree with the commenters who argue that in most scope inquiries the language of the scope is written in more general or broad terms, and, therefore, in the majority of scope inquiries, it is likely that the current (k)(1) sources would be considered by Commerce in determining if a product is covered by the scope of an order in a scope ruling. It is Commerce's understanding that the sources listed in current § 351.225(k)(1) were always intended to be interpretive tools to understand the plain meaning of the scope, recognizing that terms that may have been plain at the time they were drafted and adopted upon the issuance of the order could be interpreted differently at some later point.

With respect to the need for codifying the hierarchy of interpretive sources, we agree with the commenters who warn that absent such codification, a court might rely on a secondary source, such as a dictionary definition, to interpret a word or phrase in a manner which is inconsistent with the meaning used by the injured domestic industry in drafting the proposed scope and petition, and the collective interpretation of Commerce, the industry, and the ITC of that term expressed in the underlying investigation. We agree with the commenters that if we do not incorporate the hierarchy into our regulations, the use by courts of ''external interpretive tools,'' rather than the current (k)(1) sources, in analyzing Commerce's scope rulings could potentially weaken or even undermine the effectiveness of Commerce's orders. The purpose of an AD or CVD order is to provide a remedy to offset the harm caused by unfairly traded merchandise. Therefore, the intentions and interpretations of Commerce, the ITC, and the injured domestic parties themselves at the time of the underlying investigation should be given primary consideration in defining and interpreting the scope of the order.

On the other hand, we agree with the commenter that argues that a proposed scope or petition may differ from the language ultimately adopted by Commerce in the final scope of an order, and, under a situation such as that one, Commerce may determine that it must not only consider the current (k)(1) sources, but additional, secondary sources as well.

In light of all of these comments, we have, therefore, made several modifications to the proposed § 351.225(k)(1) provision. First, we have moved the proposed chapeau language, which states that the language of the scope is dispositive, to paragraph (k)(1). This is because it is our belief that the traditional (k)(1) sources were never intended by Commerce to be separate from the initial analysis of the scope language, but were instead intended to be interpretive tools that could be considered by Commerce, at its discretion and under consideration of the arguments on the administrative record, to determine the meaning of the scope of the order.

Second, we have modified the numbering of the paragraph and incorporated the hierarchy of the interpretive sources into the regulation itself. Specifically, using language from the current regulations, paragraph (k)(1) now states that, if Commerce determines that the language of the scope is not itself dispositive (*i.e.,* it is not dispositive using no interpretive tools whatsoever), Commerce may take into account the identified primary interpretive sources, which are the traditional (k)(1) sources, in determining if the language is dispositive and the scope covers the product at issue. Those sources (in paragraph (k)(1)(i)) are then followed by a paragraph (paragraph (k)(1)(ii)) which states that Commerce may consider secondary interpretive sources such as other Commerce or ITC determinations not included in the primary interpretive sources, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence. This language provides clarity in that it distinguishes primary interpretive sources from secondary interpretive sources, and affirmatively acknowledges that Commerce may consider secondary sources in its scope inquiries under certain scenarios. The revised language uses the terms ''may'' and ''discretion'' to be clear that Commerce is not required to consider any of these sources in this manner if it believes the record does not warrant such a hierarchical consideration. We recognize that Commerce has always had the authority under the AD and CVD laws to consider secondary sources in interpreting the scope of AD and CVD orders, but we believe in light of our experience over the last 20 years that it is better to include reference to those sources in the regulations to avoid the possibility of confusion going forward and to describe the hierarchy of interpretive sources clearly.

Third, we have also codified language in this final rule which addresses a conflict between the primary and secondary interpretive sources, providing that the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue. We have used the word ''normally'' in this provision because, as one commenter points out, there may be limited scenarios in which, under a certain set of facts, Commerce might elect to give greater weight to certain secondary sources. For example, a commenter has provided a hypothetical in which the proposed scope and petition contain language different from that of the ultimate order, and the other current (k)(1) sources provide no further guidance. Under those hypothetical facts, Commerce might determine it acceptable to give more weight to a secondary source, presuming that the secondary source is informative.

Finally, in making these modifications, Commerce also determined that it would be beneficial to provide some clarity on the descriptions of the (k)(1) sources. For paragraphs (k)(1)(i)(A), (B), and (D), we have added language to clarify that the petition language, investigation language, and ITC determinations considered under (k)(1) all pertain to the order at issue. While this may seem obvious, we have concluded that it is appropriate to add that language to distinguish those sources from paragraph (k)(1)(i)(C), which includes determinations not always applicable to the order at issue. Specifically, we have modified paragraph (k)(1)(i)(C) to clarify that both previous or concurrent Commerce scope determinations may be considered by Commerce as part of its analysis, including prior scope rulings, memoranda, or clarifications which pertain to both the order at issue, as well as other orders with the same or similar language as that of the order at issue. This change reflects Commerce's practice and interpretation of that provision over the years, and shows that unlike the other three primary sources, this primary source includes scope determinations, such as scope rulings and scope clarifications, from other proceedings addressing similar language used in the scopes of different orders that sometimes cover the same or similar physical merchandise from other countries. We have found it valuable over the years to consider such determinations as part of our scope inquiry analysis.

(b) Section 351.225(k)(2)

Section 351.225(k)(2) describes the factors Commerce considers if it finds that the sources listed under § 351.225(k)(1) are still not dispositive as to whether or not the particular product is covered by the scope of an order. In the preamble to the *Proposed Rule,* Commerce explained that under § 351.225(k)(2), it was ''Commerce's intent that the first factor—the characteristics of the product, including the technical, physical, or chemical characteristics of the product—may be given greater weight than the other factors. Nonetheless, Commerce should consider each of the factors in making its determination under paragraph (k)(2).'' [88] One of the commenters objects to this ''change'' and argues that Commerce should consider all of the factors equally, and that ''placing more importance on one factor skews'' Commerce's scope analysis.

Response:

We have made some changes to the language of § 351.225(k)(2) to clarify that Commerce will conduct its analysis under this paragraph only if the (k)(1) factors are not dispositive. Further, we have also modified the paragraph (k)(2)(i) factor to bring the term ''physical characteristics'' into conformity with the way it is used in other parts of the regulation (*i.e.,* physical characteristics (including chemical, dimensional, and technical characteristics)). In addition, we have adopted minor numbering changes.

In addition, we have revised § 351.225(k)(2)(i)(B) to clarify that Commerce considers the expectations of the ultimate users, instead of the expectations of the ultimate purchasers. This is because we have found in our practice that there are sometimes cases in which it is not the expectations of purchasers, but the expectations of the ultimate users of a product which inform whether or not a product was intended to be included in the scope of an order. There are several reasons an entity might purchase a product, including (for example) as an investment or as a gift, but in neither of those scenarios would the purchaser's activities necessarily inform whether or not the product is subject to an order. On the other hand, as § 351.225(k)(2)(i)(C) (the ultimate use of the product) informs us, it is the expectations of the ultimate user which better informs us as to whether or not a product was intended to be included in the scope of an order. We also note that § 351.225(k)(2)(i)(B) and (C) are distinguishable because, as a factual matter, the expectations of a user do not always align with the actual, ultimate use of the product.

In response to the comment on our prioritization of the first (k)(2) factor, we disagree that such an interpretation is inconsistent with our current practice. Indeed, when there is a conflict between the five factors listed under (k)(2), it has been Commerce's consistent practice to give greater weight to our analysis of the physical characteristics of the particular product. This is because the scopes of orders are generally written to cover products with certain physical characteristics, and it is an established principle in our scope practice that the objective characteristics of merchandise, including the physical descriptions of merchandise, should be given greater weight in case of a conflict between the factors under consideration. This is distinguishable from other factors, such as the expectations of the ultimate users under (k)(2)(i)(B) or the manner in which a product is advertised, and displayed under (k)(2)(i)(E), which might incorporate elements such as ''intended end use'' or ''design'' into Commerce's analysis, but also by their nature lend themselves to a more subjective outcome. Nonetheless, although this is Commerce's general practice, we also recognize that there could be scenarios in which Commerce considers and determines that the physical characteristic factor should not be given greater weight in its analysis. Thus, it is our policy to ''normally,'' but not always, give greater weight to the physical characteristics factor as part of our (k)(2) analysis if there is a conflict between the five listed factors.

Because this comment suggests that Commerce's practice in this area may not be well-known or understood, we have, therefore, added to paragraph (k)(2)(ii) a sentence which clarifies that in the event of a conflict between the five listed factors under paragraph (k)(2)(i), paragraph (k)(2)(i)(A) will normally be allotted greater weight than the other factors.

(c) Section 351.225(k)(3)

Commerce proposed a codification of its analysis of component parts of larger products, colloquially referred to as its ''mixed-media analysis'' (*i.e.,* subject merchandise assembled or packaged with non-subject merchandise), in a new § 351.225(k)(3) in the *Proposed Rule.*

One commenter argues that Commerce's mixed-media test ''lacks sufficient clarity'' to allow importers ''to discern reliably whether particular merchandise will be found to be within the scope of an order through the operation of this provision.'' The commenter, therefore, argues that Commerce should provide more definitive factors in § 351.225(k)(3), which Commerce will consider in determining if a mixed media analysis should be applied, and that Commerce should remove the term ''as appropriate'' in this paragraph to provide more certainty for exporters and importers.

Another commenter asks Commerce to explain how a party should establish the value of the components at issue under § 351.225(k)(3)(ii), arguing that importers may only have the price of the good as a whole available to them, so that they would be unable to report the value of the component to CBP for purposes of suspending and/or collecting AD or CVDs.

In a rebuttal, a third commenter states that it disagrees that Commerce should list definitive factors under this provision, arguing that it is important that Commerce retain flexibility in applying the mixed-media factors because all products are different, and, therefore, its test should be able to adapt to the products under consideration.

Response:

We agree with one commenter that paragraph (k)(3) as proposed required a certain amount of revision to more clearly reflect Commerce's mixed-media analysis. Accordingly, we have taken the three sentences as proposed, and reformatted the paragraph to reflect the sequential steps of the analysis. We have also revised some of the language used to describe the analysis. First, under paragraph (k)(3)(i), Commerce analyzes the component of the merchandise as a whole under paragraph (k)(1) and, if necessary, under (k)(2). If, after review under those provisions, Commerce determines that the component, taken alone, would not be covered by the scope of the order, then the inquiry ends. However, if the component, taken alone, would be covered by the scope of the order, under those provisions, then, under paragraph (k)(3)(ii), Commerce will analyze the scope under (k)(1) to determine whether the component product's inclusion in the merchandise as a whole would result in the component product being excluded from the order. Finally, if Commerce determines the analysis under (k)(3)(ii) does not resolve whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order, then, under paragraph (k)(3)(iii), Commerce will consider additional relevant factors on a product-specific basis, including those explicitly listed.

[88] *Proposed Rule,* 85 FR 49472 at 49481.

In addition, we also agree with the commenter that the first factor listed in Commerce's mixed-media analysis, as proposed, should also be clarified. The term ''practicability'' in factor (i) is a general and undefined term. Accordingly, we have modified that factor to explain that Commerce will consider the relative difficulty and expense of separating components as part of its analysis of whether or not separation is practicable—which Commerce has historically considered as part of this analysis.

Next, in response to concerns about how Commerce values an in-scope component, we must emphasize that a determination of how to measure the value of such a component is a case-specific analysis. Some merchandise as a whole might be extremely valuable when the component is included, even if the component, individually, is commercially inexpensive. Other merchandise as a whole does not undergo much of a change in value without the in-scope component, while the in-scope component might actually be quite valuable. Because such an analysis is case-specific, we will not include additional guidance in the regulation on this factor. We understand that the commenter's primary concern is the knowledge of unaffiliated importers with respect to this factor. We cannot speak to the chain of knowledge between an importer and the producer of the imported merchandise, except to note, as we have explained above, that there is an expectation that importers should be able to obtain relevant information pertaining to the importation of the product at issue and should have familiarity with the U.S. AD/CVD laws which apply, or potentially apply, to that merchandise. With or without that information or knowledge, the importers understand that they take on certain risks when importing the product at issue. These regulations are intended to direct and guide parties on Commerce's mixed-media analysis, so that they may make informed decisions regarding whether to import merchandise potentially subject to an AD and/or CVD order. This final rule serves as notice to parties of Commerce's intent to apply this analysis, as warranted, when examining such mixed-media products.

Finally, we disagree with the commenter that argues that we should remove the language ''as appropriate'' from this provision. While we believe that, under most scenarios, the three enumerated factors listed in paragraph (k)(3)(iii) should be sufficient, we also believe that it is possible that, in some cases, additional factors might be relevant to our analysis. We agree with the commenter who states that it is important that Commerce retain flexibility in applying the mixed-media analysis. We, therefore, determine that it is best to leave the opportunity for consideration of additional factors ''as appropriate'' in the regulation.

12. Section 351.225(l)—Suspension of Liquidation

As discussed in the *Proposed Rule,* in the context of a formal scope inquiry, current paragraph (l) allows for Commerce to direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended which entered on or after the date of initiation of the scope inquiry, and collect applicable cash deposits, at the time of a preliminary or final scope ruling, whichever is applicable, determining that the product is covered by the scope of an order. The current regulation does not address unliquidated entries not yet suspended which pre-date the date of initiation of the formal scope inquiry.[89] Furthermore, the Act does not provide direction to Commerce regarding the suspension of liquidation of entries subject to a scope inquiry.

Under paragraph (l) in the *Proposed Rule,* among other changes, Commerce proposed to eliminate the distinction between formal and informal scope inquiries so that all scope inquiries would be conducted by a formal initiation. In addition, Commerce proposed that, at the time of a preliminary or final scope ruling determining that the product is covered by scope of an order, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits.[90] After consideration of comments on the *Proposed Rule,* Commerce is adopting certain changes to paragraph (l) in this final rule. In addition, Commerce is making a number of revisions to paragraph (l) on its own initiative. For clarity, we describe all revisions made to paragraph (l) in these introductory paragraphs before summarizing and addressing comments below. Also discussed herein are the specific applicability dates for paragraph (l) as referenced in the Applicability Dates section of this preamble.

Paragraph (l)(1), which describes Commerce's actions at the time of initiation of a scope inquiry, is slightly revised from the *Proposed Rule* as discussed below. Additionally, as discussed further below, Commerce is altering paragraphs (l)(2) and (3), which describe Commerce's actions at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order. Paragraph (l)(4), which describes Commerce's actions in the event of a negative final scope ruling, remains unchanged from the *Proposed Rule.* Lastly, Commerce is adding a new provision, paragraph (l)(5), to include specific reference to CBP's authority.

Minor revisions have been made to paragraphs (l)(1), (l)(2)(i), and (l)(3)(i) from the *Proposed Rule.* Specifically, paragraph (l)(2)(i) provides that, at the time of a preliminary scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries, but removes express reference to entries previously suspended *as directed by* paragraph (l)(1). Under paragraph (l)(1), Commerce does not direct CBP to suspend liquidation at the time of initiation of the scope inquiry; rather, under paragraph (l)(1), Commerce directs CBP *to continue* the suspension of liquidation of entries subject to the scope inquiry that were already subject to the suspension of liquidation and to collect the applicable cash deposits.[91] As an initial matter, CBP has independent authority to suspend liquidation.[92] Therefore, prior to a scope inquiry, entries may be previously suspended for a number of reasons, for example, because the importer declared the merchandise as subject to the order (*e.g.,* Type 03 or Type 07), or CBP directed the importer to refile an entry that was previously declared as not subject to the order (*e.g.,* Type 01) to an entry type indicating it is covered by an AD and/or CVD

[89] *Id.* at 49481–84.

[90] *Id.*

[91] The phrase ''until appropriate liquidation instructions are issued'' from the *Proposed Rule* is removed in paragraph (l)(1) (which refers to continued suspension of liquidation) as such language is unnecessary and redundant. The relevant language is retained in paragraph (l)(3) as discussed below.

[92] As part of its statutory responsibility ''to fix the amount of duty owed on imported goods[,]'' CBP ''is both empowered and obligated to determine in the first instance whether goods are subject to existing [AD/CVD orders].'' Pursuant to 19 U.S.C. 1514(b) (section 514 of the Act), this ''determination is then 'final and conclusive' unless an interested party seeks a scope ruling from Commerce (which ruling would then be reviewable pursuant to [19 U.S.C. 1516a]).'' *See TR International,* 433 F. Supp. at 1341 (citing *Sunpreme,* 946 F.3d at 1318) (referencing section 516 of the Act). The Federal Circuit has confirmed that CBP has authority to order suspension of liquidation pursuant to its authority if it determines that an AD/CVD order applies to the imported goods. *See Sunpreme,* 946 F.3d at 1317–18.

order.[93] Thus, to avoid any unintended confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraph (l)(1) is removed from paragraph (l)(2)(i).

Similar edits have been made to paragraph (l)(3)(i) by removing a reference to entries previously suspended ''as directed under'' paragraphs (l)(1) and/or (l)(2). Under paragraph (l)(2)(ii) (as further discussed below), if Commerce issues a preliminary scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to begin the suspension of liquidation of certain entries. Therefore, at the time of a final scope ruling, entries may be previously suspended for the reasons described above, or because of Commerce's instruction to CBP to begin the suspension of liquidation of certain entries at the time of the preliminary scope ruling. To avoid confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraphs (l)(1) and/or (l)(2) is removed from paragraph (l)(3)(i).

Revised paragraph (l)(3)(i) eliminates potentially confusing language regarding entries subject to suspension of liquidation as a result of another segment of a proceeding, and revised paragraphs (l)(3)(i) and (ii) eliminate references to liquidation instructions issued pursuant to §§ 351.212 and 351.213. There may be a number of reasons why entries may already be subject to suspension of liquidation in any given scope inquiry in which Commerce issues a final scope ruling determining that the product is covered by the scope of an order, and Commerce cannot immediately instruct CBP to lift suspension of liquidation and assess final duties. This includes, for example, an ongoing administrative review, or a pending circumvention inquiry or covered merchandise inquiry. Therefore, we find that a simple reference to continued suspension until appropriate liquidation instructions are issued in paragraph (l)(3) will account for various scenarios. In addition, the language in new paragraph (l)(5) will provide added clarification regarding CBP's authority in relation to the framework established by Commerce under paragraph (l). Commerce intends to provide more details, as needed, in its individual instructions to CBP for a given case.

On the other hand, we note that we have retained similar language in paragraph (l)(4) to provide that when Commerce issues a final scope ruling determining that the product is not covered by the scope of an order, entries subject to suspension of liquidation as a result of another segment of a proceeding will remain suspended until the other segment of the proceeding has concluded. This is because, as discussed in other parts of §§ 351.225, 351.226, and 351.227, it is possible that there could be a pending circumvention or covered merchandise inquiry on the same product at the time Commerce issues its final scope ruling. Therefore, to avoid confusion in this particular scenario, this language is retained in paragraph (l)(4).

Paragraphs (l)(2)(ii) and (l)(3)(ii) clarify and maintain the *status quo* of the current regulation to provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to begin the suspension of liquidation of any unliquidated entries not yet suspended, which entered on or after the date of initiation of the scope inquiry, and collect applicable cash deposits. Paragraphs (l)(2)(ii) and (l)(3)(ii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and to avoid confusion.

New paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce normally will direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, which entered before the date of initiation of the scope inquiry, and collect applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final scope ruling. However, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide an exception that, if Commerce determines it is appropriate to do so, Commerce may direct CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date. Under this framework, Commerce may consider upon timely request of an interested party or at its discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should not be applied to certain entries which pre-date the date of initiation. In response to a timely request from an interested party, Commerce will only consider directing CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date based on a specific argument by the interested party supported by evidence establishing the appropriateness of that alternative date. These provisions are further explained below in response to comments. New paragraphs (l)(2)(iii) and (l)(3)(iii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and to avoid confusion.

Lastly, new paragraph (l)(5) provides language to clarify CBP's authority to take related action. Specifically, this language clarifies that the revised framework established by Commerce in § 351.225 do not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. As discussed above, CBP has independent authority to suspend liquidation of entries that CBP determines are within the scope of an AD or CVD order, and such determinations are ''final and conclusive'' unless appealed to Commerce through a request for a scope ruling.[94] Additionally, there may be entries of products subject to a scope inquiry that CBP has liquidated but for which liquidation is not yet final (*e.g.,* entries under protest pursuant to 19 U.S.C. 1514) or for which CBP has extended liquidation (*e.g.,* pursuant to 19 U.S.C. 1504(b)). Consistent with current practice and in accordance with CBP's statutory and regulatory authorities, Commerce expects that CBP may stay its action on these entries during the course of the scope inquiry.[95]

[93] For further information, see discussion of new paragraph (l)(5) below. For a list of entry types, including those identifying the entries as subject to AD or CVD duties, see, ''CBP Form 7501: Summary,'' available at *https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501* (last visited June 9, 2021).

[94] *See Sunpreme,* 946 F.3d at 1317–18 (citing 19 U.S.C. 1500(c) and 1514(b); sections 500(c) and 514(b) of the Act); *TR International,* 433 F. Supp. 3d at 1341; and *Fujitsu,* 957 F. Supp. at 248. Section 517 of the Act (concerning CBP's civil administrative investigations of duty evasion of AD/CVD orders) also authorizes CBP to suspend liquidation of entries for which it has reasonable suspicion, or, in the case of final determination, substantial evidence, that covered merchandise is entered into the United States through evasion under section 517(e) and (d) of the Act.

[95] This is consistent with the Federal Circuit's decision in *Thyssenkrupp Steel North America, Inc.* v. *United States,* 886 F.3d 1215 (Fed. Cir. 2018). In *Thyssenkrupp,* the Federal Circuit recognized that instructions revoking an antidumping duty order superseded previously issued liquidation instructions, as of the effective date of the revocation, and applied to entries under protest that entered the United States after the effective date of the revocation. *Id.* at 1223–27. The Federal Circuit explained that this ''serves the purpose of the

This language also clarifies that any instructions issued by Commerce directing CBP to ''lift suspension of liquidation'' and assess duties at the applicable AD/CVD rate would not limit CBP's ability to: (1) Suspend liquidation/assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically; or (2) suspend liquidation/assess duties/take any other action within CBP's or HSI's authority with respect to AD/CVD entries.[96]

There is one clarification to this revised regulatory framework as referenced above in the **DATES** section regarding the effective date and in the Applicability Dates section of this preamble. As stated above, amendments to § 351.225 apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after the effective date for the amendments to § 351.225 identified in the **DATES** section. However, Commerce will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption prior to this effective date. For example, should Commerce initiate a scope inquiry and issue a preliminary or final scope ruling that the product is covered by the scope of an order:

- Commerce will instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after the date of initiation of the scope inquiry pursuant to paragraphs (l)(2)(ii) and (l)(3)(ii); and
- Commerce normally will instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the date of initiation of the scope inquiry, but not for such entries prior to the effective date identified in the **DATES** section, pursuant to paragraphs (l)(2)(iii) and (l)(3)(iii).

In other words, the furthest retroactive suspension directed by Commerce that could apply under this framework is to unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after the effective date identified in the **DATES** section. This is consistent with the language of paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) that allows for Commerce to alter the date for which the suspension of liquidation should begin under this provision at its discretion. Thus, when applying paragraphs (l)(2)(iii) and (l)(3)(iii) in a given scope inquiry, Commerce will include the appropriate clarifying language regarding the effective date identified in the **DATES** section in the preliminary and final scope rulings and corresponding instructions to CBP. That being said, as expressly stated in paragraph (l)(5), this framework does not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. Nor will this framework apply to scope ruling applications filed or scope inquiries self-initiated by Commerce before the effective date identified in the **DATES** section.

This application will be limited in practice; as detailed in the *Proposed Rule,* CBP normally will liquidate entries declared as non-subject to AD/CVDs within one year of entry. Therefore, we expect that only within the first year after the effective date identified in the **DATES** section will there be entries that remain unliquidated and not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the effective date.

To be clear, entries that are already suspended as of the effective date identified in the **DATES** section, will be subject to the continued suspension of liquidation under paragraph (l)(1), which provides that, at the time of initiation of a scope inquiry, Commerce will instruct CBP to continue the suspension of previously suspended entries and apply the applicable cash deposit rate. Similarly, entries that are already suspended as of the effective date identified in the **DATES** section will be subject to the continued suspension of liquidation under paragraphs (l)(2)(i) and (l)(3)(i), which provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce will instruct CBP to continue the suspension of previously suspended entries and apply the applicable cash deposit rate. These entries will retain their *status quo* from before the effective date to after the effective date. Specifically, current paragraph (l)(1), as well as current paragraphs (l)(2) and (3), require continued suspension of previously suspended entries both at the time of initiation of a scope inquiry and in the event of a preliminary or final scope ruling determining that the product is covered by the scope of an order.

As noted above, Commerce received numerous comments on paragraph (l). Summaries of those comments, and responses to those comments, are provided below.

(a) Retroactive Suspension of Liquidation

As described above, among other changes, Commerce proposed to eliminate the distinction between formal and informal scope inquiries in the *Proposed Rule,* so that all scope inquiries would be conducted by a formal initiation. In addition, Commerce proposed that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended retroactive to the first date of suspension under the relevant order, and collect applicable cash deposits. Therefore, the key distinction between the current regulation and what was proposed is that the current regulation imposes a ''cut-off'' of the initiation date of the scope inquiry—the proposed regulation would have removed this limitation so that any unliquidated entries found within the scope of the order would be subject to duties, not just those that entered on or after the initiation date.

Several commenters support the proposal to apply affirmative scope rulings to all unliquidated entries dating back to the first date of suspension under the order. Certain of these commenters agree that by eliminating the distinction between formal and informal scope inquiries, Commerce makes clear that an affirmative scope ruling means that the product has always been subject to the order. One commenter argues that the proposal will address serious duty evasion issues and will foster uniformity in the enforcement of AD/CVD laws no matter what type of scope inquiry is conducted. This commenter also agrees with Commerce's statement in the *Proposed Rule* that, at the time Commerce issues an affirmative preliminary or final scope ruling, it is unlikely that there will be any

protest mechanism—to allow agency consideration of issues after an initial liquidation determination—and respects the longstanding principle . . . that newly governing law, if retroactive to particular events, is to be applied to those events in ordinary, timely initiated direct-review proceedings.'' *Id.* at 1224. A similar point was recognized in *TR International,* 433 F. Supp. 3d at 1344–46, currently on appeal, concerning CBP's potential application of a Commerce scope ruling to entries under protest.

[96] Homeland Security Investigations (HSI) has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CVDs. *See, e.g.,* 18 U.S.C. 542.

unliquidated entries more than one year old other than those already suspended.

Another commenter argues that the proposed changes are necessary because, while scope rulings do not expand the scope of an order, the Federal Circuit has foreclosed Commerce from applying scope rulings to all unliquidated entries in instances where Commerce issues a scope ruling based on the application under the current regulations.[97] According to this commenter, the proposal results in the common-sense proposition that AD/CVDs should be collected on all in-scope merchandise regardless of when a scope inquiry was initiated.

Roughly the same number (12) of commenters to those above, oppose the *Proposed Rule* regarding retroactive suspension in scope inquiries. These commenters raise the issue of fairness; in particular, they argue that there is a significant duty liability risk to importers that are genuinely unaware their products may be within the scope of an order.

In addition to fairness concerns, certain of these commenters raise concerns regarding notice and due process and argue that assessing duties retroactively when the language of an order is unclear is a violation of due process and creates uncertainty for importers. Certain of these commenters argue that product scope language should be as precise and clear as possible from the beginning and that clarification of ambiguous scope language should be applicable at the time of initiation of the scope inquiry because, otherwise, retroactive duty liability presents an incalculable risk and significant uncertainty to parties. Certain commenters also argue that scope rulings should be published in the **Federal Register** so that all interested parties affected have the same level of information and can defend their interests, or available on Commerce's website. Another of these commenters argues that, as held by the Federal Circuit, a scope ruling does not confirm the scope of an order, but clarifies an unclear scope.[98] This commenter argues that parties should not be penalized for relying on scope language that does not clearly cover merchandise, and also expresses support for providing notice of initiation of a scope inquiry via the **Federal Register**. Another commenter argues that the *Proposed Rule* would encourage ambiguity in scope language and prevent importers from making appropriate business plans.

A few commenters also argue that Commerce alleges, without citing any specific past examples of such activity by importers, that the existing approach in the current regulations encourages gamesmanship, delay, and duty evasion based on a view that importers fail to do their due diligence, are aware of the potential liability, and would not seek a scope ruling so as to avoid payment of AD/CVDs. These commenters claim that the proposal would result in negligent importers not seeking a scope ruling at all if doing so would imply that all unliquidated entries could be subject to AD/CVDs.

Another commenter argues that Commerce's premise in the *Proposed Rule* that the AD/CVD order constitutes notice that unspecified products may be in-scope is flawed because scope language may not be clear, and allowing for retroactive suspension would only serve to correct the petitioner's own errors or neglect when finalizing scope language in the investigation.

Finally, two commenters oppose the proposal to apply affirmative scope rulings to all unliquidated entries dating back to the first date of suspension under the order because it would deprive parties of the ability to request an administrative review of entries later found to be subject to an AD/CVD order. One of these commenters notes that, in certain scenarios, importers would have no ability to request an administrative review to lower their liability for entries later determined to be subject to an order. The other commenter proposes that a review would need to be conducted outside of the normal administrative review process, as often the time for requesting such reviews will have elapsed by the time Commerce issues a final scope ruling. According to this commenter, absent such a process, the proposal would likely be violative of the Excessive Fines clause of the 8th Amendment.

Response:

As discussed above, after consideration of these comments, Commerce is adopting a number of key changes to paragraph (l).

First, Commerce is adopting changes to paragraphs (l)(2) and (3) to clarify and maintain the *status quo* of the current regulation with respect to unliquidated entries not yet suspended which entered on or after the date of initiation of the scope inquiry. Specifically, paragraphs (l)(2)(ii) and (l)(3)(ii) provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce will direct CBP to begin the suspension of liquidation of any unliquidated entries not yet suspended, which entered on or after the date of initiation of the scope inquiry, and collect applicable cash deposits.

Second, Commerce is adopting changes to paragraphs (l)(2) and (3) with respect to unliquidated entries not yet suspended which entered before the date of initiation of the scope inquiry. Specifically, paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final scope ruling determining that the product is covered by the scope of an order, Commerce normally will direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, which entered before the date of initiation of the scope inquiry, and collect applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final scope ruling.[99] However, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide an exception that, if Commerce determines it is appropriate to do so, Commerce may direct CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date. Under this framework, Commerce may consider upon a timely request of an interested party or at its discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should not be applied to certain entries which pre-date the date of initiation. In response to a timely request from an interested party, Commerce will employ a heightened standard and will only consider directing CBP to begin suspension of liquidation and application of cash deposits to merchandise entering at an alternative date based on a specific argument by the interested party supported by evidence establishing the appropriateness of that alternative date. This would require, for instance, specific identification of the interested parties and entries at issue and the circumstances surrounding the

[97] *See Fasteners,* 947 F.3d at 800–03.

[98] *Id.,* 947 F.3d at 803.

[99] As stated above in the discussion of new paragraph (l)(5), consistent with current practice and in accordance with CBP's statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a scope inquiry. Additionally, any instructions issued by Commerce directing CBP to ''lift suspension of liquidation'' and assess duties at the applicable AD/CVD rate would not limit CBP's ability to (1) suspend liquidation/assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically, or (2) suspend liquidation/assess duties/take any other action within CBP's or HSI's authority with respect to AD/CVD entries.

declaration of the entries as non-AD/CVD type entries. Broad, non-specific arguments concerning general unfairness or lack of notice that are not concrete or particular to the interested party or entries at issue would not be sufficient. In addition, Commerce may consult with CBP as necessary under this provision.

As Commerce stated in the *Proposed Rule,* and as set forth in paragraph (a) of § 351.225, a scope ruling that a product is within the scope of the order is a determination that the product has always been within the scope of the order. Therefore, one of Commerce's objectives in crafting suspension of liquidation rules for scope inquiries is to ensure that AD/CVDs are applied to all unliquidated entries of products found within the scope of the order, including entries that may pre-date the date of initiation of the scope inquiry.

As a general matter, producers, exporters, and importers are already notified that their products may be covered by the scope of an order through the publication in the **Federal Register** of Commerce's determinations and/or order, which provides a description of the subject merchandise and any associated Harmonized Tariff Schedule of the United States (HTSUS) categories.[100] As discussed in further detail below under the discussion of § 351.226(l), importers are generally expected to perform their due diligence and exercise reasonable care, which would include understanding the imported product and reviewing prior **Federal Register** notices relevant to the product. Furthermore, an importer of a product under an HTSUS category that is associated with an AD/CVD order would be faced with a particular responsibility to ensure whether the product is subject to an AD/CVD order. Additionally, exporters, producers, and importers are able to ask Commerce at any time for a scope ruling on any product that is in actual production (regardless of whether it has yet been sold or exported to the United States). To the extent that a party is unclear as to whether a product falls within the scope of the order, the onus is on that party to request a scope ruling, and to seek such a scope ruling in an expeditious manner.[101]

This is particularly the case where a party has been alerted by CBP that the entries may be subject to an AD/CVD order, and advised to seek a scope ruling from Commerce.[102] Moreover, as explained above, ''Commerce, not Customs, has authority to clarify the scope of AD/CVD orders[.]'' [103] Accordingly, producers, exporters, and importers of products found to be within the scope of an order generally cannot claim ignorance or reliance on another agency's determinations or actions to avoid the application of Commerce's scope ruling to their merchandise. Thus, establishing a rule that normally applies retroactive suspension in scope inquiries will encourage parties to maintain a reasonable awareness of whether the product they are producing, exporting, or importing is subject to an AD/CVD order.

Further, as discussed in the *Proposed Rule,* and as supported by numerous commenters, in crafting its rules regarding suspension of liquidation in scope inquiries, Commerce is particularly concerned with gamesmanship, delay, and duty evasion if foreign producers and exporters, as well as U.S. importers, believe that all entries not already suspended prior to the date on which Commerce initiates a scope inquiry are essentially excused from AD/CVDs, even if Commerce finds through the scope inquiry that the product has always been within the scope of the order. Under such a system, importers would have an incentive to import as much merchandise as possible prior to requesting a scope ruling to avoid potential AD/CVD liability. If Commerce found the product at issue is not covered by the order, the importer could continue to import it without concern of AD/CVDs. On the other hand, if Commerce determines that the product is, in fact, covered by the order, the importer will have avoided AD/CVD liability for the imports imported before requesting the scope ruling. They would essentially avoid the application of the scope ruling through timing and gamesmanship. We find that such manipulation of AD/CVD liability undermines the effectiveness and remedial purpose of the AD/CVD laws.[104]

That said, Commerce also agrees, in part, with some commenters that there may be some limited instances in which it may be appropriate for Commerce to exercise its authority to direct CBP to begin the suspension of liquidation and collection of cash deposits to entries as of an alternative starting point. For example, there may be situations in which Commerce issues a scope ruling that a product is covered by the scope of an order, and the affected importers have no opportunity, for no reason other than the timing of the scope ruling, to request an administrative review to potentially lower their liability for entries that pre-date the date of initiation of the scope inquiry. In such a situation, Commerce may consider specific arguments of the parties that retroactive application of the scope ruling to certain entries might be inappropriate. However, as explained above, such a showing would require, for instance, specific identification of the interested parties and entries at issue and the circumstances surrounding the declaration of the entries as non-AD/CVD type entries. Broad, non-specific arguments concerning general unfairness or lack of notice that are not concrete or particular to the interested party or entries at issue would not be sufficient.

This exercise of Commerce's discretion (in the absence of express statutory language, as noted above) is reasonable and balanced in that it takes into account the enforcement objectives and concerns about scenarios limiting the effectiveness of an order discussed in the *Proposed Rule,* as well as comments raised in response to the *Proposed Rule* that suggest that Commerce should leave open the opportunity for a party to try to demonstrate why an exception might be appropriate in light of particular facts. In addition, in certain instances, it would not be an unreasonable exercise of Commerce's discretion to direct CBP to liquidate entries that have been converted from non-AD/CVD type entries to AD/CVD type entries at the applicable cash deposit rate, even where the party may have missed an opportunity to seek individual review of its entries. For example, if parties engaging in gamesmanship and delay tactics later discovered that they missed an opportunity to seek an administrative review to lower their potential duty liability, through a scheme to import massive volumes of merchandise, and then request a scope ruling, Commerce

[100] The Federal Circuit has recognized that **Federal Register** notices are treated as legally effective notices in a wide range of circumstances. *See Suntec Indus. Co.* v. *United States,* 857 F.3d 1363, 1370 (Fed. Cir. 2017) (*Suntec*). In certain cases, the courts have determined that a party that did not receive actual notice nonetheless received constructive notice of an event through the publication of a **Federal Register** notice. *Id.* In *Suntec,* the Federal Circuit found that publication of a notice of initiation of an administrative review in the **Federal Register** constituted notice to Suntec as a matter of law, despite the fact that the domestic industry failed to serve Suntec directly with its request that Commerce conduct an administrative review of Suntec. *Id.*

[101] *See Proposed Rule,* 85 FR 49472 at 49481.

[102] In such a scenario, CBP may agree not to convert the entry to an AD/CVD type entry at that time, and instead to extend liquidation for the entry while the party seeks a scope ruling from Commerce.

[103] *See Wirth,* 5 F. Supp. 2d at 973.

[104] *Proposed Rule,* 85 FR 49472 at 49481–84.

believes that such a missed opportunity would be the fault and responsibility of the party attempting to avoid AD/CVDs in the first instance.

On the other hand, we agree with commenters that, for example, we should leave open the possibility for limited exceptions where the facts and circumstances warrant—*e.g.,* a party seeks a scope ruling as early as possible, but the time to seek an administrative review on certain pre-initiation entries has passed. In such instances, Commerce may direct CBP to suspend liquidation and collect cash deposits only for those unliquidated entries not already subject to suspension and made prior to the initiation of the scope inquiry for which an administrative review can still be requested. In light of these changes, we disagree that a revised process for requesting an administrative review of such entries is necessary.

Therefore, with respect to comments that the *Proposed Rule* would encourage ambiguity in scope language, prevent importers from making appropriate business plans, and increase uncertainty, we believe that the framework adopted in this final rule described above adequately addresses such concerns. In practice, in individual scope proceedings, Commerce will have to balance its interest in ensuring the effectiveness of all AD/CVD orders with any case-specific issues that might warrant altering the date for which suspension of liquidation should begin for unliquidated entries not yet suspended. Exactly how to strike this balance should emerge over time, through Commerce's practice and consideration of case-specific issues.

With respect to comments that the publication of an AD/CVD order may not be sufficient notice to parties of a pending scope inquiry and the potential for retroactive suspension of entries not previously suspended, Commerce is adopting new procedures to publish a monthly notice in the **Federal Register** listing scope applications received over the past month in § 351.225(d)(2) (see discussion above). Such monthly notice will give all interested parties an opportunity to consider if the scope inquiry request is relevant to them and their interests and allow them the opportunity to participate.

Another commenter also points out that scope rulings are not published and are difficult to find and proposes that Commerce should put public versions of scope rulings on its website. As discussed below under § 351.225(o), Commerce publishes notice of its final scope rulings on a quarterly basis in the **Federal Register**. In addition, all final scope rulings since 2012 are available on ACCESS, and Commerce continuously updates its website with past scope rulings, currently available at *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

Further, we disagree with certain comments that Commerce has not provided adequate support for its concern that the existing approach in the current regulations encourages gamesmanship, delay, and duty evasion. As highlighted not only by Commerce in its discussion in the *Proposed Rule,*[105] but also by commenters in favor of the *Proposed Rule* and numerous Federal court decisions,[106] the agency, as the administrator of the AD/CVD laws, has a well-founded and significant concern that Commerce determinations may not be adequately enforced due to gamesmanship, delay, and duty evasion. If Commerce is able to modify its regulations to diminish the possibility of evasion of the payment of duties, while maintaining procedures that assure that its determinations are based on record evidence, then it is appropriate for Commerce to make such changes in this final rule.

We also disagree with comments that the proposal would result in negligent importers not seeking a scope ruling at all if doing so would imply that all unliquidated entries would be subject to AD/CVDs. We believe that the framework we have set forth will, in fact, deter parties from engaging in such gamesmanship, and will encourage parties to maintain a reasonable awareness whether the product they are producing, exporting, or importing is subject to an AD/CVD order.

(b) Suspension of Liquidation and Cash Deposits at Initiation

Several commenters generally agree with Commerce's proposal under § 351.225(l)(1) to instruct CBP upon initiation of a scope inquiry to continue to suspend liquidation of products that are already subject to suspension. Several of these commenters argue that Commerce should instruct CBP to begin suspending liquidation of entries not already suspended by CBP at an earlier stage in a scope inquiry. Specifically, these commenters request that Commerce instruct CBP upon initiation of a scope inquiry to suspend liquidation of entries which are not already subject to suspension of liquidation. Several of these commenters propose that cash deposits for such entries be collected at the rate of zero, which they argue means there would be no economic harm to importers, while one commenter proposes that the cash deposit should be at the applicable rate under the order if the product at issue were found to be covered by the order. These commenters argue that suspending liquidation at the time a scope inquiry is initiated will preserve entries for duty assessment if the product at issue is ultimately found to be within the scope of an order. According to these commenters, waiting for an affirmative preliminary scope ruling to suspend liquidation means that entries made more than one year prior to a preliminary scope ruling would have already liquidated, which would significantly undermine the purpose of the proposed changes to Commerce's regulations in this rulemaking. These commenters argue that suspending liquidation and collecting cash deposits upon initiation of a scope inquiry helps counter the situation where an importer could escape liability by importing as much as possible prior to requesting a scope ruling. These commenters consider that, under Commerce's proposal, an importer could escape duty liability by filing a scope ruling application at a time when an affirmative preliminary or final scope ruling would be issued more than one year after the date the importer's merchandise enters the United States.

These commenters further argue that Commerce's concerns in the *1997 Final Rule* with beginning the suspension of liquidation of entries at the time of initiation of a scope inquiry based on nothing more than a mere allegation by domestic industries are resolved by the proposed regulations because the proposed regulations now require additional information when filing a scope ruling application. These commenters argue that, as a practical matter, the overwhelming majority of scope ruling requests are filed by U.S. importers and foreign producers, so any purported inconvenience to these parties from domestic industries filing scope ruling requests apply only to a small portion of the importing community.

One commenter opposes the requirement under proposed § 351.225(l)(1) to post cash deposits from the date Commerce initiates a scope inquiry for any unliquidated

[105] *See Id.* at 49483; 49473 (discussing under the revisions to the new shipper review regulation, § 351.214, the Enforce and Protect Act of 2015 which highlighted duty evasion concerns).

[106] *See Sunpreme,* 946 F.3d at 1317 and 1321. In *Fasteners,* 947 F.3d 794, the Federal Circuit did not disagree with Commerce's concerns of potential ''gamesmanship and delay'' if importers did not report their merchandise to CBP as subject merchandise. *See Fasteners,* 947 F.3d at 803 (finding that ''we do not find that such gamesmanship occurred in this case.'').

entries at the time of initiation, arguing that this is an overly burdensome revision to the regulations and prematurely assumes a product is within the scope of an order before any analysis is conducted. This commenter argues that many times parties request scope rulings because it is not necessarily clear that a product is within the scope of an order. This commenter argues that requiring the posting of cash deposits from initiation of a scope inquiry is inconsistent with Commerce's practice with requiring cash deposits in similar situations, such as when Commerce initiates an investigation.

In rebuttal, several commenters expressed support for the argument that, upon initiation of a scope inquiry, Commerce should instruct CBP to suspend liquidation and require cash deposits for all unliquidated entries, whether the entries are already subject to suspension of liquidation and cash deposit requirements or not. These commenters argue that this would preserve the largest amount of entries for duty assessment and would help prevent foreign producers and exporters, and U.S. importers, from importing as much merchandise as possible before a scope ruling application is filed.

In rebuttal, several commenters oppose the proposal to begin suspending liquidation and requiring cash deposits on all unliquidated entries at the time a scope inquiry is initiated. One commenter argues that this would be contrary to all notions of fairness, which Commerce recognized when rejecting similar proposals in the *1997 Final Rule* and by not itself proposing this change in the proposed regulations. One commenter adds that this would promote the filing of frivolous scope requests, harass U.S. importers, and waste Commerce's resources.

One commenter argues in rebuttal that, regardless of the cash deposit requirement and the applicable cash deposit rate, there is a significant financial impact on importers if liquidation is suspended upon initiation of a scope inquiry because entries would remain open until Commerce issues liquidation instructions to CBP and an importer's bond cannot be terminated while entries remain open. This commenter argues that suspension of liquidation also has a significant financial impact on an importer's unrelated activity because the collateral that sureties typically require for a bond, which may be up to the face value of the bond, is not released until at least six months after all entries have liquidated.

Response:

We have left unchanged § 351.225(l)(1), which states that, upon initiation of a scope inquiry, Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. In addition, we have considered the proposal by some commenters that Commerce should instruct CBP upon initiation of a scope inquiry to begin the suspension of liquidation of unliquidated entries not previously suspended and to require cash deposits on such entries (either at zero or at the rate in effect at the time of entry). We have also considered the arguments in opposition to this proposal. As noted above, the statute does not provide direction to Commerce on the suspension of liquidation of entries subject to a scope inquiry. Therefore, after consideration of the parties' arguments and based on current practical and administrability concerns, we have decided to continue to order suspension of liquidation and collection of cash deposits for such entries only after Commerce's first (preliminary or final) scope ruling that a product is covered by the scope of an order. As a result, we have not accepted the proposal that Commerce instruct CBP to begin suspension of liquidation upon initiation.

One reason we do not find it appropriate to instruct CBP to begin the suspension of liquidation for unliquidated entries not previously suspended upon initiation of a scope inquiry is a consequence of the revisions to § 351.225(d)(2). Under those revisions, scope ruling applications that are not rejected will be deemed accepted 31 days after filing and the scope inquiry will be deemed initiated. In these situations, scope inquiries may be deemed initiated without Commerce fully analyzing the application (including the description of the product for which a scope ruling is requested) prior to initiation. Once initiated, paragraph (l)(1) provides that Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. From a practical perspective, under this new framework, Commerce is seeking to maintain the *status quo* with respect to this group of previously suspended entries. Therefore, we find it acceptable for Commerce to incorporate the description of the product in the application ''as is'' in its instructions to CBP, even if Commerce has not had a great deal of time to fully analyze the product description.

However, we find that ordering suspension for the first time on merchandise which was not previously suspended, based only on the description in the scope ruling application, raises practical and administrability concerns. Specifically, before initiation, Commerce may not have adequate time to analyze the description to ensure that when such a description is provided in CBP instructions, CBP is able to administer and enforce those instructions without difficulty. Commerce does not have the same concerns for entries already suspended, because, as noted above, for those entries Commerce is simply seeking to maintain the *status quo* for those entries. On the other hand, after initiation, Commerce would have the time to receive feedback from interested parties and seek clarification from the scope ruling applicant as appropriate, before settling on the precise description of the product to include in its instructions to CBP.

We therefore disagree with commenters who argue that Commerce's revised requirements for scope ruling applications under revised § 351.225(c) would always provide Commerce with sufficient information for purposes of ordering suspension of liquidation and collection of cash deposits upon initiating an inquiry for all entries. Although Commerce may have more information from a scope ruling application under revised § 351.225(c) than under current practice, at the point of initiation, in most cases, it is unlikely that Commerce would have had sufficient time to analyze the description for the purpose of ordering CBP to begin suspension of liquidation for certain entries as detailed above. Notably, there may be instances in which Commerce finds that the record and product descriptions are sufficient and clear enough to warrant combining an initiation with a concurrent affirmative preliminary scope ruling. However, in the cases in which Commerce just initiates a scope inquiry, Commerce will not have reached any sort of determination on the merits that the product at issue is covered by, or excluded from, the scope of the order.

Further, we are also concerned with the significant administrative burden that would result if we were to instruct CBP to begin suspension of liquidation and collection of cash deposits of all entries at initiation, regardless if they are determined later to be merchandise covered or not covered by an AD or CVD order. For example, under one possible scenario, such suspension could result in a multi-step process of Commerce: (1) Directing CBP to convert all non-AD/

CVD type entries meeting the description of the product at issue in the scope ruling application to AD/CVD type entries and directing CBP to suspend liquidation without any cash deposits at the time of initiation; (2) directing CBP subsequently, upon the event of an affirmative preliminary scope ruling, to collect cash deposits at the rate to be determined applicable retroactively; and (3) directing CBP, in the event of a negative final scope ruling, to lift suspension and liquidate entries without regard to AD/CVDs. This is just one sequence of scope inquiry proceedings and determinations, among several, that reflects the additional administrative burden that suspension of liquidation of all entries of the product described in a scope ruling application at initiation would require of Commerce and CBP.

We are cognizant of the concerns expressed by some commenters that certain entries that entered prior to a preliminary scope ruling may liquidate without being assessed AD/CVDs, and that certain parties may time the filing of a scope ruling application in an attempt to avoid the payment of AD/CVDs. We have also considered the suggestion of some commenters to begin the suspension of liquidation of not yet liquidated entries at the time of initiation, with a cash deposit rate of zero, which they argue means there would be no economic harm to importers. However, Commerce believes that this balance between enforcement concerns and practical and administrability considerations described above weighs in favor of maintaining its current practice of not imposing either suspension of liquidation and/or cash deposit requirements until after evaluating a scope ruling application and making either a preliminary or final affirmative scope ruling, whichever occurs first.

That said, although we are not adopting the suggestions that we suspend liquidation of all entries described in scope applications at initiation, we note that we have made numerous other changes throughout these regulations, such as the remedy provisions found in § 351.225(m) and the certification process addressed in § 351.228, in addition to the changes discussed above for paragraph (l), that we believe significantly strengthen the administration and enforcement of AD/CVD laws, and, overall, these changes minimize the opportunities for gamesmanship and evasion of AD/CVD orders while also mitigating the harm to importers that may be acting in good faith.

With respect to the comment that Commerce should not require cash deposits upon initiation of a scope inquiry, it is unclear whether this commenter believes that under revised § 351.225(l)(1) Commerce would be directing CBP to begin suspension of liquidation and require cash deposits of all unliquidated entries (including entries not previously suspended), or whether the commenter disagrees that Commerce should inform CBP that it has initiated a scope inquiry and direct CBP to continue any suspension of liquidation and collection of cash deposits already in place. As discussed above, prior to a scope inquiry, entries may be previously suspended for a number of reasons, including for example, because the importer declared the merchandise as subject to the order, or CBP directed the importer to refile an entry that was previously declared as not subject to the order to an entry type indicating it is covered by an AD and/or CVD order. Thus, at the time Commerce initiates a scope inquiry, entries of products subject to the scope inquiry may already be suspended. We clarify that under revised § 351.225(l)(1), when Commerce initiates a scope inquiry, it does not intend to direct CBP to suspend liquidation and collect cash deposits in the first instance. Rather, Commerce will inform CBP that it has initiated a scope inquiry and direct CBP to continue the suspension of liquidation of all unliquidated entries of products subject to the scope inquiry that have already been suspended. In other words, under revised § 351.225(l)(1), Commerce would direct CBP to continue suspending any entries that are already suspended and to continue collecting cash deposits at the applicable rate for such entries. This is consistent with current § 351.225(l)(1) in the sense that both the current and revised regulation require suspension of liquidation to continue at the applicable cash deposit rate for previously suspended entries after initiation of a scope inquiry. Although it has not been Commerce's practice under the existing regulations to direct CBP upon initiation of a scope inquiry to continue the suspension of liquidation for entries already subject to suspension and collection of cash deposits, current § 351.225(l)(1) provides that any such suspension will continue when Commerce initiates a scope inquiry. This revised framework is guided by the curative purpose and remedial intent of the AD/CVD law, as well as to provide for the protection of revenue.[107] Consistent with that policy, Commerce has revised § 351.225(l)(1) to require the issuance of instructions to ensure that entries previously suspended by CBP continue to be suspended during the pendency of the scope inquiry.

(c) Action Pursuant to a Negative Preliminary Scope Ruling

Certain commenters oppose eliminating the requirement for Commerce to notify CBP of a preliminary scope ruling determining that the product at issue is not covered by the scope of the relevant order along with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and to refund cash deposits of estimated duties. One of these commenters argues that eliminating this requirement effectively requires companies to float the extra duties under an AD/CVD order pending a final scope ruling and receiving a reimbursement without interest several months later. Other commenters argue that the proposal would be unfair to importers, especially when CBP suspends liquidation and requires cash deposits for products that are facially out of scope, because importers would be forced to wait a full year or more than 500 days based on the amount of time that it has historically taken before liquidation occurs and cash deposits are refunded. These same commenters argue that, in the context of investigations, provisional measures are not imposed following a negative preliminary determination.

In rebuttal, several commenters responded with arguments supporting the proposal to eliminate the requirement to notify CBP of a preliminary negative scope ruling. Many of these commenters argue that duty collection is a guiding principle for this rulemaking and notifying CBP at the time of a final scope ruling ensures that any duties collected are preserved in the event Commerce reverses its position after a preliminary negative scope ruling. These same commenters believe that this particular aspect of the suspension of liquidation rules will encourage importers to seek scope rulings earlier in the proceeding or risk having entries suspended by CBP. Another group of commenters agreed that the proposal ensures the

[107] *See Guangdong Wireking,* 745 F.3d at 1203 (noting that the statutory scheme has a ''curative purpose'' and a ''remedial intent''); and *Sunpreme,* 946 F.3d at 1321–22 (noting ''the policy declared in the Tariff Act, which instructs the government to 'provide, to the maximum extent practicable, for the protection of revenue.'''') (citing 19 U.S.C. 1484(a)(2)(C)).

appropriate application of AD/CVD orders in the event of a final scope ruling determining that the product in question is covered by the scope of an order and ensures that affirmative rulings are applied to all entries of subject merchandise. These commenters believe the proposal is consistent with the overall objective of addressing serious enforcement concerns and the very real risk of duty evasion.

Response:

We have left unchanged proposed § 351.225(l)(2) with respect to this issue. Under the existing regulations, if Commerce issues a preliminary scope ruling determining that the product at issue is not covered by the scope of an order, Commerce is required to notify CBP and direct CBP to terminate the suspension of liquidation for any entries previously suspended by CBP with refunds of any cash deposits paid as estimated duties. The *Proposed Rule* proposed eliminating this requirement so that Commerce would no longer issue instructions upon issuance of a preliminary scope ruling determining that the product is not covered by the scope of an order. Instead, through the elimination of this requirement, any entries previously suspended would remain suspended pending completion of the scope inquiry and a final ruling on the matter. We believe that adoption of the proposal is necessary to preserve the *status quo* for the duration of the scope inquiry and ensure the appropriate application of AD/CVDs to subject merchandise in the event of a final scope ruling determining that the product is covered by the scope of an order. As we have explained, regardless of the preliminary scope ruling, if Commerce concludes in the final scope ruling that the product at issue is covered by the scope of an order, that is a determination that the product at issue was always covered by the scope of an order. Keeping the *status quo,* therefore, helps protect the integrity of such a determination and promotes the effectiveness and remedial purpose of the AD/CVD laws.

Further, we do not agree with the comments that not directing CBP to terminate suspension of liquidation pursuant to a preliminary determination that the product at issue is not covered by the scope of an order would be unfair to importers, because that may mean importers would be forced to wait a full year or longer based on how it has historically taken before liquidation and refunding of cash deposits to occur. The revised regulations implement other changes that we anticipate will streamline and expedite the scope inquiry process and will, to a certain extent, address that timing issue. Therefore, Commerce has revised § 351.225(l)(2) to no longer require notifying CBP of negative preliminary scope rulings with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and refund any cash deposits paid as estimated duties.

With respect to the argument that provisional measures are not imposed following a negative preliminary determination in an investigation, Commerce will not direct CBP to suspend liquidation of entries not already suspended by CBP following a preliminary negative scope ruling. However, any suspension of liquidation (for example, suspension of liquidation ordered by CBP pursuant to its own authority) will be left undisturbed to preserve the *status quo* until the conclusion of the scope inquiry. Additionally, in response to one commenter, we clarify that Commerce instructs CBP to pay interest on overpayments of cash deposits paid as estimated duties following a final scope ruling determining that the product at issue is not covered by the scope of an order, in accordance with section 778 of the Act and § 351.212(e) of Commerce's regulations.

(d) Clarifying the Product at Issue

One commenter opposes the proposal to suspend liquidation of unliquidated entries of the ''product at issue'' without any limitation as to when the entries occurred. The commenter states that the proposed regulations are vague because the language does not limit any new suspension of liquidation instructions to only apply to unliquidated entries made on or after the underlying case order's earliest suspension of liquidation. The commenter further asserts that language must be added to paragraph (l)(2) and (3) that restricts the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter. The commenter claims that the United States is not entitled to AD/CVDs on entries that are not covered by or subject to the order.

Response:

We have left paragraphs (l)(2) and (3) unchanged from how they were proposed with respect to this issue. First, we agree with the commenter that Commerce does not have the authority to direct CBP to impose AD/CVDs on entries that are not subject to an order by virtue of pre-dating the first date of suspension associated with that order. Accordingly, any retroactive suspension of liquidation and collection of cash deposits would not be imposed on entries that predate the first date of suspension in the relevant AD and/or CVD proceeding. Second, the reference to the ''product at issue'' in paragraphs (l)(2) and (3) refers to the product that is the subject of the inquiry and that, for purposes of paragraph (l), the appropriate scope of products impacted, either on a country-wide or company-specific basis, are discussed under revised § 351.225(m), discussed below. Third, we do not disagree that AD/CVDs and cash deposits may not be applied on entries not covered by or subject to the order; however, the commenter's assertion that Commerce must limit the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter is incorrect. If Commerce determines that a product is subject to the order following an affirmative scope ruling, then it has the authority to impose AD/CVDs on entries of that product. Additionally, as Commerce explains below in response to comments made on § 351.225(m), Commerce may apply a scope ruling to a group of products on a country-wide basis, regardless of the producer, exporter, or importer, or apply its scope ruling on a producer-specific, exporter-specific, or importer-specific basis, or a combination of any of those remedies. Therefore, we do not find further clarification necessary for purposes of describing the product at issue under paragraphs (l)(2) and (3).

(e) Interest on Refunds of Cash Deposits

One commenter requests that Commerce modify paragraph (l)(4) to ensure that, in the event Commerce issues a final scope ruling that the product is not covered by the scope of an order, Commerce will instruct CBP to include interest on cash deposits that are refunded to importers. The commenter states that this modification would be consistent with § 351.212(e) of Commerce's regulations, which deals with interest on overpayments and underpayments of estimated duties. The commenter alternatively requests that Commerce reference § 351.212(e) in paragraph (l)(4). We received no rebuttal comments in response.

Response:

We have left paragraph (l)(4) unchanged with respect to this issue. Section 778 of the Act requires that CBP pay interest on overpayments or assess interest on underpayments of cash deposits paid as estimated duties on merchandise entered, or withdrawn from warehouse, for consumption, on and after the date of publication of the order. The implementing regulation, § 351.212(e), provides that Commerce

will instruct CBP to calculate interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited through the date of liquidation. In accordance with section 778 of the Act and § 351.212(e), following a final scope ruling determining that the product at issue is not covered by the scope of an order, Commerce instructs CBP to pay interest on overpayments of estimated duties. Given this well-established framework, we are not modifying paragraph (l)(4) regarding the payment of interest on cash deposits paid as estimated duties.

(f) Notification to Sureties

One commenter requests that sureties be notified, either by Commerce or CBP, at the time CBP is instructed to begin the suspension or continue the suspension of liquidation of entries for AD/CVD purposes in the context of a scope inquiry. This commenter argues that the duties demanded from sureties may be in amounts which exceed the bond and without any prior notice to the surety to allow for participation in administrative proceedings and communication with the bond principal, *i.e.,* the importer, to address or satisfy AD/CVD requirements. Citing to a previous CIT decision,[108] this commenter argues that sureties have standing in AD/CVD proceedings, given that sureties stand in the shoes of the importer and are jointly and severally liable for the duties that an importer is liable to pay. Therefore, this commenter argues that this rulemaking presents Commerce with an opportunity to recognize a surety as an ''interested party'' in AD/CVD proceedings. The commenter also states that providing sureties with information on AD/CVD entries in a timely manner will enhance the role and ability of sureties to address shortfalls in the collection of AD/CVDs.

No commenter opposes notifying sureties of any instruction to CBP to suspend or continue to suspend liquidation of entries for AD/CVD purposes in the context of scope inquiries. However, in rebuttal, several commenters oppose the inclusion of a surety in the regulatory definition of ''interested party.'' These commenters argue that it would be inconsistent with the statute to grant sureties interested party status through regulation, because a surety is not listed in the statutory definition of ''interested party.'' These commenters argue further that the surety-importer relationship does not involve the extent to which dumping or subsidization is occurring or the actual importation of unfairly traded imports.

Response:

We have not modified paragraph (l) to include a requirement to notify the involved surety or sureties that Commerce has instructed CBP to suspend, or to continue to suspend, liquidation of entries for AD/CVD purposes. However, we recognize and appreciate the unique role of sureties in the payment and collection of AD/CVDs, and that sureties need timely access to information to assess the risk that they assume when underwriting bonds for imports of merchandise subject to AD/CVD orders. As such, in response to these comments, Commerce intends to consult with CBP and explore whether and how sureties may be notified of entries that are subject to suspension of liquidation for AD/CVD purposes in connection with a scope inquiry being conducted by Commerce. In the interim, we note that, under revised § 351.225(d)(2), Commerce will publish in the **Federal Register** a notice of a self-initiated scope inquiry and a monthly notice that lists recently-filed scope applications to provide notice to those that are not on the annual inquiry service list, as discussed above. Separately, we decline to modify the regulatory definition of ''interested party'' under § 351.102(b)(29) to include a surety because such a change would be beyond the scope of this rulemaking. Furthermore, section 771(9) of the Act provides the list of entities that qualify as an ''interested party'' in AD/CVD proceedings, and sureties are not expressly included in that list. Commerce's regulations include a definition of the term ''interested party,'' but this definition does not differ from the statutory definition and was promulgated solely for purposes of addressing an issue that Commerce previously experienced in identifying and verifying the interested party status of an applicant that seeks access to BPI under an APO. As explained in the 2008 final rule that promulgated the regulatory definition of ''interested party,'' Form ITA–367 (Application for Administrative Protective Order in Antidumping or Countervailing Duty Proceeding) requires applicants who are not a petitioner or respondent to identify the section of Commerce's regulations that defines the applicant's interested party status and this was not possible under the regulations as they existed at the time because the regulations did not provide a definition of the term ''interested party.'' [109]

13. Section 351.225(m)—Applicability of Scope Rulings; Companion Orders

Section 351.225(m) addresses the universe of products at issue to which Commerce may apply its scope rulings. In the proposed § 351.225(m)(1), Commerce included a sentence which stated that if it had previously issued a scope ruling for an order with respect to a particular product, it might apply that scope ruling to all products with the identical physical description from the same country of origin as the particular product at issue, regardless of producer, exporter, or importer, without initiating or conducting a new scope inquiry under this section. One commenter requests that Commerce delete much or all of that sentence. The commenter's request stems from the requirement of proposed § 351.225(c)(2)(ii) for scope requestors to submit a concise public description of the product. The commenter argues that through this description, the applicant might unintentionally characterize the product in such a way publicly that interested parties might not realize they have an interest in the proceeding and should comment on the scope inquiry. The result, the commenter argues, would be that Commerce either might automatically apply its scope ruling to either too many or too few products, under this provision, without giving other parties an adequate opportunity to participate.

More generally, several parties raise due process concerns about determinations being made under this provision without the opportunity for meaningful input.

Finally, in accordance with paragraph (m)(2), which applies only to companion AD and CVD orders covering the same merchandise from the same country, one commenter requests that Commerce add a provision which applies its scope rulings not only to companion orders, but also to orders with identical scope language across multiple countries and multiple proceedings.

Response:

Upon consideration of the comments and further reflection, we have determined to remove the last two sentences of proposed paragraph (m)(1). Commerce agrees with the concerns expressed that if Commerce does not initiate or conduct a new scope inquiry based upon the filing of a scope application, but instead automatically issues a scope ruling that is applicable to all producers, exporter, or importers of that merchandise, such a procedure

[108] *See Lincoln Gen.* v. *United States,* 341 F. Supp. 2d 1265 (CIT 2004).

[109] *See Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634, 3635–36 (January 22, 2008).

would not provide potential interested parties with adequate procedures to protect their interests.

Nonetheless, we believe a remedy still exists that largely addresses previously issued scope rulings covering ''identical physical'' products from the ''same country of origin,'' as described in those sentences. Specifically, as Commerce explained in the preamble to the *Proposed Rule,* Commerce may issue a scope clarification, post-order, that addresses scope inquiry requests by multiple parties made ''over and over covering the same or similar scope language.'' [110] For this reason, we have determined to codify Commerce's authority to issue scope clarifications in a new paragraph, § 351.225(q), which we describe in greater detail below.

With respect to the request of a commenter that Commerce add a provision to its regulations that automatically applies its scope rulings across AD and CVD orders from different countries, we have determined not to include such a provision in our regulations. Unlike companion orders from the same country, as described in § 351.225(m)(2), parallel orders from different countries have different records, different interested parties, and sometimes different procedural histories. Accordingly, such a provision would not be administrable or fair to those interested parties subject to different orders from different countries who never had the opportunity to comment on the original scope ruling.

We note, however, that this does not mean that Commerce is unable to take action based upon a scope ruling applicable to an order covering one country with the same or similar scope language on the record of another order. Section 351.225(b) permits Commerce to self-initiate a scope inquiry on the record of another proceeding where the products are similar or identical to that of a particular product subject to a scope ruling. Furthermore, interested parties to both proceedings can do the same by filing a scope application, in accordance with paragraph (c), and attaching the scope ruling at issue. In accordance with paragraph (k)(1), if the product at issue in the first scope ruling was physically identical to the product for which a new scope ruling is requested, the results of that first scope ruling would certainly carry a great deal of weight for Commerce in reaching a determination.

Finally, we have determined to significantly revise and simplify the first sentence of paragraph (m)(1) to clarify that Commerce may apply a scope ruling on a country-wide basis to all products from the same country with the same relevant [111] physical characteristics (including chemical, dimensional, and technical characteristics), as the product at issue, no matter the identity of the producers, exporters, or importers, or apply its scope ruling on a producer-specific, exporter-specific, or importer-specific basis. Furthermore, the new language provides that Commerce may determine to apply its scope ruling to a combination of producers, exporters, and importers, depending on the remedy which Commerce determines is appropriate given the facts of a particular case. We believe this modified language provides a much clearer description of the options which Commerce has available to it in applying the results of a scope ruling.

Likewise, we have changed the term ''merchandise at issue'' to ''product at issue'' in paragraph (m)(2) to use the terminology as that used in paragraph (m)(1) and other provisions of these regulations.

14. Section 351.225(n)—Service of Scope Ruling Application; Annual Inquiry Service List; Entry of Appearance

Section 351.225(n) covers Commerce's creation of a public annual inquiry service list and segment-specific service lists (both public and APO). As we have explained above, Commerce has determined to modify its notice requirements to publish self-initiations of scope inquiries and a monthly list of scope applications filed with Commerce in the **Federal Register** notice, as described in § 351.225(b) and (d). Furthermore, after publication of the final rule, Commerce intends to provide additional instruction to interested parties on the procedures for the annual inquiry service list, as appropriate. We received many comments on this provision.

(a) Supportive Comments

We received many comments in support of the *Proposed Rule.* Commenters expressed their belief that Commerce's current use of a comprehensive service list to notify parties has been an ''onerous task.'' Further, they argue that the new requirement that parties must affirmatively request participation on the annual inquiry service list may encourage importers to be more alert to AD/CVD issues and file scope applications when they are uncertain if the product they are importing is covered by the scope of an order, given that importers will be affirmatively receiving notifications of new scope inquiries throughout the year. Finally, they voice their approval that Commerce automatically place petitioners on the annual inquiry service list under this provision, because, in every case, the petitioners have an interest in the order which does not abate until the order is revoked.

Response:

We appreciate the support of the commenters in this regard and agree with each of the points they raised. We do not disagree that the use of the comprehensive service list has, indeed, been an onerous task. Further, we believe that this new system of annual service lists and segment-specific service lists will make interested parties more alert to potential scope issues and proceedings. In addition, we agree that petitioners are uniquely situated in that they filed the petition requesting trade remedies, and, therefore, have a unique continuing interest in AD and CVD orders for the life of the orders.

That being said, upon consideration of the comments we received on this provision, we have concluded that foreign governments are also uniquely situated in that their interest in the products covered by the scope of AD and CVD orders does not diminish as foreign producers and exporters come and go during the life of an order. Accordingly, we have, therefore, modified § 351.225(n) to reflect that after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow.

As noted above, Commerce intends to provide additional instruction to interested parties on the procedures for the annual inquiry service list, as appropriate, with special instructions for petitioners and foreign governments. Specifically, once the petitioners and foreign governments have submitted their initial requests to be added to the first annual inquiry service list for a given proceeding, it is reasonable to automatically add them in each subsequent year to the list when the annual service list for the proceeding is

[110] *Proposed Rule,* 85 FR 49472 at 49480, n. 51.

[111] Commerce has added the word ''relevant'' to this description because it is possible that two products may not be completely physically identical, but share the physical characteristics which Commerce considered in making its scope ruling. For example, the products might have different coloring or come in different designs or different sizes, but none of those factors were relevant to Commerce's determination in the scope ruling that the particular product was covered by the scope of an order. In that case, even if the similar products do not share exactly the same physical characteristics, Commerce could still apply its scope ruling to entries of those products.

updated. To be clear, the first time a petitioner or foreign government wishes to be included on an annual inquiry service list, it will be incumbent upon the petitioner or foreign government to request Commerce to include them on the list. However, after that first time, inclusion for them will be automatic. Additionally, after initial inclusion on the annual inquiry service list, it is also incumbent upon the petitioner or foreign government to notify Commerce of any changes to its information.

(b) Comments Suggesting Changes

We also received several comments with suggested changes or criticisms of Commerce's proposed § 351.225(n).

First, one commenter suggests that Commerce require scope applicants to file notice of their applications on foreign governments of countries from which the product at issue is exported.

Second, some commenters request that all initiations, preliminary scope rulings, and final scope rulings be published in the **Federal Register**.

Third, certain surety companies request that Commerce provide them with ''interested party'' status, so that they may receive notification of all scope inquiry requests and scope rulings.

Finally, one commenter points out that Commerce currently automatically places foreign governments on the segment of a proceeding that commences under a CVD order, but under proposed paragraph (m)(2), all scope inquiries applicable to companion orders will be conducted on the record of the AD order. That commenter, therefore, requests that Commerce modify paragraph (n) to automatically place foreign governments on the segment of the AD proceeding in which the scope inquiry is conducted for both companion orders.

Response:

First, as noted above, we have determined that once a foreign government requests to be included on the annual inquiry service list for a particular AD or CVD order, it will automatically be placed on subsequent annual inquiry service lists. Once that occurs, because scope inquiry applicants will be required to file notice of their applications on all interested parties on the annual inquiry service list, the foreign government of the country of the order at issue in the inquiry will be sent copies of scope inquiry applications. For those foreign governments which elect not to request placement on the annual inquiry service list in the first instance, we believe the monthly list of scope applications in the **Federal Register** pursuant to paragraph (d) nonetheless provides sufficient notice in that regard.

Second, we will not require that all initiations, preliminary scope rulings, and final scope rulings be published in the **Federal Register** in these regulations, as there is no requirement in the statute that Commerce take such additional actions, and we believe our procedures outlined herein provide appropriate opportunities for notice to interested parties.

Third, we have not provided sureties ''interested party'' status because, as discussed above regarding § 351.225(l), section 771(9) of the Act lists the parties who are ''interested parties'' under the AD and CVD laws, and surety companies are not included on that list. Nonetheless, as we explained earlier, we believe publication in the **Federal Register** of Commerce's scope self-initiations and the monthly list of scope applications will provide the public, including sureties, with notice that a scope inquiry may be commencing or underway, allowing those companies an opportunity to determine if they wish to follow and participate in the scope inquiry.

Finally, we disagree with the commenter that requested that Commerce modify paragraph 225(n) to automatically place foreign governments on the segment-specific service list of the AD proceeding in which the scope inquiry is conducted for both companion orders. Because we have determined to automatically place foreign governments on the annual inquiry service list following their initial request for inclusion, there is no additional need to automatically place foreign governments automatically on segment-specific service lists. As we've explained, foreign governments on the annual inquiry service list will get notification of all scope inquiry requests. Like petitioners and all other interested parties, if the foreign government wishes to participate in a particular scope inquiry segment of the proceeding, that foreign government will have an opportunity to timely request placement on the segment-specific service list.

In addition, in addressing comments on paragraph (n)(4), we realized that we had not included the self-initiation of scope inquiries in the description of determinations that lead to the establishment of a segment-specific service list. Such an exclusion was an oversight. Accordingly, we have added language to that effect in this final rule.

15. Section 351.225(o)—Publication of List of Final Scope Rulings

In the *Proposed Rule,* Commerce amended current § 351.225(o) to indicate that, in addition to the quarterly list of final scope rulings published in the **Federal Register**, Commerce may also include complete public versions of its scope rulings on its website should Commerce determine such placement is warranted. Numerous commenters encourage Commerce to create a single public repository on its website for all scope rulings to ensure that all parties have notice of all public scope rulings.

Response:

We agree with those commenters and Commerce has endeavored to create such a repository in an effort to assist interested parties to efficiently obtain scope ruling information. However, implementation and maintenance of such a repository requires resources and a significant amount of time. Commerce continues to update its website with copies of scope rulings that pre-date 2012, the year in which Commerce's electronic record system, ACCESS, went live.[112] Additionally, Commerce updates the website regularly with the scopes of new orders and the ACCESS bar codes for newly issued scope rulings that can be obtained through ACCESS. Accordingly, because we agree that the pursuit of such a resource is worthwhile, we will continue to maintain the language from the *Proposed Rule* in paragraph (o) in that regard and work to continue to maintain this online repository in the future.

16. Section 351.225(p)—Suspended Investigations; Suspension Agreements

No comments were filed with respect to this paragraph. We have modified the provision, however, to clarify that the procedures of this regulation may be applied in determining whether a product at issue is covered by the scope of a suspended investigation or agreement.

17. Section 351.225(q)—Scope Clarifications

As noted above, we removed certain language from proposed paragraph (m)(1), which addressed determinations made based on ''previously issued'' scope rulings ''without initiating or conducting a new scope inquiry,'' because of due process concerns raised by certain commenters. We believe that some of the scenarios which we wished to address in proposed paragraph (m)(1), however, can be addressed through a

[112] Currently available at: *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

different proceeding without those same due process concerns—scope clarifications. We discussed scope clarifications in the preamble to the *Proposed Rule,*[113] and have concluded that in light of the removal of the aforementioned language from paragraph (m)(1), it would be beneficial to codify scope clarifications in the final regulations. For example, there are scenarios in which Commerce issues a scope ruling on a product covered by the scope of an order, and then later it is called upon again to conduct a scope ruling on a product nearly identical to that product, and then a third time a scope request is filed with the agency to address a product which is the same or very similar to the prior two products. As we explained in the preamble to the *Proposed Rule,* historically Commerce has been able to address this situation using scope clarifications instead of scope rulings. Accordingly, we are adding to the final regulations paragraph (q) to codify the use of scope clarifications in certain scenarios.

Unlike scope rulings, which require a fulsome analysis under these regulations, scope clarifications either provide an interpretation of specific language in the scope of an order or address a particular scope matter which was already brought to Commerce's attention on a prior occasion. Scope clarifications may be issued either in underlying investigations or after an order has been issued. With respect to post-order clarifications, specifically, Commerce explained in the preamble to the *Proposed Rule* that ''after an AD/CVD order has been in place for a period of time and Commerce has found that multiple parties have requested scope rulings over and over covering the same or similar scope language,'' Commerce has, at times, issued ''a scope clarification addressing that particular scope language'' and then memorialized ''that clarification in the form of an interpretive footnote to the scope of the order.'' [114]

Post-order scope clarifications need not be issued in the context of a scope ruling, but can be conducted and applied in the course of different segments of a proceeding. Because Commerce conducts scope clarifications in a segment of the proceeding, parties to that segment have an opportunity to comment on the clarification, unlike the procedures set forth in the proposed (and now removed) language of paragraph (m)(1) of this section. Thus, the due process concerns we had with the removed paragraph (m)(1) language do not exist for scope clarifications. Subsequent to the issuance of a scope clarification, the resulting interpretive footnote will normally accompany the text of the scope itself when it is published in Commerce's administrative determinations, such as preliminary and final results of subsequent segments, and instructions to CBP.

Given the importance of post-order scope clarifications, and the fact that we have removed certain remedies available under proposed paragraph (m)(1), we have concluded that it is reasonable to add a new regulatory provision, § 351.225(q), which codifies Commerce's ability to issue such scope clarifications. Specifically, the new provision provides that Commerce may issue a scope clarification in any segment of a proceeding providing an interpretation of specific language in the scope of an order or addressing whether a product is covered or excluded by the scope of an order at issue based on previous scope determinations covering the same or similar products. Further, it explains that the scope clarification may take the form of an interpretive footnote to the scope when the scope is published or issued in instructions to CBP. We believe codifying post-order scope clarifications in Commerce's scope regulations will add clarity to Commerce's scope procedures under the factual scenarios set forth in the regulation.[115]

Circumvention—§ 351.226

Section 351.226 covers procedures in which Commerce addresses potential circumvention of AD/CVD orders. Section 781 of the Act provides the four scenarios under which Commerce may inquire into alleged circumvention and, if it finds circumvention, may determine that a particular product should be considered subject to an order, even if that product would not otherwise be covered by the scope of an AD or CVD order under § 351.225. We received many comments and rebuttal submissions on the proposed provisions under this regulation. Below, we briefly discuss each provision, address any comments received, and, where appropriate, explain any changes to the *Proposed Rule* in response to comments. In addition, we explain additional modifications to the *Proposed Rule* where we have determined that such amendments brought § 351.226 into greater conformity with scope and covered merchandise regulations §§ 351.225 and 351.227, or otherwise provided greater clarity to these regulations.

1. Section 351.226(a)—Introduction

Section 351.226(a) summarizes the general principles of a circumvention inquiry under section 781 of the Act. Numerous commenters have expressed their support for these regulations and have requested that Commerce clarify that even if it determines that a particular product is determined to not be covered by the scope of an order under § 351.225 of these regulations, Commerce may still conduct a circumvention inquiry of the product. Further, those commenters request that Commerce explain that if it concludes that the particular product has circumvented an order, it may, despite the negative scope ruling, find that the product should be treated as subject to the order.

An additional commenter also expressed its support for Commerce's division of the scope and circumvention regulations, citing to Federal Circuit holdings in which the Court has recognized the differences between the two types of proceedings.[116]

Other commenters are critical of Commerce's proposed circumvention regulations in general, arguing that the proposed regulations treat parties who operate in good faith in the same manner as those who operate in bad faith, that the regulations would do nothing to address bad conduct of certain exporters, and that the regulations place too great of an obligation on importers.

In rebuttal to those claims, other commenters disagree with the portrayal of U.S. importers as unknowing and unsuspecting with regard to circumvention or potential circumvention, especially when the importer is a subsidiary of a foreign producer. They argue that U.S. importers are in the best position to prevent circumvention because they can communicate with the foreign producer and, with proper due diligence, can request information directly from the foreign producer or exporter prior to

[113] *Proposed Rule,* 85 FR 49472 at 49480–81, n. 51.

[114] *See id.*

[115] Section 351.225(q) addresses scope clarifications issued by Commerce following the publication of an AD or CVD order. As Commerce explained in the *Proposed Rule,* we continue to also have the authority to issue scope clarifications during an investigation. *See Proposed Rule,* 85 FR 49472 at 49480, at n. 51. Unlike post-order scope clarifications, investigation scope clarifications will usually not take the form of an interpretive footnote, but instead can be issued solely as a response to a comment on the record or as part of Commerce's determination of the language of the scope of the order itself.

[116] *See Deacero S.A. de C.V.* v. *United States,* 817 F.3d 1332, 1337–39 (Fed. Cir. 2016) (*Deacero*); *Nippon Steel Corp.* v. *United States,* 219 F.3d 1348, 1350 (Fed. Cir. 2000); *see also Bell Supply,* 888 F.3d at 1230.

importing particular products to determine whether the product could be circumventing an AD/CVD order. These commenters suggest that the nature of circumvention typically requires an affirmative act by a foreign producer to change the location of production/assembly, alter the merchandise in minor respects, or develop a new product to circumvent the order, and a U.S. importer is usually well-situated to notice such changes and the risks that come with such changes.

Response:

We disagree that the new circumvention regulation places an excessive burden on importers and treats good faith importers the same as bad faith importers.

As discussed above, although section 781 of the Act describes certain applicable procedures and standards for circumvention determinations, the Act does not provide direction to Commerce regarding the suspension of liquidation for entries subject to a circumvention inquiry. In the absence of any such statutory guidance, Commerce is modifying § 351.226(l) to provide that affirmative circumvention determinations will normally apply to products entered on or after the date of initiation of the circumvention inquiry, with certain exceptions. With respect to issues concerning notice to exporters and importers, those issues are addressed below in response to comments under § 351.225(l)). As discussed below, the purpose of the proposed modifications is not to penalize companies acting in good faith, but to ensure that circumvention determinations are properly applied to merchandise found to be circumventing an order. Also, as explained further below under § 351.226(l), when an importer decides to import merchandise from a foreign country, it takes on the risk and the responsibility that the merchandise it imports might be subject to an AD and/or CVD order. If an importer is transparent and works with its exporters and producers to abide by the trade remedy laws, we do not believe these regulations will be excessively burdensome.

Furthermore, we disagree that these regulations will have no effect on foreign exporters' behavior. An exporter which is found to be circumventing an order will be faced with customers having to pay additional cash deposits and duties on those exports when they are imported. As a result, an exporter may find that demand for its products declines in the United States as the cost to import its merchandise increases, which might, in turn, lead to the exporter altering its behavior with regard to circumvention.

Finally, we agree that just because Commerce determines that a particular product is not covered by the scope of an order, pursuant to § 351.225 of these regulations, such a determination does not preclude Commerce from also finding that the product should still be covered by the order if the product is found to be circumventing the order. Indeed, a product can only be determined to be circumventing an AD or CVD order under section 781 of the Act if the product does not fall within the description of the subject merchandise in the scope of the order in the first place. Sometimes, as part of its circumvention analysis, Commerce must first determine if the product at issue is covered by the description of subject merchandise in the scope of an order, and it is only after it determines that the product at issue does not match the description of merchandise covered by the scope that Commerce can then continue with its circumvention analysis and reach a determination. If Commerce ultimately finds that the merchandise is circumventing the order, such merchandise will be determined to be covered by the scope of the order for AD/CVD purposes despite not falling within the physical description of the subject merchandise of the scope of the order.

2. Section 351.226(b)—Self-Initiation of Circumvention

Section 351.226(b) describes Commerce's authority to self-initiate a circumvention inquiry. One commenter requests that Commerce make it clear that when it determines under § 351.225 of these regulations that a particular product is not covered by the scope of an order, the agency may self-initiate a circumvention inquiry of that product when information derived from the scope inquiry suggests that the product may be circumventing an AD or CVD order.

Response:

We agree that a determination that a product is not covered by the scope of an order does not preclude Commerce from conducting a circumvention inquiry. We further agree that Commerce may self-initiate a circumvention inquiry whenever it determines from available information that an inquiry is warranted into the question of whether the elements necessary for a circumvention determination under section 781 of the Act exist. This includes a situation where Commerce has reviewed information through the course of a scope inquiry that indicates that although the product is not covered by the scope of the order, circumvention of the order may, nonetheless, be taking place. In fact, the Federal Circuit explained this very scenario in *Bell Supply,* in which the court held that ''if Commerce applies the substantial transformation test and concludes that the imported article has a country of origin different from the country identified in an AD or CVD order'' (and is, therefore, not covered by the scope of the order) ''then Commerce can include such merchandise within the scope of an AD and CVD order only if it finds circumvention under [section 781(b) of the Act].'' [117] We have accounted for various related scenarios in both §§ 351.225 and 351.226, which allow Commerce, for example, to issue a negative scope ruling on a product while a circumvention inquiry is pending (*see* § 351.225(l)(4)), or to address scope issues in the context of a circumvention inquiry (*see* § 351.225(i)(1)).

We note, however, that although Commerce may conduct a circumvention inquiry following the completion of a scope inquiry, such an analysis is not required by statute or Commerce's practice. Furthermore, in certain situations, self-initiating a circumvention inquiry at the conclusion of a scope inquiry may not be warranted, because, for example, Commerce does not have information concerning the elements necessary for a circumvention determination under section 781 of the Act. For these reasons, we are not codifying a process for automatic self-initiation of a circumvention inquiry following a negative scope determination. A determination to self-initiate a circumvention ruling is fact-based and, therefore, should be decided by Commerce on a case-by-case basis.

3. Section 351.226(c)—Circumvention Inquiry Request

Section 351.226(c) sets forth the requirements for an interested party [118]

[117] *Bell Supply,* 888 F.3d at 1230.

[118] As noted above with respect to the discussion of § 351.225(c), the term ''interested party'' is defined in section 771(9) of the Act, and pertains, for example, to ''foreign manufacturers,'' ''producers,'' ''exporters,'' or ''United States importers'' ''of subject merchandise.'' However, the nature of a circumvention proceeding is to determine whether the merchandise produced, imported by, or exported by a party is circumventing an AD or CVD order. Thus, in many cases, the question of whether a party is an ''interested party'' depends in part on whether the merchandise at issue is subject merchandise. Accordingly, for purposes of these circumvention regulations, the term ''interested party'' includes a party that would meet the definition of ''interested party'' under section 771(9) of the Act, if the

to request a circumvention inquiry. In many respects, they parallel much of the information required of a party filing a scope ruling application, pursuant to § 351.225(c). Where we have modified the parallel language in § 351.225(c), we have, therefore, incorporated the same modifications into § 351.226(c). Accordingly, we have made the following modifications for the same reasons we made to those modifications in the scope regulations: (1) We focused on the physical characteristics of the product, which include the chemical, dimensional, or technical characteristics of the particular product in § 351.226(c)(2)(i)(A); (2) we added the requirement that a requester identify the country or countries where the product is produced, the country from where the product is exported, and the declared country of origin in § 351.226(c)(2)(i)(B); (3) we added the requirement that Customs rulings relevant to the product's tariff classifications be included in § 351.226(c)(2)(i)(C); (4) we identified the information that a requester must include in its concise public summary of the product's description in § 351.226(c)(2)(ii); (5) we removed the name and addresses of producers, exporters, and importers of the product from the public summary, and included that data request, instead, in the overall circumvention inquiry request in § 351.226(c)(2)(iii); and (6) we removed the language that stated that the concise public description was not intended to restrict the inclusion of BPI, as that provision was not proposed for the scope regulations, and is unnecessary now that Commerce has listed the factors required for the public summary.

Several commenters express concern with the provisions that require ''clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product'' and ''a description of parts, materials, and the production process employed in the production of the product,'' because they argue that domestic producers will frequently not have access to such information. They worry that such requirements would discourage petitioners from requesting circumvention inquiries due to lack of access to that data, and additional commenters filed rebuttal comments arguing that Commerce should eliminate those provisions on the exact same basis.

Other commenters, in rebuttal to those claims, disagree with that request, stating that removing the proposed requirements would lower the bar too much. Those commenters claim that circumvention requests are a new ''petition light'' weapon for domestic industries, allowing them to avoid an expensive investigation process while basing their requests on vague, baseless, specious, and unsubstantiated allegations of circumvention. Instead, these commenters argue that Commerce should require even more robust information from parties filing a circumvention request under § 351.226(c) than that put forward in the *Proposed Rule.*

Another commenter requests that parties requesting a circumvention inquiry be required to serve the request upon all producers, exporters, and importers of the product, arguing that such service is necessary to provide adequate notice.

Finally, one commenter suggests Commerce include a question under § 351.226(c) that asks the requester whether, based on information available to the requestor at the time of the request, the circumvention inquiry, if initiated, should be conducted on a country-wide basis.

Response:

We recognize that some of the information requested of a party requesting a circumvention inquiry might not be reasonably available, which is why we have included the restricting phrase ''to the extent reasonably available'' in § 351.226(c)(2). We believe, however, that where the information, such as clear and legible photographs, schematic drawings, and the description of the parts and production process employed in producing the particular product, is available, that information should be provided and is important to Commerce's analysis. We, therefore, reject the request to remove this information request from our list of necessary information under § 351.226(c)(2). However, if a party can explain why certain information is not reasonably available to it, we will take that explanation into consideration in determining whether or not to reject a circumvention inquiry request, or initiate on the data submitted on the record.

With respect to the argument that Commerce should require requestors to serve their circumvention inquiry request on all known producers, exporters, and importers of the product at issue, we disagree that such actions are necessary. As provided for under § 351.226(c) and (n), the requestor is required to serve parties on the annual inquiry service list. Therefore, parties wishing to be served with such requests must follow Commerce's procedures as detailed in §§ 351.225(n) and 351.226(n) to be added to the list. Additionally, if Commerce determines to initiate a circumvention inquiry, it will publish that initiation in the **Federal Register** and the public will be made aware of the circumvention inquiry. Such notification will then allow parties to file a notice of appearance and participate in the circumvention inquiry, if they wish to do so, in accordance with § 351.226(n).

Finally, a finding that a circumvention determination should be addressed through a company-specific or country-wide application, or some combination thereof, pursuant to the remedies outlined in § 351.225(m), is a determination that Commerce will make based on the case-specific facts. In general, though, Commerce will consider the description of the product and any named companies in the circumvention request in issuing the initiation notice in the **Federal Register**. Absent evidence on the record of the inquiry that would lead the agency to apply its determination differently, this notice will indicate the scope of Commerce's inquiry, which will normally be tied to the remedy ultimately determined, if any, under § 351.226(m). Therefore, although we will not require that a requestor provide a suggested remedy under § 351.225(m), we expect that requestors likely will include a suggested remedy in their arguments in support of their request.

4. Section 351.226(d)—Initiation of Circumvention Inquiry and Other Actions Based on a Request

Section 351.226(d) provides the deadline by which Commerce must reject or accept a request for a circumvention inquiry. One commenter argues that the 20-day deadline set forth in the *Proposed Rule* was too short a period of time to allow parties to correct any deficiencies in their submissions.

Several other commenters argue in both comments and rebuttal comments that Commerce should automatically initiate a circumvention inquiry after the deadline for accepting the circumvention inquiry request, similar to the automatic initiation of a scope inquiry described in § 351.225(d), or at least set a hard deadline in which Commerce must initiate following the receipt of a circumvention inquiry request to make certain that Commerce addresses circumvention in a timely fashion. Those commenters express frustration with Commerce's procedures under the current regulations in which Commerce has extended its decision to

merchandise at issue in the circumvention inquiry is in fact circumventing.

initiate a circumvention inquiry at times by over one hundred days.

Other commenters disagree that Commerce should automatically initiate circumvention inquiries because there will inevitably be cases in which a request to conduct a circumvention inquiry does not contain adequate information to warrant such initiation. Those commenters argue that automatic initiation based on circumvention inquiries which are meritless would force importers, exporters, and producers to participate in unnecessary proceedings, force them to unnecessarily pay cash deposits on their entries, and would undermine the necessity of the information required under § 351.226(c). Those same commenters state that they approve of Commerce's proposed § 351.226(d)(1), which describes Commerce's authority to reject an incomplete or otherwise unacceptable circumvention inquiry request.

Finally, one commenter argues that Commerce should publish notification of the receipt of all circumvention inquiry requests in the **Federal Register**.

Response:

With respect to the argument that 20 days is too short a period of time in which Commerce must decide to accept or reject a circumvention inquiry request, we find that it would be reasonable to increase the deadline from 20 days to 30 days. As set forth in the text in the regulation, that deadline may be extended by Commerce by 15 days, making the maximum period 45 days in which Commerce must decide to accept or reject a circumvention inquiry. The unextended 30-day period also brings this provision more in alignment with the 30-day deadline for accepting or rejecting a scope application found in § 351.225(d).

We believe that this new deadline will better enable Commerce to determine whether the circumvention request properly alleges that the elements necessary for a circumvention determination under section 781 of the Act exist and is accompanied by information reasonably available to the requestor supporting these allegations. Within this timeframe, Commerce may also send questionnaires to the requestor and gather additional information, if necessary. As provided for under § 351.226(d), Commerce may ultimately determine to reject the request and provide the requestor with the reasons for the rejection so that the requestor may cure the request and refile at a later date. In addition, Commerce may determine that the request is best addressed either by conducting a scope inquiry in the first instance or in another segment of the proceeding.

To the extent certain commenters argue that Commerce should automatically accept requests for circumvention inquiries without seeking additional information that would otherwise be necessary, or that Commerce must initiate a circumvention inquiry by a hard deadline, even if it does not have the necessary information by that deadline to satisfy initiation standards, we disagree. In determining to accept a request and initiate a circumvention inquiry, it is vital that Commerce conclude that the request satisfies the standard for initiation of an inquiry and is supported by reasonably available information. If Commerce were to initiate a circumvention inquiry without having made such a determination, we agree with the commenters who argue that such an exercise would result in a waste of time and resources for both Commerce and the interested parties. It is imperative that Commerce have all the information which it needs to initiate a circumvention inquiry before it initiates. We recognize that this differs in some respects from the initiation procedures set forth in § 351.225, but the information necessary to initiate a scope inquiry is different from that needed to initiate a circumvention inquiry.

Further, we disagree that Commerce should publish notification of the receipt of circumvention inquiry requests in the **Federal Register**. Section 351.226(n) requires that those requesting a circumvention inquiry must serve a copy of the circumvention inquiry request on all persons on the annual inquiry service list. Furthermore, when Commerce determines to initiate a circumvention inquiry, § 351.226(d)(3) requires that Commerce publish notice of initiation in the **Federal Register**. We believe that the initial service on persons on the annual inquiry service list, combined with the publication of initiation in the **Federal Register**, will provide more than enough notice to all interested parties that a circumvention inquiry has commenced.

We have also made some additional revisions to paragraph (d) from that proposed in the *Proposed Rule.* Specifically, we have concluded that there may be situations in which, after a request for a circumvention inquiry has been filed, Commerce determines that the circumvention issue should be addressed in an ongoing segment of the proceeding, such as a covered merchandise inquiry under § 351.227. In that case, Commerce will inform the requestor of its intent to not initiate the circumvention inquiry, but instead to address the issue in that other segment.

5. Section 351.226(e)—Deadlines for Circumvention Determinations

Section 351.226(e) sets deadlines of 150 days from the date of publication of the initiation notice for a preliminary circumvention determination and 300 days, to the maximum extent practicable, for the final circumvention determination. However, if Commerce determines that a circumvention inquiry is extraordinarily complicated, it may extend the 300-day deadline, but by no more than 65 days (for a fully-extended total of 365 days). Commerce received praise from commenters on these new regulatory deadlines, with commenters stating that such time limits will provide all interested parties with a better and more predictable understanding of the duration of a circumvention inquiry.

We have, however, made some changes to this section. We have revised the heading of this section to ''Deadlines for circumvention determinations'' from ''Time limits,'' to better reflect the provisions covered by this section of the regulation, and we have moved the provision allowing for alignment of scope rulings with other segments of a proceeding from proposed paragraph (f)(7) to this section to clarify that all of the deadlines described in this section may be inapplicable or extended if the circumvention determination is aligned with another segment.

6. Section 351.226(f)—Circumvention Inquiry Procedures

Section 351.226(f) sets forth Commerce's procedure for circumvention inquiries. Commerce received a number of comments for scope and circumvention that argued that the deadlines set forth in both sets of regulations were too short.

In addition, one commenter expressed its concerns with the language in § 351.226(f)(3) which states that Commerce may limit issuance of questionnaires to a reasonable number of respondents. The commenter states that Commerce does not set forth any standards as to how it would select respondents for this exercise and expresses concern for the due process rights of those respondents not selected.

Response:

Upon consideration of the various comments about Commerce's proposed deadlines, as well as consideration of our own practice in other circumstances, including scope rulings under § 351.225(f), we have determined to modify our proposed deadlines under § 351.226(f) accordingly, to allow

interested parties additional time to provide responses and new factual information as follows:

- Under § 351.226(f)(1) parties will have 30 days, rather than 20 days, to submit comments and factual information after Commerce self-initiates a circumvention inquiry;
- Under § 351.226(f)(1) parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other parties;
- Under § 351.226(f)(2) parties will have 30 days, rather than 20 days, to submit comments and factual information in response to the request after Commerce initiates a circumvention inquiry;
- Under § 351.226(f)(2), the requestor will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted by the interested parties;
- Under § 351.226(f)(3), interested parties will have 14 days, rather than 10 days, to submit comments and factual information to rebut, clarify, or correct factual information contained in a questionnaire response;
- Under § 351.226(f)(3), the original submitter will have 7 days, rather than 5 days, to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction;
- Under § 351.226(f)(4), interested parties will have 14 days, rather than 10 days, after the preliminary circumvention determination to submit comments; and
- Under § 351.226(f)(4), interested parties will have 7 days, rather than 5 days, to submit rebuttal comments thereafter.

With respect to the argument about Commerce's ability to limit questionnaires, we do not disagree with the commenter that it would be preferable if Commerce could issue questionnaires to all potential respondents in all circumvention inquiries. However, in reality, Commerce normally conducts its administrative proceedings with limited resources and under specific time constraints. Accordingly, in consideration of Commerce's authority to limit respondents under section 777A(c)(2) of the Act, we continue to believe that it is appropriate to retain the language in our regulations that explains that we may limit the issuance of questionnaires to a reasonable number of respondents, if the record of the circumvention inquiry warrants such a limitation. In accordance with that provision, it is Commerce's normal practice to select the ''exporters and producers accounting for the largest volume of the'' particular product subject to the circumvention inquiry ''from the exporting country that can be reasonably examined.'' [119]

In addition, we have made some modifications to § 351.226(f)(6) and (7), however, to provide clarity to this provision which are not directly responsive to comments. First, we explain that if Commerce determines it appropriate to do so, Commerce may rescind a circumvention inquiry, in whole or in part, and we explain that the list provided in the proposed regulations is not exhaustive, but merely contains examples of situations in which rescission might be warranted.

Second, we have removed a reference to Commerce's ability to ''forgo'' a circumvention inquiry, as that scenario is now set forth in paragraph (d) of this section.

Furthermore, we have added a fourth example in which a covered merchandise inquiry under § 351.227 has been initiated, and Commerce concludes that an inquiry into whether the elements necessary for a circumvention determination exist can be addressed in that segment of the proceeding instead.

In addition, we have noted that if we rescind a circumvention inquiry, we will notify interested parties. We also have clarified that Commerce can both alter and extend time limits under this section, if it determines it appropriate to do so.

Finally, we have moved proposed § 351.226(m)(2), which addresses actions Commerce may take during the pendency of a circumvention inquiry or upon issuance of a final circumvention determination, to § 351.226(f)(9). Not only does this change better conform with the structure of the scope and covered merchandise referral regulations, but it also logically fits more appropriately under the section labeled ''Circumvention inquiry procedures.''

7. Section 351.226 (g)—Circumvention Determinations

We received no comments on this provision.

8. Section 351.226(h)—Products Completed or Assembled in the United States

Section 351.226(h) addresses the situation in which an entity circumvents an order through further processing or assembly of its merchandise in the United States. Commerce's regulation provides that in determining the value of parts or components, or the value of processing, of the particular product under inquiry, Commerce may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act—or, in the case of a nonmarket economy, through the use of surrogate values and the nonmarket economy methodology, as set forth in section 773(c) of the Act. One commenter expressed its support for this clarification, stating that it agreed with Commerce's revised regulation, and stating that Commerce's use of a constructed value or nonmarket economy methodology to value those parts or components in its circumvention analysis, as proposed, will improve the accuracy of its further processing or assembly circumvention methodology and analysis. We agree and have made no revisions to § 351.226(h).

9. Section 351.226(i)—Products Completed or Assembled in Foreign Countries

Section 351.226(i) addresses the situation in which an entity circumvents an order through further processing or assembly in a third country under section 781(b) of the Act. One commenter argues that Commerce should remove the country of origin provision, at § 351.225(j), from the scope regulations and conduct its substantial transformation analysis in a circumvention inquiry under this provision, or, in the alternative, provide greater explanation as to the similarities and differences between the two provisions. We have addressed some of these arguments above in response to comments specific to § 351.225(j).

However, with respect to the commenter's confusion over the situations in which Commerce will apply the substantial transformation factors set out in § 351.225(j) and the situations in which Commerce will apply its third country processing and assembly analysis using the factors set out in § 351.226(i), we respond below. The commenter argues that the factors which Commerce considers in both provisions are similar, but not exactly the same, and those differences may lead to confusion and impair predictability. The commenter, therefore, argues that Commerce should explain with greater specificity which factors apply in each situation.

Response:

[119] *See* section 777A(c)(2)(B) of the Act.

Commerce's substantial transformation analysis under § 351.225(j) and the test for determining whether a product was completed or assembled in other foreign countries under § 351.226(i) (and section 781(b) of the Act) are two distinct analyses used for different purposes, and there is no basis for Commerce to modify either the scope regulations or the circumvention regulations in response to this comment. Commerce has explained this distinction before in certain circumvention determinations, noting that its substantial transformation test is used in scope rulings and other proceedings to determine a particular product's country-of-origin, while the factors it considers to determine whether merchandise is being completed or assembled into a product in a third country are specific to a circumvention analysis under section 781 of the Act to determine if the product is circumventing an AD or CVD order.[120] Because these analyses are distinct and serve different purposes, Commerce's application of a substantial transformation analysis does not preclude Commerce from also applying an analysis based on statutory criteria established in section 781(b) of the Act.[121]

In determining whether merchandise is subject to an AD and/or CVD order, Commerce considers whether the merchandise is: (1) The type of merchandise described in the order; and (2) from the particular country the order covers.[122] Thus, Commerce's determination on whether merchandise meets these parameters involves two separate inquiries, *i.e.,* whether the product is of the type described in the order, and whether the country of origin of the product is that of the subject country.[123] In determining the country of origin of a product, Commerce's usual practice has been to conduct a substantial transformation analysis.[124] The substantial transformation analysis asks, essentially, ''whether, as a result of the manufacturing or processing, the product loses its identity and is transformed into a new product having a new name, character, and use'' [125] and whether ''[t]hrough that transformation, the new article becomes a product of the country in which it was processed or manufactured.'' [126] Commerce may examine a number of factors when conducting its substantial transformation analysis, and the weight of any one factor can vary from case to case and depends on the particular circumstances unique to the products at issue.[127]

Section 781(b) of the Act provides that Commerce may include merchandise completed or assembled in foreign countries within the scope of an order if the ''merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of'' an AD or CVD order, and such merchandise ''is completed or assembled . . . from merchandise which . . . is produced in the foreign country with respect to which such order [] applies. . . .'' To include such merchandise within the scope of an AD or CVD order, Commerce must determine and assess whether: The process of assembly or completion in the foreign country is minor or insignificant; the value of the merchandise produced in the country subject to the AD or CVD order is a significant portion of the merchandise exported to the United States; and, the action is appropriate to prevent evasion of such order or finding.[128] As part of this analysis, Commerce also considers additional factors such as: Patterns of trade, including sourcing patterns; whether the manufacturer or exporter of the parts or components in the country of the order is affiliated with the person who assembles or completes the merchandise sold in the United States and, whether imports of the parts or components produced in such foreign country into the country in which they are assembled or completed have increased after the initiation of the investigation which resulted in the issuance of such order or finding.[129] As such, the purpose of this circumvention inquiry under section 781(b) of the Act is to determine whether merchandise from the country subject to the AD and/or CVD orders that is processed, *i.e.,* completed or assembled into a finished product, in a third country into a merchandise of the type subject to the AD and/or CVD order should be considered within the scope of the AD and/or CVD order at issue.

Although an AD or CVD order would not normally cover merchandise that has a country of origin other than the country subject to the order, the Act expressly provides an exception to the general rule in the cases of circumvention because, in general, with regard to third country or U.S. further processing, ''[c]ircumvention can only occur if the articles are from a country not covered by the relevant AD or CVD orders.'' [130]

An interpretation of section 781(b) of the Act that requires the imported merchandise have the same country of origin as the merchandise subject to the AD/CVD order at issue would severely undermine section 781(b) of the Act because the merchandise would already be subject to the order and there would be no need to engage in a circumvention analysis. Accordingly, Commerce interprets the requirement in section 781(b) of the Act that the merchandise imported into the United States be of ''the same class or kind'' as the merchandise that is subject to the AD and/or CVD order to mean that the imported merchandise must be the same type of product as the subject merchandise. In other words, the imported merchandise meets the physical description of the subject merchandise and is only distinct because of its different country-of-origin designation.

[120] *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affirmative Final Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Orders,* 84 FR 70934 (Dec. 26, 2019) and accompanying Issues and Decision Memorandum (IDM) at Comment 9; *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders,* 83 FR 23895 (May 23, 2018), and accompanying IDM at Comment 1 and 2; *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders,* 83 FR 23891 (May 23, 2018), and accompanying IDM at Comment 1 and 2.

[121] *See Bell Supply,* 888 F.3d at 1230 (''Although substantial transformation and circumvention inquiries are similar, they are not identical.'').

[122] *See Bell Supply Co., LLC* v. *United States,* 179 F. Supp. 3d 1082, 1091 (CIT 2016); *see also Sunpower Corp.* v. *United States,* 179 F. Supp 3d 1286, 1298 (CIT 2016) (*Sunpower*).

[123] *See Sunpower,* 179 F. Supp. 3d at 1298; *see also Final Determination of Sales at Less Than Fair Value: 3.5*'' *Microdisks and Coated Media Thereof from Japan,* 54 FR 6433, 6435 (February 10, 1989).

[124] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India,* 73 FR 16640 (March 28, 2008), and accompanying IDM at Comment 5; *see also Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review,* 69 FR 74495 (December 14, 2004) (*Plate Belgium Final*), and accompanying IDM at Comment 4; *see also Canadian Solar,* 918 F.3d at 918–20 (affirming Commerce's discretion to use other tests beyond the substantial transformation test when reasonable).

[125] *See Bell Supply,* 888 F.3d at 1230 (quotations and citations omitted).

[126] *See Ugine and Alz Belgium N.V.* v. *United States,* 571 F. Supp. 2d 1333, 1337 n.5 (CIT 2007) (quoting *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina,* 58 FR 37065 (July 9, 1993) (*Steel Argentina Final*)).

[127] *See Laminated Woven Sacks from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review,* 76 FR 14906 (March 18, 2011) (*Sacks China Final*), and accompanying IDM at Comment 1b.

[128] *See* sections 781(b)(C)–(E) of the Act.

[129] *See* section 781(b)(3) of the Act.

[130] *See Bell Supply,* 888 F.3d at 1229.

With regard to the circumvention statute established by Congress, the language provided in the SAA supports Commerce's decision to not apply the substantial transformation test in third-country circumvention proceedings. The Federal Circuit has affirmed that ''[t]the legislative history indicates that [section 781 of the Act] can capture merchandise that is substantially transformed in third countries, which further implies that [section 781 of the Act] and the substantial transformation analysis are not coextensive.'' [131] When Congress passed the Omnibus and Trade Competitiveness Act in 1988, it explained that section 781 of the Act ''addresses situations where 'parts and components . . . are sent from the country subject to the order to the third country for assembly and completion.'' [132] Congress also stated that ''[t]he third country assembly situation will *typically* involve the same class or kind of merchandise, where Commerce has found that the *de facto* country of origin of merchandise completed or assembled in a third country is the country subject to the antidumping or countervailing duty order.'' [133] Thus, Congress contemplated that where Commerce had made an affirmative circumvention determination, the imported merchandise found to be circumventing would be within the AD or CVD order at issue and would be treated as having the same country of origin as the country subject to the order. Subsequently, when implementing the URAA in 1994, Congress further recognized in the SAA the problem arising from foreign exporters attempting to ''circumvent an [ ] order by purchasing as many parts as possible from a third country'' and assembling them in a different country, such as the United States.[134] Similarly, the SAA demonstrates that Congress was aware of Commerce's substantial transformation analysis and the potential interplay of such an analysis with a circumvention finding under section 781 of the Act. Further, as Congress noted in the SAA, ''*outside of a situation involving circumvention* of an antidumping duty order, a substantial transformation of a good in an intermediate country would render the resulting merchandise a product of the intermediate country rather than the original country of production.'' [135] In sum, it is evident from the above that Congress anticipated that circumvention could result in a situation where, despite the merchandise undergoing some change that resulted in a new country of origin pursuant to a substantial transformation analysis, the merchandise could still be considered to be within the AD or CVD order at issue, if, pursuant to section 781(b) of the Act, Commerce determined the existence of circumvention. As such, Congress has already contemplated that substantial transformation did not preclude a finding of circumvention under the Act.

Moreover, the Federal Circuit has stated that ''[i]n order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order, *even when the articles do not fall within the order's literal scope.*'' [136] The Act ''identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach,'' [137] including *inter alia* merchandise completed or assembled in foreign countries using merchandise produced in the country with respect to which the AD or CVD order applies.[138] Similarly, the Federal Circuit has explained that ''if Commerce applies the substantial transformation test and concludes that the imported article has a country of origin different from the country identified in an AD or CVD order, then Commerce can include such merchandise within the scope of an AD and CVD order only if it finds circumvention under [section 781(b) of the Act].'' [139]

In short, the two analyses have distinct purposes. The substantial transformation test is focused on whether the input product loses its identity and is transformed into a new product having a new name, character, and use, and thus a new country of origin. On the other hand, section 781(b) of the Act focuses on the extent of processing applied to subject merchandise in a third country and whether such processing is minor or insignificant in comparison to the entire production process of the finished subject merchandise. Under section 781(b) of the Act, we also examine whether the processing in a third country has resulted in ''evasion'' of the order, and, therefore, whether ''action is appropriate'' to prevent further evasion in the future. Thus, there is nothing contradictory in finding an input to be substantially transformed into a finished product, in terms of its physical characteristics and uses, while also finding the process of effecting that transformation to be minor *vis-à-vis* the manufacturing process of producing a finished product. Further, as the Federal Circuit has explained, ''even if a product assumed a new identity, the process of 'assembly or completion' may still be minor or insignificant, and undertaken for the purpose of evading an AD or CVD order.'' [140] The SAA illustrates this possibility in its discussion of the circumvention provisions of the Act through its references to ''parts'' and finished products.[141] It is evident from this discussion that the ''parts'' and the finished goods assembled are two different products. Nevertheless, the process of assembling such parts into a final product may be minor.[142] Furthermore, section 781(b) of the Act requires that we examine other factors, *e.g.,* patterns of trade including sourcing patterns, and whether imports into the third country have increased after initiation of the relevant AD or CVD investigation. These additional factors further emphasize the different purposes of the substantial transformation test and the analysis conducted under section 781(b) of the Act and § 351.226(i).

For these reasons, Commerce has neither removed the country of origin section from 351.225(j) nor modified the requirement as set forth in the newly created 351.226(i).

10. Section 351.226(j)—Minor Alterations of Merchandise

Section 351.226(j) addresses the situation in which a particular product has been altered in form or appearance in minor respects before being exported to the United States. In the proposed modifications to the current regulation, Commerce included certain criteria

[131] *See id.* at 1231.

[132] S. Rep. No. 100–71, at 101.

[133] *See* H.R. Rep. No. 100–576, at 603 (1988) (Conference Report accompanying the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100–418, 102 Stat. 1107 (1988)) (emphasis added).

[134] *See* SAA at 893.

[135] *Id.* at 844 (emphasis added).

[136] *See Deacero,* 817 F.3d at 1338 (emphasis added).

[137] *Id.*

[138] *See* section 781(b) of the Act. The other three articles are: (1) Merchandise completed or assembled in other foreign countries with respect to which the AD or CVD order applies; (2) merchandise altered in form or appearance in minor respects . . . whether or not included in the same tariff classification; and (3) later-developed merchandise. See section 781(a), (c)–(d) of the Act.

[139] *See Bell Supply,* 888 F.3d at 1230.

[140] *See id.*

[141] *See* SAA at 893.

[142] *Id.* (''Another serious problem is that the existing statute does not deal adequately with the so-called third country parts problem. In the case of certain products, particularly electronic products that rely on many off the shelf components, it is relatively easy for a foreign exporter to circumvent an antidumping duty order by establishing a screwdriver operation in the United States that purchases as many parts as possible from a third country.'').

described in the legislative history of the provision to determine whether alterations are properly considered ''minor.'' [143] One commenter states that it was pleased Commerce had included those factors in its revised regulation, as those factors are important to Commerce's minor alterations analysis.

Response:

Commerce appreciates the comment and agrees that the inclusion of the factors from the legislative history in the regulation will provide greater clarity to Commerce's analysis of a minor alteration allegation in a circumvention inquiry.

Upon further consideration of this provision, we have made one minor edit, clarifying that physical characteristics include chemical, dimensional, and technical characteristics, to bring that term into conformity with other provisions of the regulation. Otherwise, we have made no further changes from the provision as it appeared in the *Proposed Rule*.

11. Section 351.226(k)—Later-Developed Merchandise

There were no comments on this provision.

12. Section 351.226(l)—Suspension of Liquidation

As discussed in the *Proposed Rule,* in the context of a circumvention inquiry, current § 351.225(l) allows for Commerce to direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended which entered on or after the date of initiation of the inquiry, and collect applicable cash deposits, at the time of a preliminary or final affirmative determination, whichever is applicable. The current regulation does not address unliquidated entries not yet suspended which pre-date the date of initiation of a circumvention inquiry.[144] Furthermore, the Act does not provide direction to Commerce regarding the suspension of liquidation for entries subject to a circumvention inquiry.

Under § 351.226(l) in the *Proposed Rule,* Commerce proposed that, at the time of a preliminary or final affirmative circumvention determination, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits.[145] After consideration of comments on the *Proposed Rule* and corresponding changes to similar language in § 351.225(l), Commerce is adopting certain changes to § 351.226(l) in this final rule both in response to comments and on its own initiative. For clarity, we describe all revisions made to § 351.226(l) in these introductory paragraphs before summarizing and addressing comments below. Also discussed herein are the specific applicability dates for § 351.226(l) as referenced in the Applicability Dates section of this preamble.

Paragraph (l)(1), which describes Commerce's actions at the time of initiation of a circumvention inquiry, is slightly revised from the *Proposed Rule* and mirrors changes in § 351.225(l)(1), which are described above in that section. Additionally, because § 351.226(l)(2) and (3) concerning Commerce's actions at the time of a preliminary or final circumvention determination largely mirror similar provisions in §§ 351.225, with a few exceptions described below, we are adopting the same changes to paragraphs (l)(2) and (3) that are being made to § 351.225(l)(2) and (3). Paragraph (l)(4), which we touch on briefly below, describes Commerce's actions in the event of a negative final circumvention determination, remains unchanged from the *Proposed Rule*. Lastly, Commerce is adding a new provision, paragraph (l)(5), to include specific reference to CBP's authority.

Minor revisions have been made to paragraphs (l)(1), (l)(2)(i), and (l)(3)(i) from the *Proposed Rule*. Specifically, as explained above in the discussion of similar language in § 351.226(l), paragraph (l)(2)(i) provides that, at the time of an affirmative preliminary circumvention determination, Commerce will direct CBP to continue the suspension of liquidation of previously suspended entries, but removes express reference to entries previously suspended ''as directed under'' paragraph (l)(1). Under paragraph (l)(1), Commerce does not direct CBP to suspend liquidation at the time of initiation of the circumvention inquiry; rather, under paragraph (l)(1), Commerce directs CBP *to continue* the suspension of liquidation of entries subject to the inquiry (if any) that were already subject to the suspension of liquidation and to collect the applicable cash deposits.[146] As noted above in the discussion of § 351.225(l), CBP has independent authority to suspend liquidation, and, therefore, prior to a circumvention inquiry, it is possible that entries may be previously suspended for a number of reasons. Therefore, to avoid any unintended confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraph (l)(1) is removed from paragraph (l)(2)(i).

Similar edits have been made to paragraph (l)(3)(i) by removing a reference to entries previously suspended ''as directed under'' (l)(1) and/or (l)(2). Under paragraph (l)(2)(ii) (as further discussed below), if Commerce issues a preliminary affirmative circumvention determination, Commerce will direct CBP to begin the suspension of liquidation of certain entries. Therefore, at the time of a final circumvention determination, entries may be previously suspended as described above, or because of Commerce's instruction to CBP to begin the suspension of liquidation of certain entries at the time of the preliminary affirmative circumvention determination. To avoid confusion regarding the underlying basis for suspension of liquidation of previously suspended entries, the reference to paragraph (l)(1) and/or (l)(2) is removed from paragraph (l)(3)(i).

Revised paragraph (l)(3)(i) also eliminates potentially confusing language regarding entries subject to suspension of liquidation as a result of another segment of a proceeding, and revised paragraphs (l)(3)(i) and (ii) eliminate reference to liquidation instructions issued pursuant to §§ 351.212 and 351.213. There may be a number of reasons why entries remain subject to suspension of liquidation in any given circumvention inquiry in which Commerce issues an affirmative final circumvention determination, and Commerce cannot immediately instruct CBP to lift suspension of liquidation and assess final duties. This includes, for example, an ongoing administrative review. Therefore, we find that a simple reference to the continued suspension until appropriate liquidation instructions are issued in paragraph (l)(3) will account for various scenarios. In addition, the language in new paragraph (l)(5) will provide added clarification regarding CBP's authority in relation to the framework established by Commerce under paragraph (l). Commerce intends to provide more details, as needed, in its individual instructions to CBP for a given case.

On the other hand, we note that we have retained language in paragraph (l)(4) to provide that when Commerce

[143] *See Proposed Rule,* 85 FR 49472 at 49487 (referencing S. Rep. No. 100–71, at 100).

[144] *Id.* at 49487–88.

[145] *Id.*

[146] The phrase ''until appropriate liquidation instructions are issued'' from the *Proposed Rule* is removed in paragraph (l)(1) (which refers to continued suspension of liquidation) as such language is unnecessary and redundant. The relevant language is retained in paragraph (l)(3) as discussed below.

issues a final negative circumvention determination, entries subject to suspension of liquidation as a result of another segment of a proceeding, if any, will remain suspended until that other segment of the proceeding has concluded. Although perhaps less common in the circumvention context, it is possible that there could be a scenario in which it would not be appropriate to immediately direct CBP to liquidate entries without regard to duties. Therefore, to avoid confusion in this particular scenario, this language is retained in paragraph (l)(4).

Paragraphs (l)(2)(ii) and (l)(3)(ii) clarify and maintain the *status quo* of the current regulation to provide that, at the time of a preliminary or final affirmative circumvention determination, Commerce will direct CBP to begin the suspension of liquidation of any unliquidated entries not yet suspended, which entered on or after the date of initiation of the inquiry, and collect applicable cash deposits. Paragraphs (l)(2)(ii) and (l)(3)(ii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and to avoid confusion. Additionally, this language also clarifies that the relevant date is the date of publication of the notice of initiation in the **Federal Register**.

New paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final affirmative circumvention determination, if Commerce determines that it is appropriate to do so, Commerce may direct CBP to begin the suspension of liquidation of certain unliquidated entries not previously suspended, which entered before the date of publication of notice of initiation of the inquiry, and collect applicable cash deposits. Under this framework, Commerce may consider upon timely request of an interested party or at its own discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should be applied to certain entries which pre-date the date of initiation, *i.e.,* to a specific alternative retroactive suspension date. In response to a timely request from an interested party, Commerce will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date. These provisions are further explained below in response to comments. Additionally, new paragraphs (l)(2)(iii)(B) and (l)(3)(iii)(B) provide an exception that, if Commerce has determined to address a covered merchandise referral under § 351.227 in a circumvention inquiry, the rules of § 351.227(l)(2)(iii) and (l)(3)(iii) will apply. This provision is explained below under the discussion of § 351.227(l). New paragraphs (l)(2)(iii) and (l)(3)(iii) also retain language from the current regulation regarding entries entered, or withdrawn from warehouse, for consumption, to maintain consistency with this long-standing language and avoid confusion. Additionally, this language also clarifies that the relevant date is the date of publication of the notice of initiation in the **Federal Register**.

Lastly, new paragraph (l)(5) provides language to clarify CBP's authority to take related action. Specifically, this language clarifies that the revised framework established by Commerce in § 351.226 do not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. This is identical language to the language for § 351.225(l), which is explained above and not repeated here.

There is one clarification to this revised regulatory framework, as noted in the **DATES** section and in the Applicability Dates section of this preamble, and as discussed in detail above regarding § 351.225(l)(2)(iii) and (l)(3)(iii) for scope inquiries, regarding the effective date and applicability dates. As stated above, amendments to § 351.225 apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after the effective date for the amendments to § 351.225 identified in the **DATES** section. Likewise, amendments to § 351.226 apply to circumvention inquiries for which a circumvention request is filed, as well as any circumvention inquiry self-initiated by Commerce, or after the effective date for the amendments to § 351.226 identified in the **DATES** section. However, for § 351.226(l), like for § 351.225(l), Commerce will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to this effective date. These issues are fully described above for § 351.225(l) and are not repeated here. In addition, we clarify that as expressly stated in paragraph (l)(5), this revised framework does not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. Nor will this framework apply to circumvention requests filed or circumvention inquiries self-initiated by Commerce before the effective date identified in the **DATES** section.

As noted above, Commerce received numerous comments on paragraph (l). Summaries of those comments, and responses to those comments, are provided below.

(a) Retroactive Suspension of Liquidation

As described above, in the *Proposed Rule,* among other changes, Commerce proposed that, at the time of a preliminary or final affirmative circumvention determination, Commerce would direct CBP to begin suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits. Therefore, the key distinction between the current regulation and what was proposed is that the current regulation imposes a ''cut-off'' of the initiation date of the inquiry. The proposed regulation would have removed this limitation so that the affirmative circumvention determination would apply to any unliquidated entries of the product at issue, not just those that entered after the initiation date.

Thirteen commenters support the proposal to apply affirmative circumvention determinations to all unliquidated entries dating back to the first date of suspension under the order. A few of these commenters generally support the adoption of proposed new § 351.226, with no comments specific to paragraph (l). Another group of these commenters discuss their first-hand experiences in dealing with circumvention and explain that such practices undermine the import relief granted to the domestic industry. In their view, companies engaging in circumvention contravene the remedial purpose of the AD/CVD law, and Commerce's experience over the past 20 years has made it evident that strong enforcement of the trade remedy laws is necessary to level the playing field, prevent circumvention, and eliminate opportunities to elude the payment of AD/CVDs.

Several of these commenters disagree that imports that circumvent an AD/CVD order can enter without the payment of duties unless and until a domestic interested party alerts Commerce that circumvention is occurring. These commenters argue that importers should be exercising due diligence (as part of the concept of shared responsibility and the statutory duty to exercise reasonable care when entering merchandise) and it is

incumbent upon them to take proactive measures to reduce any duty risk exposure. One of these commenters notes that the Federal Circuit has also recognized the risk of duty evasion and the declared policy in the Act to protect AD/CVD revenue to the maximum extent practicable, which is consistent with the curative purpose and remedial intent of the statute.[147]

Eleven commenters oppose the proposal to apply affirmative circumvention determinations to all unliquidated entries dating back to the first date of suspension under the order. These commenters argue that by applying suspension of liquidation to the earliest date of suspension, the *Proposed Rule* unfairly expands the scope of an order prior to making a circumvention determination. In particular, they argue that there is a significant duty liability risk to importers that are genuinely unaware their products may be covered by the scope of an order. They state that, as Commerce acknowledges, these products do not fall within the literal scope language; thus, it is impossible for importers to predict what products may be circumventing an order when they are not covered by the literal scope language. Certain of these commenters also argue that attaching duty liability when the language of the orders does not cover the product is a violation of due process and the fair notice doctrine. They note that a circumvention request is the first time an importer has notice of a potential circumvention inquiry; retroactively applying orders to unliquidated entries does not constitute fair notice to importers.

Additional commenters oppose the *Proposed Rule* and raise notice and due process issues. In particular, they argue that the proposal requires notification to those on the annual inquiry service list, but does not clearly establish how producers and importers will be informed if circumvention is taking place via third countries. One of these commenters proposes that circumvention inquiries be published in the **Federal Register** so that all interested parties affected have the same level of information and can defend their interests. Another commenter also expressed support for providing notice via the **Federal Register**, either at the time of the circumvention allegation or the time of the initiation. This commenter also notes that the *Proposed Rule* implicates due process issues, stating that importers should not be held responsible for duties on entries that pre-date any notice of the extension of the order to cover the merchandise.

Another group of commenters argues that Commerce has expressly recognized in the *1997 Final Rule* that notice and fairness are key factors in a circumvention case. These commenters argue that the issue regarding the apparent unfairness associated with retroactively imposing duties on merchandise prior to initiation of an inquiry was expressly addressed in *Fasteners,* where the Federal Circuit held that Commerce exceeded its regulatory authority.[148] The commenters also argue that the court's reasoning was based on the *1997 Final Rule* and Commerce has failed to provide an adequate explanation as to why it is no longer extremely unfair to respondents to subject entries to duty assessment with no prior notice based on nothing more than a domestic party's allegation. Further, these commenters argue that the Federal Circuit's decision in *Sunpreme* cannot justify retroactive assessment because that case concerned CBP's suspension authority, not Commerce's authority to reach all unliquidated entries prior to the initiation of a circumvention inquiry.[149] Finally, they state that the proposal is even more blatantly unfair in the circumvention context with third country completion, where there has been no AD/CVD investigation, no injury finding, no suspension, and no notice of findings in the **Federal Register**. They also state that it is unreasonable to assume importers can make a prediction concerning merchandise produced in a separate country.

Response:

As discussed above, after consideration of these comments, Commerce is adopting a revised framework under paragraph (l) with respect to entries that pre-date the date of initiation of a circumvention inquiry. First, under paragraph (l)(1), Commerce is clarifying that, at the time of initiation of a circumvention inquiry, Commerce will direct CBP to *continue* the suspension of liquidation of entries subject to the inquiry (if any) that were already subject to the suspension of liquidation and to collect the applicable cash deposits. Second, Commerce is clarifying its treatment of unliquidated entries not yet suspended which entered before the date of initiation of the inquiry. Specifically, paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) provide that, at the time of a preliminary or final affirmative circumvention determination, if Commerce determines that it is appropriate to do so, Commerce may direct CBP to begin the suspension of liquidation of certain unliquidated entries not previously suspended, which entered before the date of publication of notice of initiation of the inquiry, and collect the applicable cash deposits. This includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final circumvention determination.[150] Under this framework, Commerce may consider upon timely request of an interested party or at its own discretion whether such suspension of liquidation and application of cash deposits, also referred to as retroactive suspension, should be applied to certain entries which pre-date the date of initiation, *i.e.,* to a specific alternative retroactive suspension date. In response to a timely request from an interested party, Commerce will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date. In addition, as explained further below, because this is a determination separate from a determination as to whether the elements for circumvention exist, the evidence required to support retroactive suspension must go beyond the evidence required to establish circumvention of the order under the relevant criteria. Further, Commerce may consult with CBP as necessary under this provision to determine if suspension of liquidation should fall on the date of initiation or to entries preceding that date.

In establishing this framework, which differs from the scope framework applied under § 351.225(l), we recognize that neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding when merchandise found to be circumventing an AD and/or CVD order should be subject to suspension of liquidation and cash deposit requirements. When Congress passed the Omnibus and Trade

[147] *See Guangdong Wireking,* 745 F.3d at 1203; and *Sunpreme,* 946 F.3d at 1321–22.

[148] *See Fasteners,* 947 F.3d at 803.

[149] *See Sunpreme,* 946 F.3d at 1316–18.

[150] As stated above in the discussion of new paragraph (l)(5), consistent with current practice and in accordance with CBP's statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a circumvention inquiry. Additionally, any instructions issued by Commerce directing CBP to ''lift suspension of liquidation'' and assess duties at the applicable AD/CVD rate would not limit CBP's ability to (1) suspend liquidation/assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically, or (2) suspend liquidation/assess duties/take any other action within CBP's or HSI's authority with respect to AD/CVD entries.

Competitiveness Act of 1988, it explained that the purpose of the circumvention statute ''is to authorize the Commerce Department to apply antidumping and countervailing duty orders in such a way as to prevent circumvention and diversion of U.S. law.'' [151] Congress also recognized that ''aggressive implementation of [the circumvention statute] by the Commerce Department can foreclose these practices.'' [152]

In light of this language, we are cognizant of the purpose of the AD/CVD law generally and the circumvention provisions, in particular, to prevent parties from undermining the effectiveness of these trade remedies through circumvention measures. Congress, and the courts, have long recognized that Commerce has the vested authority to administer the trade remedy laws in accordance with their intent, and has the discretion to take appropriate enforcement measures to ensure the effectiveness of its AD/CVD orders by preventing duty evasion and circumvention.[153] Weighing in favor of retroactive suspension are Commerce's objectives to promote the effectiveness and remedial purpose of AD/CVD orders; to provide the requisite relief to domestic industries suffering from attempts by others to undermine that relief; to deter parties from engaging in the circumvention practices in the first instance; and to encourage parties to maintain a reasonable awareness whether the product they are producing, exporting, or importing is subject to an AD/CVD order, and also to scrutinize the parties with which they do business (for example, to determine whether a supplier is a respondent in a U.S. AD/CVD proceeding, which could indicate possible circumvention activity depending on the circumstances). Therefore, based on these objectives, we agree, to an extent, with commenters in favor of the *Proposed Rule.*

On the other hand, we also agree to some degree with arguments raised by the commenters opposed to the *Proposed Rule* that retroactive application of circumvention determinations may not be appropriate in all instances. Depending on the circumstances of a given case, prior to the notice of initiation of the circumvention inquiry, certain exporters, producers, and/or importers of products alleged to be circumventing may not be aware that Commerce could apply AD/CVDs to such products—which ''do not fall within the order's literal scope'' [154]—through an affirmative circumvention determination.

In light of the concerns raised by those opposed to the *Proposed Rule,* and the need to effectively administer and enforce the circumvention laws under section 781 of the Act, we have therefore modified paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A) as described above. In determining whether to suspend liquidation of entries preceding initiation, Commerce will consider its objectives described above (*e.g.,* to promote the effectiveness and remedial purpose of AD/CVD orders; to provide the requisite relief to domestic industries; to deter parties from engaging in circumvention; and to encourage parties to maintain a reasonable awareness of their business activities) in light of the circumstances set forth on the administrative record. This framework recognizes that although merchandise may not fall within the literal terms of the order, this does not mean, depending on the circumstances, that parties are completely unaware of an existing order or previous circumvention determinations relevant to their product, or even unaware that their products are or may be circumventing the order. Thus, in certain instances, we disagree that it would be unfair to all parties or that all parties would have ''no notice'' or lack due process in every case before potential duty liability attaches to entries that pre-date the date of initiation of the inquiry pursuant to an affirmative circumvention determination. In fact, we believe that there are scenarios in which parties will certainly have notice before potential duty liability attaches to entries that pre-date the date of initiation. Therefore, the appropriateness of applying duty liability to pre-initiation entries pursuant to an affirmative circumvention determination must be determined by Commerce on a case-by-case basis.

For example, Commerce has published hundreds of AD/CVD orders on numerous types of products covering multiple countries and issued numerous circumvention determinations. The Federal Circuit has recognized that **Federal Register** documents are treated as legally effective notices in a wide range of circumstances.[155] In certain cases, the courts have determined that a party that did not receive actual notice nonetheless received constructive notice of an event through the publication of a **Federal Register** document.[156] These published documents and accompanying memoranda would put parties on notice that circumvention occurred in previous instances under the same order by the same or different companies, or that the same pattern of circumvention occurred in previous instances involving the same product for a different country. This type of evidence could serve as the evidence needed to consider retroactive suspension appropriate under paragraphs (l)(2)(iii) and (l)(3)(iii), because, as noted above, such evidence would go beyond the evidence required to establish circumvention of the order under the relevant criteria.

Allowing for retroactive suspension in such instances would encourage parties to maintain a reasonable awareness of whether the product they are producing, exporting, or importing is subject to an AD/CVD order, and also to scrutinize the parties with whom they do business (as stated above). As a general matter, importers are expected to perform their due diligence and exercise reasonable care in conducting their business. Certain importers are also required to provide or maintain relevant information for their product; and, depending on the type of product, more detailed information may be mandated based on requirements established by CBP, Commerce, or other Federal agencies.[157] In light of these existing obligations and requirements, a reasonable importer may be expected to know, at a minimum, the identity of

[151] *See* S. Rep. No. 100–71, at 101.

[152] *Id.*

[153] *See generally* section 781 of the Act; SAA at 892–95; *Tung Mung,* 219 F. Supp. 2d at 1343 (''Commerce has a duty to avoid the evasion of antidumping duties. [Commerce] 'has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, [Commerce] has a certain amount of discretion [to act] . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.' '') (quoting *Mitsubishi I,* 700 F. Supp. at 555; *see also Torrington Co.* v. *United States,* 745 F. Supp. 718, 721 (CIT 1990), *aff'd* 938 F.2d 1276 (Fed. Cir. 1991).

[154] *See Deacero,* 817 F.3d at 1337–38 (''In order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope. The Tariff Act identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach[.]'' (internal citations omitted)).

[155] *Suntec,* 857 F.3d at 1370.

[156] *Id.*

[157] For example, importers of steel products are required to obtain a steel import license through Commerce's Steel Import Monitoring and Analysis (SIMA) online license system. *See* 19 CFR part 360. In their license application, importers are required to report, among other requirements, the country of origin of the product, along with the country where the steel used in the mill product is melted and poured (which may differ from the claimed country of origin). Steel importers must also furnish steel mill test certificates that provide detailed information regarding the imported steel product. *See Steel Import Monitoring Analysis System,* 85 FR 56162 (Sept. 11, 2020).

certain parties in the transaction chain, understand the imported product, including where it was made, how it was made, and the components of the product (and, in some instances, the source of those components). Furthermore, an importer of a product under an HTSUS category that is associated with an AD/CVD order would be faced with a particular responsibility to ensure whether the product is subject to an AD/CVD order. And, as described above, an importer would generally be charged with reviewing prior **Federal Register** notices relevant to its product and to the producers and exporters of its products.

Moreover, in determining whether to apply retroactive suspension, certain evidence, apart from the evidence required to establish circumvention of the order under the relevant criteria, may be considered in light of Commerce's objective to deter parties from engaging in the circumvention practices in the first instance.[158] Just as there is no right to import,[159] there is no right to circumvent the order with impunity until or unless a party gets caught in the circumvention scheme. In practice, in individual circumvention inquiries, Commerce will have to balance its various objectives in ensuring the effectiveness of all AD/CVD orders, along with case-specific considerations. For example, Commerce must consider its objective to deter parties from engaging in the circumvention practices in the first instance in light of the facts surrounding an importer's classification of an entry as not subject to AD/CVDs. Exactly how to strike this balance should emerge over time, through Commerce's practice and consideration of case-specific issues.

Lastly, to the extent parties argue that it is unfair to apply AD/CVDs retroactively to merchandise which may not fall within the literal terms of the order without adequate notice, this final rule provides additional notice to parties that AD/CVDs may be applied retroactively because of a subsequent affirmative circumvention determination, depending on the circumstances described above.

In response to arguments regarding notice of circumvention inquiries, we note that, as provided under § 351.226(b) or (d), Commerce publishes notice of initiation of a circumvention inquiry in the **Federal Register**. In addition, Commerce publishes notice of its preliminary and final circumvention determinations as well, as provided under § 351.226(g)(1) and (2).

In light of the above, Commerce may consider whether retroactive suspension should be applied to entries prior to the date of initiation, based upon available information on the record, at the time of the first affirmative (preliminary or final) circumvention determination. In exercising its discretion under this provision, Commerce will consider whether there is information on the record supporting retroactive suspension, which goes beyond the evidence required to establish circumvention of the order under the relevant criteria.

(b) Suspension of Liquidation and Cash Deposits at Initiation

Several commenters generally agree with Commerce's proposal under § 351.226(l)(1) to instruct CBP upon initiation of a circumvention inquiry to continue to suspend liquidation of products that are already subject to suspension. Some commenters oppose Commerce's proposal under § 351.226(l)(1) to require cash deposits at the time of initiation of a circumvention inquiry, arguing that it is contrary to statute, unreasonable, and unfair. These commenters argue that, under current practice, cash deposits are not required until Commerce makes a preliminary determination of circumvention.

As with proposed § 351.225(l)(1), in the context of circumvention, several commenters argue Commerce should instruct CBP to begin suspending liquidation of entries not already suspended by CBP at an earlier stage in a circumvention inquiry. Specifically, these commenters request that Commerce instruct CBP upon initiation of a circumvention inquiry to suspend liquidation of entries which are not already subject to suspension of liquidation, and to require cash deposits. Likewise, we received similar comments and rebuttal comments to those described above regarding § 351.225(l)(1), both supporting and opposing this proposal, which we incorporate herein.

In the context of circumvention, several commenters further argue that unless CBP suspends liquidation under its own authority, in most cases products subject to a circumvention inquiry will not have liquidation suspended when Commerce initiates a circumvention inquiry, and thus, certain circumventing products will liquidate without duty liability. These commenters argue that waiting until a preliminary determination of circumvention to begin suspension of liquidation undermines the relief to the domestic industries, and that suspending liquidation and requiring cash deposits upon initiation of a circumvention inquiry is consistent with Congress's intent to aggressively implement the circumvention statute. These commenters argue that Commerce's concerns in the *1997 Final Rule* do not apply in circumvention because the proposed regulations clearly outline the factors necessary to allege a *prima facie* case of circumvention. These commenters further argue that circumvention typically requires an affirmative act by foreign producers, so it is unlikely foreign producers will be unaware that their actions potentially circumvent an order. Additionally, these commenters argue there is no economic harm when entries are suspended at initiation and cash deposits are set to zero, but that doing so preserves potentially circumventing entries for duty assessment.

As noted above, in rebuttal, certain commenters oppose the proposal that Commerce direct CBP, upon initiation of a circumvention inquiry, to suspend liquidation of unliquidated entries not previously suspended and to require cash deposits. In addition to rebuttal comments described under § 351.225(l)(1), one commenter points out that petitioning parties have inconsistently argued that Commerce should lower the threshold for initiating a circumvention inquiry while also arguing that these same criteria establish a *prima facie* case of circumvention and support their proposal that suspension of liquidation for entries not already suspended should begin upon initiation of a circumvention inquiry.

Response:

We have left unchanged § 351.226(l)(1), which states that, upon

[158] We note that the AD/CVD statute on the whole, as well as the circumvention provisions in particular, do not contain intent elements. *See, e.g., Nippon Steel Corp.* v. *United States,* 337 F.3d 1373, 1382 (Fed. Cir. 2003) (explaining that, in the context of an adverse facts available determination under section 776(b) of the Act, [w]hile intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element.''). However, evidence demonstrating intentional conduct may support retroactive suspension because such evidence could indicate that there was no lack of notice about the order or the fact that the particular product might be circumventing the order before the date of initiation, thereby undermining arguments regarding fairness, notice, and due process in a given case.

[159] *See GPX International Tire Corporation* v. *United States,* 893 F. Supp. 2d 1296, 1313 (CIT 2013) (''[T]he court notes that customs duties are to an extent unique from other government assessments in that there is no right to import, and where unfair trade remedies apply, those with goods that may be imported rarely can predict with accuracy what the duty will be.'') (citing *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 318 (1933) (recognizing that as with tax rates '[n]o one has a legal right to the maintenance of an existing rate or duty.')).

initiation of a circumvention inquiry, Commerce will direct CBP to continue the suspension of liquidation (if any) of previously suspended entries and to apply the applicable cash deposit rate. In addition, we have considered the proposal by some commenters that Commerce should instruct CBP upon initiation of a circumvention inquiry to begin the suspension of liquidation of unliquidated entries not previously suspended and to require cash deposits on such entries (either at zero or at the rate in effect at the time of entry). We have also considered the arguments in opposition to this proposal. As noted above, the statute does not provide direction to Commerce on the suspension of liquidation of entries subject to a circumvention inquiry. Therefore, after consideration of the parties' arguments and based on current practical and administrability concerns, we have decided to continue to order suspension of liquidation and collection of cash deposits for such entries only after Commerce's first (preliminary or final) affirmative circumvention determination. As a result, and for many of the same reasons described in detail above under the discussion of § 351.225(l), we have not accepted the proposal.

In particular, during the 45-day period in which Commerce has to decide whether to initiate an inquiry based on a circumvention request, Commerce must consider whether the request alleges the elements necessary for a circumvention determination under section 781 of the Act and is accompanied by information reasonably available to the interested party supporting these allegations. During this time, Commerce may receive comments from other interested parties, and may issue questionnaires to the requestor to seek clarification or additional information. Although Commerce may seek clarification of the description of the product at issue, it would likely be difficult for Commerce to fully analyze the description of the product at issue, such that it would be appropriate to direct CBP to *begin* suspension of liquidation for entries not previously suspended. We recognize that once initiated, paragraph (l)(1) provides that Commerce will direct CBP to *continue* the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. However, for the reasons discussed above under § 351.225(l), we find it acceptable for Commerce to incorporate the description of the product in the circumvention request ''as is'' in such instructions to CBP, even if Commerce has not had a great deal of time to fully analyze the description, because Commerce is seeking to maintain the status quo with respect to this group of previously suspended entries.

On the other hand, we find that ordering suspension for the first time on merchandise which was not previously suspended, based only on the description of the product at issue in the circumvention request, raises practical and administrability concerns. Specifically, before initiation, Commerce may not have adequate time to analyze the description of the product at issue to ensure that when such a description is provided in CBP instructions, CBP is able to administer and enforce those instructions without difficulty. Notably, there may be instances in which Commerce finds that the record and product descriptions are sufficient and clear enough to warrant combining initiation with a concurrent affirmative preliminary circumvention determination. However, in the cases in which Commerce just initiates a scope inquiry, Commerce will not have reached any sort of determination on the merits that the product at issue is circumventing the order.

Further, we are also concerned with the significant administrative burden that would result if we were to instruct CBP to begin suspension of liquidation and collection of cash deposits of all entries at initiation, regardless if they are determined later to be circumventing an AD/CVD order. For example, under one possible scenario, such suspension could result in a multi-step process of Commerce: (1) Directing CBP to convert all non-AD/CVD type entries meeting the description of the product at issue to AD/CVD type entries and directing CBP to suspend liquidation without any cash deposits at the time of initiation; (2) directing CBP subsequently, upon the event of an affirmative preliminary determination, to collect cash deposits at the rate to be determined applicable retroactively; and (3) directing CBP, in the event of a negative final determination, to lift suspension and liquidate entries without regard to AD/CVDs. This is just one sequence of circumvention inquiry proceedings and determinations, among several, that reflects the additional administrative burden that suspension of liquidation of all entries of the product described in a circumvention request at initiation would require of Commerce and CBP.

We are cognizant of the concerns expressed by some commenters that certain entries that entered prior to an affirmative preliminary determination may liquidate without being assessed AD/CVDs, and that parties later found to be circumventing the order may benefit from this arrangement. We have also considered the suggestion of some commenters to begin the suspension of liquidation of not yet liquidated entries at the time of initiation, with a cash deposit rate of zero, which they argue means there would be no economic harm to importers. However, Commerce believes that this balance between enforcement concerns and practical and administrability considerations described above weighs in favor of maintaining its current practice of not imposing either suspension of liquidation and/or cash deposit requirements until making either an affirmative preliminary or final affirmative determination, whichever occurs first.

That said, although we are not adopting the suggestions that we suspend liquidation of all entries described in circumvention requests at initiation, we note that we have made numerous other changes throughout these regulations, such as the remedy provisions found in § 351.226(m) and the certification process addressed in § 351.228, in addition to the changes discussed above for paragraph (l), that we believe significantly strengthen the administration and enforcement of AD/CVD laws, and, overall, these changes minimize the opportunities for gamesmanship and evasion of AD/CVD orders while also mitigating the harm to importers that may be acting in good faith.

With respect to the comment that Commerce should not require cash deposits upon initiation of a circumvention inquiry, it is unclear whether these commenters believe that under § 351.226(l)(1), Commerce would be directing CBP to begin suspension of liquidation and require cash deposits of all unliquidated entries (including entries not previously suspended by CBP), or whether the commenter disagrees that Commerce should inform CBP that it has initiated a circumvention inquiry and direct CBP to continue any suspension of liquidation and collection of cash deposits already in place. As noted in response to a similar comment regarding § 351.225(l), CBP has independent authority to suspend liquidation. Thus, at the time Commerce initiates a circumvention inquiry, although perhaps less common in the circumvention context, CBP may have already suspended liquidation for entries of products subject to the circumvention inquiry. We clarify that, under § 351.226(l)(1), when Commerce initiates a circumvention inquiry, it

does not intend to direct CBP to suspend liquidation and collect cash deposits in the first instance. Rather, Commerce will inform CBP that it has initiated a circumvention inquiry and direct CBP to *continue* the suspension of liquidation of any unliquidated entries of products subject to the circumvention inquiry that have already been suspended by CBP. This is consistent with current § 351.225(l)(1), the existing regulation governing suspension of liquidation in circumvention inquiries, in the sense that both the current and revised regulation require suspension of liquidation to continue at the applicable cash deposit rate for previously suspended entries after initiation of a circumvention inquiry. Although it has not been Commerce's practice under the existing regulations to direct CBP upon initiation of a circumvention inquiry to continue any suspension of liquidation already subject to suspension and collect cash deposits, current § 351.225(l)(1) provides that any such suspension by CBP will continue when Commerce initiates a circumvention inquiry. Consistent with the noted policy objectives of the AD/CVD law (including the protection of revenue),[160] Commerce has revised § 351.226(l)(1) to require the issuance of instructions to ensure that entries previously suspended by CBP continue to be suspended during the pendency of the circumvention inquiry.

(c) Action Pursuant to a Negative Preliminary Circumvention Determination

Certain commenters oppose the proposal not to include a requirement for Commerce to notify CBP of a negative preliminary circumvention determination that the product at issue is not circumventing the relevant order along with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and to refund cash deposits of estimated duties. These commenters argue that the proposal is contrary to the statute and would be manifestly unfair to importers because entries for which liquidation has already been suspended by CBP may have been in error or based on a misunderstanding of the scope. According to these commenters, to continue to collect cash deposits following a negative preliminary circumvention determination is unlawful, especially where the product is entering from a country different from the country to which an order applies and for which no injury determination has been made. These commenters also argue that, in the context of investigations, provisional measures are not imposed following a negative preliminary determination.

In rebuttal, several commenters responded with arguments supporting the proposal not to include a requirement for Commerce to notify CBP of a negative preliminary circumvention determination. Many of these commenters argue that duty collection is a guiding principle for this rulemaking and notifying CBP at the time of a final circumvention determination ensures that any duties collected are preserved in the event Commerce reverses its position after a negative preliminary circumvention determination. These same commenters believe that this particular aspect of the suspension of liquidation rules applicable to circumvention inquiries will encourage importers to seek scope rulings earlier in the proceeding or risk having entries suspended by CBP. Another group of commenters agreed that the proposal ensures the appropriate application of AD/CVD orders in the event of an affirmative final circumvention determination. These commenters believe the proposal is consistent with the overall objective of addressing serious enforcement concerns and the very real risk of duty evasion.

Response:

We have left unchanged proposed § 351.226(l)(2) with respect to this issue. Under the existing regulations, if Commerce issues a preliminary circumvention determination that the product at issue is not circumventing the order, Commerce is required to notify CBP and direct CBP to terminate the suspension of liquidation for any entries previously suspended by CBP with refunds of any cash deposits paid as estimated duties. In the *Proposed Rule,* Commerce proposed not to include this requirement so that Commerce would no longer issue instructions to CBP at the time of a negative preliminary circumvention determination. Instead, by not including this requirement, any entries previously suspended by CBP pursuant to its own authority would remain suspended pending completion of the circumvention inquiry and a final determination on the matter. We believe that adoption of the proposal is necessary to preserve the *status quo* for the duration of the circumvention inquiry and ensure the appropriate application of AD/CVDs in the event of an affirmative final circumvention determination. Consistent with the aforementioned underlying policy objectives of the Act, including the protection of the revenue,[161] Commerce has decided that it is not appropriate to require notifying CBP of negative preliminary circumvention determinations with instructions to terminate the suspension of liquidation for any entries previously suspended by CBP and to refund any cash deposits paid as estimated duties.

With respect to the argument that provisional measures are not imposed following a negative preliminary determination in an investigation, Commerce will not direct CBP to suspend liquidation of entries not already suspended by CBP following a negative preliminary circumvention determination. However, any suspension of liquidation ordered by CBP pursuant to its own authority will be left undisturbed to preserve the *status quo* until the conclusion of the circumvention inquiry. We disagree with the commenters that argue the proposal is contrary to the statute. As discussed above, Congress enacted section 781 of the Act to combat certain forms of circumvention of AD/CVD orders; however, neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding suspension of liquidation and cash deposit requirements in the context of circumvention inquiries. The rules adopted herein are a reasonable exercise of Commerce's discretion in light of the statutory aims to prevent circumvention and evasion. Moreover, Commerce's final circumvention determination and any subsequent instructions to CBP will clarify the appropriate status of such entries.

Consistent with Congress's intent when enacting the circumvention statute, the proposal not to require Commerce to notify CBP of a negative preliminary circumvention determination will help prevent companies from eluding the payment of duties if Commerce ultimately concludes in a final determination that the merchandise is circumventing an order.

(d) Clarifying the Product at Issue

One commenter opposes the proposal to suspend liquidation of unliquidated entries of the ''product at issue'' without any limitation as to when the entries occurred. The commenter states that the proposed regulations are vague because the language does not limit any new suspension of liquidation instructions to only apply to unliquidated entries made on or after the underlying case order's

[160] *See Guangdong Wireking,* 745 F.3d at 1203; and *Sunpreme,* 946 F.3d at 1321–22.

[161] *Id.*

earliest suspension of liquidation. The commenter asserts that language must be added to §§ 351.226(l)(2) and (3) that restricts the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter. The commenter claims that the United States is not entitled to AD/CVDs on entries that are not covered by or subject to the order.

Response:

We have left paragraphs (l)(2) and (3) unchanged from how they were proposed with respect to this issue. First, we agree with the commenter that Commerce does have the authority to direct CBP to impose AD/CVDs on entries that are not subject to an order by virtue of pre-dating the first date of suspension associated with that order. Accordingly, such retroactive suspension of liquidation and collection of cash deposits would not be imposed on entries that predate the first date of suspension in the relevant AD and/or CVD proceeding. Second, the reference to the ''product at issue'' in paragraphs (l)(2) and (3) refers to the product that is the subject of the inquiry, and that for purposes of (l), the appropriate scope of products impacted, either on a country-wide or company-specific basis, are discussed under revised § 351.226(m), discussed below. Third, we do not disagree that AD/CVDs or cash deposits may not be applied on entries not covered by or subject to the order; however, the commenter's assertion that Commerce must limit the imposition of suspension of liquidation and cash deposit requirements to the entries of the applicable manufacturer or exporter is incorrect. If Commerce determines that a product is subject to the order following an affirmative circumvention determination, then it has the authority to impose antidumping and/or countervailing duties to entries of that product. Additionally, as Commerce explains below in response to comments made on § 351.226(m), Commerce has the ability to apply a remedy which is producer-specific, exporter-specific, importer-specific, or a combination of any of those remedies Commerce also has the ability to apply its circumvention determination on a country-wide basis to all products from the same country as the particular product at issue and with the same relevant physical characteristics, and even to apply its circumvention determination to physically similar products as well (*i.e.,* not physically identical in all relevant characteristics). Therefore, Commerce need not limit its ability to suspend liquidation for imports of merchandise found to be circumventing an AD/CVD order under § 351.226(l)(2) and (3).

(e) Notification to Sureties

One commenter requests that sureties be notified, either by Commerce or CBP, at the time CBP is instructed to begin the suspension or continue the suspension of liquidation of entries for AD/CVD purposes in the context of a circumvention inquiry. This commenter argues that the duties demanded from sureties may be in amounts which exceed the bond and without any prior notice to the surety to allow for participation in administrative proceedings and communication with the bond principal, *i.e.,* the importer, to address or satisfy AD/CVD requirements. This commenter believes providing notice of any suspension of liquidation ordered in the context of circumvention inquiries will help sureties manage risk.

Response:

For the reasons discussed above regarding § 351.225(l), comment 12(f), in the context of scope, we have not modified paragraph (l) in § 351.226 to include a requirement to notify the involved surety or sureties that Commerce has instructed CBP to suspend or to continue to suspend liquidation of entries for AD/CVD purposes. However, we note that, under § 351.226(b) and (d)(3), sureties will be notified of Commerce's self-initiation of a circumvention inquiry or initiation of a circumvention inquiry based on a request through publication in the **Federal Register**.

13. Section 351.226(m)—Applicability of Circumvention Determinations; Companion Orders

Section 351.226(m) is the provision through which Commerce applies circumvention determinations. Commerce received several comments on this proposal, with some commenters expressing satisfaction that Commerce indicated under the proposed § 351.226(m)(1) that it would consider, based on the available record evidence, whether the circumvention determination should be applied on a country-wide basis, while others expressed concern with that language. For those commenters advocating a country-wide application, they emphasize that a such an analysis avoids repeated requests for circumvention inquiries on the same product against exporters from the same country, thereby conserving Commerce resources and ensuring the effectiveness of trade remedies. They further suggest that Commerce take the additional step in the final regulations of making a country-wide application the default remedy for most circumvention determinations, with an exception only in rare cases for the application of a company-specific remedy.

Other commenters express concerns over the use of the country-wide remedy, asking Commerce to clarify the bases or criteria it would use to determine when the use of a country-wide remedy versus when a company-specific remedy is appropriate. Some commenters even oppose it outright, arguing that the country-wide remedy is too harsh when the majority of producers in a foreign country have not sought to circumvent the United States' AD and CVD orders. Those commenters argue that a company-specific remedy is more balanced, targeting only those participating in bad behavior.

Still other commenters suggest that Commerce limit a country-wide circumvention remedy to cases of repeated action and not apply the country-wide remedy to circumvention determinations in the first instance. They emphasize that the facts surrounding most circumvention allegations and findings are often exporter-specific, and only in rare cases do they involve repeated activity.

In addition, some commenters suggest that if Commerce does make a country-wide remedy the default remedy, that it also create a mechanism by which exporters may request exemption from that remedy. In rebuttal, other commenters agree with this suggestion and emphasize that because many exporters of the same merchandise have not engaged in any circumventing activities, the creation of an exemption mechanism would be a practical alternative when Commerce cannot individually analyze all companies willing to participate in circumvention proceedings or make a circumvention determination on a company-specific basis.

Several other commenters argue that Commerce should, in fact, expand the remedies available to it in § 351.226(m) to include not only country-wide remedies, company-specific remedies, and the use of certifications, as described in greater detail in § 351.228 of these regulations, but also a remedy which takes into consideration the possibility of future circumvention and is applied to imports of products similar to, but not the same as, the particular product subject to the circumvention inquiry. Specifically, those commenters cite to the remedy Commerce applied in

Wire Rod from Mexico.[162] In that case, Commerce determined that to prevent the repeated circumvention by a company of the AD order, it found that all wire rod under 4.75 mm in diameter, including wire rod with a diameter less than 4.4. mm, produced and/or exported by that company, to be merchandise altered in minor respects and within the class or kind of merchandise subject to the order. The commenters argue that because discovering circumvention normally requires significant resources and time, Commerce should not have to wait for a company to circumvent an order in the same general manner again, as that could result in the repetitive undermining of U.S. trade remedy laws. They argue that Commerce should be able to foreclose predictable, potential circumvention schemes by applying a country-wide remedy that applies not only to identical products, but similar products, as well. Furthermore, they rebut the claims that Commerce should have any ''default'' remedy under § 351.225(m), because the appropriateness of a remedy should be one that is determined on a case-by-case basis.

Another commenter rebuts the arguments from some commenters that country-wide remedies should be applied only to parties who have repeatedly been found to circumvent an order. It notes that producer-specific circumvention findings are often ineffective because parties merely rearrange and shift operations to continue circumventing after Commerce has issued a circumvention finding. It highlights the importance of country-wide remedies to ensure relief from circumvention, when record evidence supports such an application.

Finally, one commenter expresses its support for Commerce's ability in § 351.226(m)(2) to request information concerning the product that is the subject of the circumvention inquiry for purposes of an administrative review under § 351.213.

Response:

Upon consideration of the various arguments on this provision, we have determined to revise § 351.226(m)(1). We agree with the commenters that Commerce has multiple potential remedies available to it upon an affirmative finding of circumvention, each of those listed in the final rule which may be combined with certain others listed if the facts warrant such an application. There may be other options for remedies, as well, so it is important to emphasize that this list is not exhaustive. Further, although the rule applies to products ''from the same country,'' this language is not meant to delineate only the country of export. It could mean the country of export, but it could also mean the country of production or country of further processing, depending on the product at issue and the facts in a given case. It is not uncommon for products produced or further processed in one country to be transshipped and exported to the United States through another country. In that scenario, regardless of the reported country of export to the United States, if a product at issue was found to be circumventing an AD and/or CVD order, that merchandise could be considered ''from'' the country of production or further processing, and remedies under this provision could apply to those imported products.

Commerce has the ability to apply a remedy which is producer-specific, exporter-specific, importer-specific, or a combination of any of those remedies, such as applying a circumvention determination to merchandise produced and exported by a particular company, or merchandise produced by one company, exported by a second, and imported by a third. We have, therefore, included all of these options in the regulation.

Furthermore, Commerce has the ability to apply its circumvention determination on a country-wide basis to all products from the same country as the product at issue and with the same relevant physical characteristics. When Commerce uses the term ''relevant'' here, it means that if Commerce's circumvention determination focused on particular physical characteristics, such as the height and width of the particular product, then those are the physical characteristics which are the ''same'' and ''relevant'' for purposes of a country-wide application, regardless of producer, exporter, or importer.[163]

We agree with commenters who argue that Commerce has an additional practice, as reflected in *Wire Rod from Mexico,* where it may determine that based on record evidence and to prevent future evasion concerns, the appropriate remedy should include products which are similar to the circumventing merchandise. We have incorporated that option into the regulation as § 351.226(m)(1)(iii), and also provided that Commerce may apply that option on a country-wide basis.

Commerce frequently uses certifications in conjunction with other remedies in response to affirmative circumvention determinations. Thus, we have added reference to that remedy as well in § 351.226(m)(1). Further, we have used the conjunction ''and'' between these remedies, rather than ''or,'' because Commerce also has the authority to apply a remedy which is a combination of two or more of these remedies, such as, for example, the use of certifications under § 351.228 and the country-wide remedy under § 351.226(m)(1)(i).

Additionally, Commerce has determined not to make any of these options a ''default'' option. We agree with the commenters who argue that Commerce should maintain flexibility in applying remedies to address its circumvention determinations on a case-by-case basis. For example, there may be cases in which Commerce finds that the circumvention of an order by a particular product was unique to a particular exporter, producer, or importer, and that it is unlikely that other producers or exporters would or could engage in the same or similar forms of circumvention in the future. In that situation, Commerce might determine that the most appropriate remedy to apply in that case is a company-specific application. On the other hand, Commerce might conclude that the observed circumvention could be replicated by other producers, exporters, or importers of the same product, and, therefore, determine that the application of a country-wide remedy is appropriate.

The remedy which Commerce may apply with potentially the greatest impact, however, is that of the remedy used in *Wire Rod from Mexico.* In that case, Commerce had initially determined in an earlier circumvention determination that a producer and exporter had circumvented the *Wire Rod from Mexico* order through its production and export of wire rod with actual diameters between 4.75 mm and 5.00 mm.[164] Commerce, therefore, expanded the scope of the order through its circumvention determination to cover those products. Subsequently, the

[162] *Carbon and Certain Alloy Steel Wire Rod from Mexico: Final Affirmative Determination of Circumvention of the Antidumping Duty Order,* 84 FR 9089 (Mar. 13, 2019), and accompanying Issues and Decision Memorandum (*Wire Rod from Mexico*); *see also Carbon and Certain Alloy Steel Wire Rod from Mexico: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order,* 83 FR 53030 (Oct. 19, 2018), and accompanying Preliminary Decision Memorandum (*Wire Rod from Mexico Preliminary Memorandum*).

[163] In other words, two products with the same height or width might be considered the ''same,'' despite different colors or weights, if those additional physical characteristics are not relevant to Commerce's circumvention determination.

[164] *See Carbon and Certain Alloy Steel Wire Rod from Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 77 FR 59892 (Oct. 1, 2012), and accompanying Issues and Decision Memorandum.

same company produced and exported wire rod with a 4.4 mm diameter, which Commerce found was a minor alteration to circumvent, yet again, the *Wire Rod from Mexico* order. In determining the appropriate remedy, Commerce considered the fact that the producer/exporter had now been determined twice to have circumvented the *Wire Rod from Mexico* order, engaging in efforts to evade the payment of AD duties. Further, there was evidence on the record that at least one other producer made wire rod with a diameter less than 4.4 mm. Commerce concluded that the record reflected that a remedy was necessary to ensure that the exporter/producer at issue in that case would not engage in further circumvention of the *Wire Rod from Mexico* order in the future. Thus, Commerce concluded that the ''history of the proceeding'' indicated that ''limiting'' the ''affirmative circumvention finding in this inquiry to wire rod with a diameter greater than or equal to 4.4 mm and less than 4.75 mm could allow for further circumvention of the *Order*'' if the exporter/producer were permitted ''to again make another marginal change to the diameter of its wire rod.'' [165]

In reaching that decision, Commerce explained the legal basis for its determination that it should apply this particular remedy under these specific facts. Citing to the legislative history accompanying the Omnibus and Trade Competitiveness Act in 1988, Commerce explained that Congress was concerned about preventing ''circumvention and diversion'' of United States trade laws, and the undermining of the effectiveness of trade remedies through '''loopholes,' *i.e.,* foreign companies evading orders by making slight changes in their method of production, because such scenarios ''seriously undermine the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings. . . .'' [166] Accordingly, Commerce explained that as the agency ''vested with authority to administer the antidumping laws in accordance with the legislative intent'' and, it ''has a certain amount of discretion [to act] ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.'' [167]

Furthermore, Commerce explained that in ''enacting the circumvention provisions, Congress did not intend to allow foreign companies to avoid antidumping duties by advantageously modifying their manufacturing process to produce merchandise altered in minor respects in form or appearance from that which is covered by the order. In similar circumstances, Commerce has found it appropriate to implement measures necessary to prevent future circumvention.'' [168] Commerce, therefore, concluded that the ''circumstances of this proceeding require Commerce to exercise its discretionary authority under the antidumping duty law in a manner that is tailored to prevent future evasion or circumvention of the *Order* by'' the producer/exporter at issue.[169]

In drafting the remedies listed in paragraph (m), we have determined that there may be situations in which Commerce applies its circumvention determinations to similar products not only on an exporter/producer basis, as it did in *Wire Rod from Mexico,* but also on country-wide basis. For example, if Commerce determines that more than one producer or exporter has consistently altered merchandise related to a single case, such a conclusion might lead Commerce to apply a ''similar product'' remedy to the country as a whole, regardless of producers, exporters, or importers. Likewise, Commerce might decide to apply a certification requirement under § 351.228 alongside a country-wide determination that covers the same products or a country-wide determination that covers similar products. As we have indicated, the most important factor is that Commerce has the flexibility to apply a remedy in accordance with a circumvention determination on a case-by-case basis which it finds to be appropriate given the facts on the record and its policies and practices.

In light of these changes to our regulations, we have not adopted the suggestion by multiple parties to create a new procedure by which to review additional exporters or producers to determine if parties that have not engaged in any circumventing activities should be exempt from country-wide determinations. Still, we recognize that, in some circumstances, Commerce uses the certification program, as described in § 351.228 of these regulations, to allow parties who have not engaged in the practices which Commerce determined were circumventing an order to certify that they did not participate in such conduct. Additionally, as discussed below under § 351.228, parties can seek a changed circumstances review or raise issues regarding ongoing certification requirements in the context of an administrative review, as appropriate.

Finally, we have changed the term ''merchandise at issue'' to ''product at issue'' in paragraph (m)(2) to use the same terminology as that used in § 351.226(m)(1) and other provisions of these regulations.

14. Section 351.226(n)—Service of Circumvention Inquiry Request; Annual Inquiry Service List; Entry of Appearance

Section 351.226(n) Provides the service procedures for the circumvention regulation. We received two comments on this provision.

First, one commenter requests that Commerce provide sureties ''interested party'' status and allow them to receive notice under this provision.

Second, another commenter points out that currently, Commerce automatically places foreign governments on the segment of a proceeding that commences under a CVD order, but under proposed § 351.226(m), all circumvention determinations applicable to companion orders will be conducted on the record of the AD order. That commenter, therefore, requests that Commerce modify § 351.226(n) to automatically place foreign governments on the segment of the AD proceeding in which the circumvention inquiry is conducted for both companion orders.

Response:

In response to the surety issue, as discussed in response to this same commenter under § 351.225(l) and (n) and other provisions, we have not provided sureties with ''interested party'' status because, among other

[165] *See Wire Rod from Mexico Preliminary Memorandum* (emphasis in original).

[166] *Id.* (citing S. Rep. No. 100–71, at 101 and H.R. Rep. No. 100–576, at 600). Commerce also noted that in the SAA, Congress recognized that ''aggressive implementation of [the circumvention statute] by the Commerce Department can foreclose these practices.'' *See id.* (citing the *SAA* at 892–95).

[167] *See id.* (citing *Tung Mung,* 219 F. Supp. 2d at 1343 (quoting *Mitsubishi I,* 700 F. Supp. at 555), *aff'd* in *Mitsubishi II,* 898 F.2d at 1583).

[168] *See id.* (citing to *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China,* 76 FR 50996, 50997 (August 17, 2011), which was an affirmative circumvention that was applied to all producers in the subject country where circumvention occurred repeatedly by multiple parties producing and importing different specifications of cut-to-length plate that used boron).

[169] *Id. (citing also to Appleton Papers, Inc.* v. *United States,* 929 F. Supp. 2d 1329, 1337 (CIT 2013) (''Commerce has a certain amount of discretion to act in order to 'prevent [] the intentional evasion or circumvention' of the Act. To that end, Commerce may impose measures . . . where it believes they will be effective in preventing future circumvention of its orders.'') (internal citations omitted)).

reasons, section 771(9) of the Act lists the parties who are ''interested parties'' under the AD and CVD laws, and surety companies are not included on that list.

On the other hand, as we explained above, we have modified § 351.225(n) to automatically include foreign governments on the annual inquiry service list for AD or CVD proceedings after the foreign governments' first request to be on that list; meaning that if they are on that list they will receive copies of all circumvention inquiry requests. In light of the fact that foreign governments will get notification of all such requests, we disagree that they should also automatically be placed on the service list of particular segments of AD or CVD proceedings. Like petitioners and all other interested parties, if they decide to participate in the circumvention inquiry segment of the proceeding, foreign governments will have an opportunity to timely request placement on a segment-specific service list.

In addition, in addressing comments on proposed § 351.226(n)(2), we realized that we had not included the self-initiation of circumvention inquiries in the description of determinations which lead to the establishment of a segment-specific service list in the *Proposed Rule.* Such an exclusion was an oversight. Accordingly, we have added language to that provision to that effect in these final regulations.

15. Section 351.226(o)—Suspended Investigations; Suspension Agreements

Commerce received no comments on this provision. We have made minor modifications to this paragraph, however, to bring it into conformity with the similar provisions of §§ 351.225(p) and 351.227(o).

Covered Merchandise Referrals—§ 351.227

Section 351.227 addresses procedures when Commerce receives a covered merchandise referral from CBP under section 517 of the Act. As explained in the *Proposed Rule,*[170] Commerce and CBP each have their own independent authorities under the AD/CVD statutory framework to address the circumvention and evasion of AD/CVD orders. Section 517 of the Act establishes a formal process for CBP to investigate potential duty evasion of AD/CVD orders. During an EAPA investigation, if CBP is unable to determine whether the merchandise at issue is ''covered merchandise'' within the meaning of section 517(a)(3) of the Act, pursuant to section 517(b)(4)(A) of the Act, CBP shall refer the matter to Commerce to make a covered merchandise determination (covered merchandise referral). In the *Proposed Rule,* Commerce proposed adopting new § 351.227 to address procedures and standards specific to covered merchandise referrals that Commerce receives from CBP in connection with an EAPA investigation.[171] To summarize, in proposing this new regulation, Commerce took into account considerations relating to flexibility in requesting the information that Commerce needs in making a covered merchandise determination, the timeliness of Commerce's covered merchandise determination in response to a CBP referral, and the need to afford parties opportunities to submit evidence and argument for Commerce's consideration and allow Commerce sufficient time to consider such evidence and argument for purposes of reaching a well-reasoned determination.[172]

The *Proposed Rule* also explained that there is a potential significant overlap between the inquiry that Commerce undertakes in response to a covered merchandise referral through a covered merchandise inquiry, a scope inquiry conducted under § 351.225, and a circumvention inquiry conducted under § 351.226. Congress has directed Commerce to make covered merchandise determinations pursuant to its existing authority under the Act,[173] and, thus, Commerce has utilized its authority and procedures for issuing scope and circumvention determinations to determine whether a product is ''covered merchandise.'' Accordingly, many provisions in § 351.227 were crafted to mirror the corresponding provisions in §§ 351.225 and 351.226, which have been further revised in this final rule.

We received numerous comments and rebuttal submissions on the proposed adoption of § 351.227, some in favor and some in opposition. Below, we briefly discuss each provision, address any comments received, and, where appropriate, explain any changes to the *Proposed Rule* in response to comments. In addition, we explain additional modifications to the *Proposed Rule* where we have determined that such amendments brought § 351.227 into greater conformity with scope and circumvention regulations §§ 351.225 and 351.226, or otherwise provided greater clarity to these regulations.

1. Section 351.227(a)—Introduction

Paragraph (a) is an introductory provision to § 351.227, which briefly describes the framework of CBP's EAPA investigations and covered merchandise referrals under section 517 of the Act and the procedures for Commerce's covered merchandise inquiries and determinations. We received no comments on § 351.227(a) and no changes are being made to this provision in this final rule.

2. Section 351.227(b)—Actions With Respect to Covered Merchandise Referral

Under § 351.227(b) of the *Proposed Rule,* Commerce proposed taking one of the following three actions within 15 days after receiving a covered merchandise referral that Commerce determines to be sufficient:[174] (1) Initiate a covered merchandise inquiry; (2) self-initiate a circumvention inquiry in accordance with § 351.226(b); or (3) address the referral in an ongoing segment of a proceeding (*e.g.,* a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226). After consideration of comments on the *Proposed Rule,* Commerce is adopting certain changes to § 351.227(b) in this final rule.

First, upon further consideration, we find it reasonable to increase the time period during which Commerce must decide what action to take upon receipt of a sufficient covered merchandise referral from 15 days to 20 days. In the *Proposed Rule,* we explained that, although the EAPA does not prescribe timing requirements for Commerce, we took timeliness into account in drafting the proposed deadlines and procedures in § 351.227.[175] While timeliness continues to be a significant consideration in drafting this final rule, increasing the proposed 15-day deadline to 20 days will give Commerce the time it needs at this initial stage while also ensuring that Commerce takes swift action after receiving a sufficient covered merchandise referral. This 20-

[170] *See Proposed Rule,* 85 FR 49472 at 49489.

[171] *Id.* at 49489–91.

[172] *Id.* at 49489–90.

[173] *See* section 517(b)(4)(A)(i) of the Act (providing that, upon referral from CBP, Commerce shall ''. . . determine whether the merchandise is covered merchandise pursuant to the authority of [Commerce] under subtitle IV [of the Act.]'').

[174] As explained in the *Proposed Rule,* in determining whether a covered merchandise referral is sufficient, Commerce may consider, among other things, whether the referral has provided the name and contact information of the parties to CBP's EAPA investigation, including the name and contact information of any known representative acting on behalf of such parties; an adequate description of the alleged covered merchandise; identification of the applicable AD and/or CVD orders; and any necessary information reasonably available to CBP regarding whether the merchandise at issue is covered merchandise. *See Proposed Rule,* 85 FR 49472 at 49490.

[175] *See Proposed Rule,* 85 FR 49472 at 49489.

day deadline remains shorter than the deadlines at similar stages in scope inquiries under § 351.225(d) (30 days with an inquiry deemed initiated on day 31) and circumvention inquiries under § 351.226(d) (30 days with the possibility of a 15-day extension).

Second, we are removing one of the three actions in § 351.227 that Commerce proposed to take upon receiving a sufficient covered merchandise referral—paragraph (b)(2) that had provided that Commerce may self-initiate a circumvention inquiry in accordance with § 351.226(b). To be clear, Commerce retains the authority and discretion to self-initiate a circumvention inquiry pursuant to § 351.226(b) if it determines from available information that an inquiry is warranted. However, we are adopting an approach which will allow Commerce to immediately initiate a covered merchandise inquiry within 20 days of receipt of a sufficient referral and conduct a circumvention analysis in reaching a covered merchandise determination. Specifically, under § 351.227(b)(1), when read in conjunction with paragraph (f), Commerce may initiate a covered merchandise inquiry and rely on either the scope analysis described under § 351.225(j) or (k), or the circumvention criteria under section 781 of the Act (as reflected in paragraphs (h), (i), (j), and (k) of § 351.226), in issuing a covered merchandise determination. Importantly, initiation of a covered merchandise inquiry simply allows Commerce to begin its inquiry into the appropriate analysis to use for its covered merchandise determination. In other words, Commerce does not need to have identified, at this early stage of the proceeding, before the benefit of evidence and argument presented by interested parties, whether to conduct a scope or circumvention analysis. Rather, Commerce will consider the appropriate analysis on a case-by-case basis.

This framework, coupled with the expedited deadlines for completion of a covered merchandise inquiry under § 351.227(c) (a maximum deadline of 270 days, rather than a maximum deadline of 365 days under § 351.226(e) for completion of a circumvention inquiry), means that Commerce can still apply the same analysis and reach the same determination it would if it self-initiated a circumvention inquiry, but on an expedited basis. An additional consideration informing this approach is that, although a covered merchandise referral may be found sufficient for purposes of initiating a covered merchandise inquiry, a referral likely will not have all the information needed regarding the elements necessary for a circumvention determination under section 781 of the Act, as required for self-initiation of a circumvention inquiry under § 351.226(b).[176] Thus, under this preferred approach described in § 351.227(b)(1), Commerce can initiate its covered merchandise inquiry, collect information and arguments from interested parties regarding either a scope analysis or the elements necessary for a circumvention determination (or both), and issue a determination on an expedited basis. For these reasons, we have removed reference to § 351.226(b) in § 351.227(b).

The one alternative to § 351.227(b)(1) is provided in § 351.227(b)(2) (paragraph (b)(3) in the *Proposed Rule*). Under this alternative, Commerce envisions that a scope or circumvention inquiry may already be underway at the time Commerce receives a sufficient covered merchandise referral. In this scenario, Commerce may elect to address the referral in an ongoing segment of the proceeding, rather than starting at the beginning of a new inquiry. Under such a scenario, as provided under § 351.227(e)(3), Commerce would transmit a copy of the final action in that segment to CBP in accordance with section 517(b)(4)(B) of the Act.

These changes simplify the procedures for covered merchandise referrals and still provide for the flexibility that Commerce endeavored to create in the *Proposed Rule.* The remaining changes to § 351.227(b) consist of minor revisions to the text of the two remaining subparagraphs and conforming changes required after removal of proposed § 351.227(b)(2).

(a) Authority To Self-Initiate a Circumvention Inquiry and To Integrate Covered Merchandise Referrals Into Other Segments

One commenter asserts that Commerce is not authorized to use scope or circumvention tools to address covered merchandise referrals. This commenter opposes the covered merchandise regulations on the basis that CBP's EAPA investigations are largely conducted in secret and these investigations do not conform to Commerce's unfair trade practice or the AD Agreement. This commenter appears to argue that Commerce should not pursue any additional fact-finding inquiries in addition to CBP's own inquiry, claiming that the legislative history of section 517 of the Act has made it clear that either Commerce or CBP was intended to conduct investigations of evasion, but not both. This commenter argues that Commerce's own factual inquiry is a waste of resources and a burden on the parties in an EAPA investigation. This commenter further argues that EAPA-covered merchandise referrals should not be intertwined with a circumvention inquiry or any other ongoing segment of a proceeding. In the alternative, this commenter argues that Commerce should not be permitted to self-initiate a circumvention inquiry unless it can meet the requirements set forth under proposed § 351.226(c)(2). This commenter also argues that Commerce should refrain from conducting a circumvention inquiry within the framework of an EAPA investigation because of the harsh consequences of EAPA investigations. The commenter claims that the proposed regulatory provision requiring that Commerce merely believe that an inquiry is ''warranted'' to initiate invites an abuse of Commerce's self-given authority to self-initiate a circumvention inquiry. The commenter asserts that if Commerce cannot resolve the scope issue that is the basis of CBP's covered merchandise referral within a reasonable time, then CBP's EAPA investigation should be concluded with no finding of evasion. After such a conclusion, Commerce could then conduct its circumvention inquiry within the framework of its own statutory authority. This commenter also made general comments about the differences between CBP's and Commerce's authority and claimed that Commerce does not have the authority to intertwine EAPA-covered merchandise referrals and AD/CVD proceedings.

A few commenters assert that the *Proposed Rule* does not explain why a referral from CBP should be treated differently, nor does the *Proposed Rule* justify Commerce's authority to do so. Another commenter argued that Commerce needs to distinguish between its different proceedings, including scope, circumvention, and covered merchandise inquiries, in order to ensure predictability and legal certainty for stakeholders. This commenter requested clarification on the implication that, in its response to CBP on covered merchandise referrals, Commerce may rely on varying analyses regarding country of origin, scope rulings, or circumvention.

Several commenters rebut the assertion that Commerce cannot self-initiate a circumvention inquiry or

[176] This is because, for example, the information CBP provides with its referral may pertain only to a single company, may rely heavily on BPI, or may not provide the kind of detail Commerce might need to self-initiate a circumvention inquiry.

integrate covered merchandise referrals into other segments of the proceeding. They argue that Congress authorized CBP to make a covered merchandise referral to Commerce so that Commerce may determine whether the products are covered by the scope of an order. They note that nothing precludes Commerce from relying on information from an EAPA investigation to initiate an inquiry under its own authority. They state that U.S. government agencies must take a coordinated approach to enforce trade laws and protect domestic industries. They also state that arguments that EAPA investigations and Commerce's proceedings should never be intertwined are irrelevant, legally flawed, and should be dismissed.

Response:

We disagree with the commenters that argue Commerce should not conduct a covered merchandise inquiry in response to a covered merchandise referral from CBP. As explained in the *Proposed Rule,*[177] pursuant to section 421 of the TFTEA/EAPA, section 517 was added to the Act and establishes a formal process for CBP to conduct an EAPA investigation. If CBP is unable to determine whether the merchandise at issue is covered merchandise within the meaning of section 517(a)(3) of the Act, then section 517(b)(4) of the Act requires CBP to make a covered merchandise referral to Commerce. Pursuant to section 517(b)(4)(A)(i) of the Act, Commerce determines whether merchandise is covered by the scope of an order ''pursuant to the authority of the administering authority under title VII.'' Title VII of the Act provides the basis for Commerce's authority to administer the AD/CVD laws, including making class or kind determinations.[178] Thus, Congress expressly provided that, in answering a covered merchandise referral, Commerce should use its existing authority to determine whether the merchandise at issue is covered by the scope of the order. In doing so, Congress did not limit Commerce in the procedures that it may use to determine whether the merchandise at issue is covered by the scope of an order.

The commenter's arguments regarding the legislative history and whether Commerce should be pursuing any fact-finding inquiry in relation to a covered merchandise referral from CBP are contrary to Congress's intent as expressed in the language of section 517 of the Act. When CBP submits its referral to Commerce, Commerce is charged with determining if the merchandise at issue is subject to the scope of an order. If Commerce could not request information from parties, and conduct its own fact-finding inquiry, then it would be unable to perform its function under the statute to answer CBP's referral. Commerce's existing authority allows it to conduct its own fact-finding inquiry to make a class or kind determination and, as explained in the *Proposed Rule,* § 351.227 allows for flexibility in relying on the standards for scope issues under § 351.225 or circumvention issues under § 351.226, as appropriate, in issuing a covered merchandise determination. While Commerce has only received a limited number of these referrals to date, analyzing a covered merchandise referral under these criteria is consistent with how Commerce has answered covered merchandise referrals.[179] For further clarity, as provided in adopted § 351.227(b)(2), Commerce may also address a covered merchandise referral in the context of an ongoing segment of the proceeding. Furthermore, as discussed below under § 351.227(d)(5)(ii), Commerce may also rescind a covered merchandise inquiry and address a covered merchandise referral in another segment of the proceeding, as appropriate.

Nor do we agree with commenters' argument that Commerce does not have the authority to self-initiate a circumvention inquiry in the context of a covered merchandise referral. As explained above, Congress authorized Commerce to determine whether the merchandise at issue is covered by the scope of an order, and Congress did not limit Commerce's discretion in determining the appropriate procedures to make a covered merchandise determination. In any event, as explained above, Commerce has removed the express reference to self-initiation of a circumvention inquiry under § 351.227(b) for purposes of streamlining its procedures because a circumvention analysis can be performed, on an expedited basis, in a covered merchandise inquiry as provided for under § 351.227(b) and (f). Nor do we find persuasive the argument that Commerce must refrain from conducting a circumvention inquiry within the framework of an EAPA investigation because of the ''harsh consequences'' of an EAPA investigation. Notably, while Commerce's and CBP's duties and responsibilities under the AD/CVD statutory framework are often related, Commerce and CBP are U.S. government agencies that operate independently and pursuant to distinct statutory mandates and authorities. CBP's EAPA investigation and Commerce's segment answering a covered merchandise referral are two separate proceedings and each proceeding addresses different issues. CBP's EAPA investigation addresses evasion concerns as outlined under section 517 of the Act. This is distinct from, but aided by, Commerce's covered merchandise inquiry (or another segment of the proceeding used to address a covered merchandise referral), which determines whether merchandise is subject to the scope of an order.

Additionally, the adoption of § 351.227 is intended to fit into the current statutory scheme and the revised regulatory framework adopted in this final rule, under which Commerce may already request participation of interested parties and issue a substantive determination whether certain merchandise is covered by the scope of an AD/CVD order.

We also disagree with a commenter's argument that if Commerce cannot resolve the scope issue that is the basis of CBP's referral within a reasonable time, then CBP's EAPA investigation should be concluded with no finding of evasion, and that Commerce can then examine whether the merchandise is circumventing an order. First, as Commerce noted in the *Proposed Rule,* Congress did not prescribe timing requirements for Commerce to reach its covered merchandise determination. As contemplated in the *Proposed Rule,* there may be a need for Commerce to seek further information to establish a more detailed description of the merchandise at issue, or engage in a complex analysis, before determining whether the merchandise is covered merchandise. Commerce is mindful that section 517(b)(4)(B) of the Act instructs Commerce to promptly transmit its determination to CBP, and that CBP's deadlines to complete its EAPA investigation will be stayed pending completion of Commerce's covered merchandise determination. At the same time, as explained further below in response to comments on proposed paragraph (c), Commerce requires

[177] *See Proposed Rule,* 85 FR 49472 at 49489.

[178] *Id.* at 49475, 49484; *see also* section 701(a) of the Act; section 706(a)(2) of the Act; section 731(a) of the Act; section 736(a)(2) of the Act; and section 771(25) of the Act.

[179] Commerce has addressed covered merchandise referrals using both scope and circumvention analyses. *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Notice of Covered Merchandise Referral,* 83 FR 9272 (March 5, 2018) (*Wooden Bedroom Furniture*); *Hydrofluorocarbon Blends From the People's Republic of China: Notice of Covered Merchandise Referral,* 83 FR 9277 (March 5, 2018) (*HFC Blends*); and *Diamond Sawblades and Parts Thereof From the People's Republic of China: Notice of Covered Merchandise Referral,* 83 FR 9280 (March 5, 2018) (*Diamond Sawblades*).

sufficient time to request necessary information, allow parties an opportunity to comment and submit factual information, analyze the issues and record evidence, and to issue a covered merchandise determination. The deadlines established in paragraph (c) ensure that Commerce will issue a covered merchandise determination within a reasonable timeframe and are more expedient than the deadlines established for scope and circumvention inquiries.

Second, this commenter's argument conflates the two different proceedings. Under section 517(b)(4)(A)(i) of the Act, Commerce is tasked with determining whether the merchandise at issue is covered by the scope of the order, not determining whether covered merchandise has entered the United States through evasion.

Finally, as noted above, Commerce is not precluded from conducting a covered merchandise referral in a circumvention inquiry as a means to address CBP's covered merchandise referral. The commenter's argument to the contrary suffers from the misconception that unliquidated entries of products that circumvent an AD/CVD order and enter without the payment of duties are beyond the reach of trade remedies unless and until a domestic interested party alerts Commerce that circumvention is occurring and Commerce actually initiates a circumvention inquiry. Congress enacted section 781 of the Act to combat certain forms of circumvention of AD and CVD orders; however, neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding when merchandise found to be circumventing an AD and/or CVD order should be subject to the order. As discussed in great detail above in our analysis under § 351.226(l), merchandise not covered by the literal terms of an order may, under certain factual scenarios, be subject to the imposition of AD/CVDs prior to the date a circumvention inquiry is initiated. Moreover, Commerce's regulations do not address CBP's independent authority to suspend liquidation for purposes of its EAPA investigation under section 517 of the Act.

(b) Participation of Interested Parties and Opportunity to Comment Prior to Initiation

We received a few comments on proposed § 351.227(b) requesting clarification on the participation of interested parties in the segment of the proceeding used to address a covered merchandise referral, as well as whether parties will have an opportunity to comment on a covered merchandise referral prior to Commerce initiating a covered merchandise inquiry. One commenter noted that in the *Proposed Rule,* Commerce stated it will decide whether to initiate an inquiry in response to a covered merchandise referral from CBP within 15 days. This commenter requested that Commerce modify proposed § 351.227(b) to notify interested parties on the annual inquiry service list of the referral from CBP within 7 days of receipt of the referral. This commenter also requested that Commerce provide parties an opportunity to comment on the referral prior to initiating a covered merchandise inquiry.

Another commenter rebutted the request to provide notice to petitioners and other interested parties on the annual inquiry service list when Commerce receives a covered merchandise referral from CBP. This commenter requested that we not allow these parties an opportunity to comment on the covered merchandise referral prior to initiating a covered merchandise referral.

Response:

Commerce is not adopting the recommendation to notify interested parties on the annual inquiry service list when Commerce receives a covered merchandise referral from CBP. Nor is Commerce adopting the recommendation to allow parties to comment on the covered merchandise referral prior to initiating a covered merchandise inquiry. As explained above, Congress authorized CBP to investigate evasion of AD/CVD orders. If CBP cannot determine whether the merchandise at issue is covered merchandise, then it is required to refer the inquiry to Commerce and Commerce is required to make a covered merchandise determination. Given this statutory directive, Commerce will not notify parties or allow parties the opportunity to comment on the covered merchandise referral prior to taking action in response to a referral. Instead, Commerce will publish notice of its intent to address the covered merchandise referral pursuant to § 351.227(b) in the **Federal Register**, allow parties the opportunity to enter an appearance on the segment-specific service list, submit an APO application, and review and comment on the referral in accordance with its outlined procedures.

Additionally, Commerce disagrees with one commenter's claim that it cannot allow any party that is not an interested party in CBP's EAPA investigation to participate in a covered merchandise inquiry. As explained above, pursuant to section 517(b)(4)(A)(i) of the Act, Commerce determines whether merchandise is covered by the scope of an order ''pursuant to the authority of the administering authority under title VII.'' Title VII of the Act provides the basis for Commerce's authority to administer the AD/CVD laws, including making class or kind determinations.[180] Thus, Congress expressly provided that Commerce should use its existing authority in responding to a covered merchandise referral from CBP. By statute, Commerce provides interested parties the opportunity to comment and participate in AD/CVD proceedings.[181] Commerce has provided additional explanation below under proposed § 351.227(n) in response to this comment regarding interested party participation in Commerce's segment of the proceeding addressing a covered merchandise referral.

3. Section 351.227(c)—Deadlines for Covered Merchandise Determinations

Section 351.227(c) of the *Proposed Rule* provided the deadline for Commerce to conduct covered merchandise inquiries and also set forth that Commerce could only extend the deadline if it determines that the inquiry is extraordinarily complicated. After consideration of the comments on the *Proposed Rule,* detailed below, and in light of changes to §§ 351.225 and 351.226, Commerce is adopting certain changes to § 351.227(c) in this final rule. For clarity, we first describe the revisions to § 351.227(c) in these introductory paragraphs, before discussing comments and responses to comments below.

To conform with similar provisions in §§ 351.225 and 351.226, we have revised the heading of proposed § 351.227(c) from ''Time limits'' to ''Deadlines for covered merchandise determinations,'' which better reflects the nature of this. Similarly, as with §§ 351.225 and 351.226, we have moved and made minor revisions to the provision allowing for alignment of the deadlines for a covered merchandise

[180] *See Proposed Rule,* 85 FR 49472 at 49475, 49484; *see also* section 701(a) of the Act; section 706(a)(2) of the Act; section 731(a) of the Act; section 736(a)(2) of the Act; and section 771(25) of the Act.

[181] *See* section 782(g) of the Act (''Information that is submitted on a timely basis to the administering authority . . . during the course of a proceeding under this title shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority . . . shall provide.''); *see also Mid Continent Nail Corp.* v. *United States,* 712 F. Supp. 2d 1370, 1375 (CIT 2010) (''Congress has provided a fair process for commenting within the statutory language of [section 782(g) of the Act].'').

determination with the deadlines in another segment of a proceeding from proposed § 351.227(d)(6) to § 351.227(c)(3). Placing the alignment provision within § 351.227(c) clarifies that the deadline for a covered merchandise determination will no longer apply if the deadline for the covered merchandise inquiry is aligned with the deadlines of another segment of the proceeding.

While we are adopting § 351.227(c)(1) and the initial 120-day deadline for a covered merchandise determination as proposed in the *Proposed Rule,* as further explained below, we are changing § 351.227(c)(2) in this final rule to increase the number of days that Commerce may extend the deadlines for issuing a final covered merchandise determination from an additional 60 days to up to an additional 150 days (for a fully-extended total of 270 days). Additionally, we are changing the standard for an extension under § 351.227(c)(2) from ''extraordinarily complicated'' to ''good cause,'' and have provided examples of situations in which good cause exists to warrant an extension. One example of good cause specific to covered merchandise inquiries that we have added in § 351.227(c)(2)(iii) refers to a situation where Commerce has determined to address a scope or circumvention issue from another segment of the proceeding (such as a scope or circumvention inquiry) involving the same or similar products in the covered merchandise inquiry. These changes provide Commerce with flexibility as it continues to gain experience in this new area of the law, establish procedures that remain more expedient than those provided for scope inquiries under § 351.225 and circumvention inquiries under § 351.226, and ensure that Commerce will have sufficient time to consider all evidence and arguments submitted and reach a well-reasoned determination that may be subject to judicial review.

As noted above, Commerce received numerous comments on § 351.227(c). Summaries of those comments, and responses to those comments, are provided below.

(a) Clarification of Applicable Deadlines

We received several comments asking for clarification of the applicable deadlines when Commerce receives a covered merchandise referral, or otherwise proposing alternative deadlines. Several commenters generally request that Commerce complete covered merchandise inquiries on an expedited basis. One group of commenters proposes that Commerce complete a covered merchandise inquiry within 45 days of the initiation notice publication date, with an extension possibility of an additional 45 days if the covered merchandise inquiry is extraordinarily complicated. This group of commenters argues that an expedited timeframe is appropriate and fair because parties have already participated in the EAPA investigation for up to 360 days. Two other commenters propose that the expedited timeframes in proposed § 351.227(c) should apply to circumvention inquiries self-initiated under proposed § 351.227(b)(2). One commenter requests clarification of what time limits apply when Commerce addresses a covered merchandise referral in an ongoing segment under proposed § 351.227(b)(3). Another commenter proposes that Commerce revise proposed § 351.227(b)(3) to state that Commerce will address a covered merchandise referral in an ongoing segment only if Commerce determines it can do so ''without undue delay.''

Response:

We have not adopted the proposed modifications to further expedite the deadlines in Commerce's covered merchandise inquiries. As explained further below, we have made changes to § 351.227(c) to maintain flexibility and to provide Commerce additional time to complete a covered merchandise inquiry. Specifically, although we are adopting the initial 120-day period under § 351.227(c)(1), we are increasing the number of days that Commerce may extend the deadlines for issuing a final covered merchandise determination under paragraph (c)(2) from an additional 60 days to up to an additional 150 days (for a fully-extended total of 270 days). Additionally, we are changing the standard for an extension from ''extraordinarily complicated'' to ''good cause,'' and have provided examples of situations in which good cause exists to warrant an extension. We believe an ''extraordinarily complicated'' standard would unduly restrict Commerce's ability to extend the deadline and, although the same standard is provided under new § 351.226(e)(2), that heightened standard applies only to an extension that goes beyond the 300-day deadline referenced in the statute for a final circumvention determination.[182] We believe that applying the same standard in covered merchandise inquiries at the 120-day mark is unworkable and fails to recognize that covered merchandise referrals will often present complex scope and circumvention issues.

As we stated in the *Proposed Rule,* in proposing § 351.227, Commerce has taken into account considerations relating to flexibility in Commerce's ability to request information necessary for its analysis in reaching a covered merchandise determination, timeliness, and scheduling that allows Commerce sufficient time to analyze the issues and the record evidence and issue a determination that may be subject to judicial review.[183] Although the EAPA does not prescribe timing requirements for Commerce to reach its covered merchandise determinations, Commerce is mindful that section 517(b)(4)(B) of the Act instructs Commerce to promptly transmit its determination to CBP, and that CBP's deadlines to complete its EAPA investigation will be stayed pending completion of Commerce's covered merchandise determination. Upon further consideration, Commerce believes additional time may be necessary to allow Commerce sufficient time to request necessary information, allow parties an opportunity to comment and submit factual information, analyze the issues and record evidence, and to issue a covered merchandise determination. As explained below in our discussion of § 351.227(d), we have increased the time periods for parties to comment and submit factual information. While these increases provide interested parties with additional time to comment and submit factual information to Commerce, they further shorten the time Commerce has to consider and analyze such information, and to subsequently issue a timely and well-reasoned covered merchandise determination that may be subject to judicial review.

Additionally, Commerce is cognizant that covered merchandise inquiries are a new type of segment, and, to date, the limited number of covered merchandise referrals Commerce has received have presented novel or complex issues. Thus, Commerce believes it is important to maintain flexibility to ensure sufficient time for Commerce to complete a covered merchandise determination. Nonetheless, Commerce continues to be mindful of timeliness considerations and notes that even with the additional extension days, the deadline to complete a fully extended covered merchandise inquiry under § 351.227(b)(1) is shorter than the deadlines to complete a fully extended scope or circumvention inquiry under §§ 351.225 and 351.226. Moreover, it is not necessarily the case that Commerce

[182] *See* section 781(f) of the Act.

[183] *See Proposed Rule,* 85 FR 49472 at 49489–90.

will always extend the deadline for a covered merchandise inquiry, especially when the inquiry is fairly simple, straightforward, and/or uncontested. In such cases, Commerce might issue a covered merchandise determination within the initial 120-day period provided under § 351.227(c)(1). Nor is it necessarily the case that Commerce will extend the deadline of a covered merchandise inquiry the full 150 days allowed under § 351.227(c)(2) if Commerce is able to issue a covered merchandise determination within a shorter timeframe.

In response to the comment that the expedited time frames in § 351.227(c) should apply to circumvention inquiries self-initiated under proposed § 351.227(b)(2), as discussed above, we have removed this proposed subparagraph. However, to be clear, Commerce maintains its authority to self-initiate a circumvention inquiry under § 351.226(b) if it determines from available information that an inquiry is warranted. If Commerce self-initiates a circumvention inquiry, § 351.226 would govern and the deadlines under § 351.226(e) would apply.

In response to the comment asking for clarification of what deadlines apply when Commerce addresses a covered merchandise referral in an ongoing segment of the proceeding, we clarify that, in that situation, the deadlines in the ongoing segment would continue to apply. By contrast, if Commerce initiates a covered merchandise inquiry under § 351.227(b)(1), the expedited deadlines of § 351.227(c) apply.

In response to the comment that Commerce should only address a covered merchandise referral in an ongoing segment if it determines it can do so ''without undue delay,'' we disagree that it is necessary to revise the regulation to include this language. As noted above, however, Commerce is mindful of timeliness considerations and will continue to take these considerations into account when it receives a covered merchandise referral from CBP.

(b) Deadline for Issuance of Preliminary Covered Merchandise Determinations

One commenter argues that Commerce should also have a deadline for preliminary covered merchandise determinations when not issued concurrently with the initiation of a covered merchandise inquiry. According to this commenter, this would allow for greater certainty and clarity because interested parties would know when to expect a preliminary covered merchandise determination.

Response:

We have not adopted changes establishing a deadline for preliminary covered merchandise determinations. As with scope inquiries, Commerce is not required to issue a preliminary covered merchandise determination in every case. When Commerce determines that a preliminary covered merchandise determination is warranted, we do not believe Commerce should be restricted by a specific deadline in the regulations. Instead, we believe that Commerce should have the flexibility to determine whether to issue a preliminary covered merchandise determination. Furthermore, it would be unreasonable to require Commerce to issue a preliminary covered merchandise determination when the facts on the record are simple enough for Commerce to issue a final covered merchandise determination on or before 120 days after the date of notice of initiation of a covered merchandise inquiry is published in the **Federal Register**. Therefore, we have not modified the deadlines in § 351.227(c) to mandate the issuance of a preliminary covered merchandise determination.

4. Section 351.227(d)—Covered Merchandise Inquiry Procedures

Section 351.227(d) of the *Proposed Rule* provides the procedures for covered merchandise inquiries, including the deadlines for comments and the submission of factual information, in the event such an inquiry is initiated pursuant to paragraph (b)(1). Much of this provision tracks the procedures provided for scope inquiries under § 351.225(f) and circumvention inquiries under § 351.226(f). As discussed above, we have considered the comments submitted regarding these procedures and have determined to modify the proposed deadlines to allow interested parties additional time to submit comments and factual information from 20 to 30 days under § 351.227(d)(1), from 10 to 14 days under § 351.227(d)(1) through (3), and from five to seven days under § 351.227(d)(2) and (3). This follows the same modifications to the deadlines for comments and factual information in scope and circumvention inquiries under §§ 351.225 and 351.226. We have also made a minor revision to the text of § 351.227(d)(3) to add language that was inadvertently omitted in the *Proposed Rule.* Within proposed § 351.227(d)(4), one commenter identified an incorrect reference to ''paragraphs (e)(1) through (3),'' which we are correcting to make reference to ''paragraphs (d)(1) through (3)'' as intended in the *Proposed Rule.*

Additionally, in line with the changes to similar provisions in §§ 351.225 and 351.226, we have made changes to § 351.227(d)(5) to provide clarity and to establish more streamlined procedures in covered merchandise inquiries. Specifically, we have limited this provision to provide that Commerce may rescind a covered merchandise inquiry in a variety of situations and removed language indicating that Commerce may ''forgo'' such an inquiry. As established under § 351.227(b)(2), Commerce may determine not to initiate a covered merchandise inquiry if it determines to address the issue in another segment of the proceeding. With respect to rescission, § 351.227(d)(5) provides that, if Commerce determines it appropriate to do so, Commerce may rescind, in whole or in part, a covered merchandise inquiry. We have also included an express requirement for Commerce to notify interested parties when a covered merchandise inquiry has been rescinded.

Proposed § 351.227(d)(5) further provided a non-exhaustive list of three situations in which Commerce may rescind a covered merchandise inquiry. In this final rule, we have adopted the first situation listed in § 351.227(d)(5)(i) (*i.e.,* rescission when CBP withdraws its covered merchandise referral). We have removed proposed § 351.227(d)(5)(ii) and (iii), which, upon reflection, may have led to some confusion about the interplay between covered merchandise inquiries and other segments of a proceeding. Therefore, we are adopting a new § 351.227(d)(5)(ii) to describe a situation where, after initiation of a covered merchandise inquiry, Commerce may rescind the inquiry if it determines that it can address the covered merchandise referral in an ongoing scope or circumvention inquiry. Under such a scenario, as provided under § 351.227(e)(3), Commerce would transmit a copy of the final action in that segment to CBP in accordance with section 517(b)(4)(B) of the Act. These changes also reflect that we do not consider it appropriate to rely on a prior scope or circumvention determination to serve as the basis for a covered merchandise determination without conducting an inquiry (whether a covered merchandise inquiry or an ongoing scope or circumvention inquiry) and affording interested parties an opportunity to participate.

Lastly, we have made modifications to proposed § 351.227(d)(6) to conform to the changes being made to similar provisions in §§ 351.225 and 351.226 discussed above. In addition to minor revisions to the text of proposed § 351.227(d)(6), we have moved and

made minor revisions to the provision allowing for alignment of the deadlines for a covered merchandise determination with the deadlines in another segment of a proceeding from proposed § 351.227(d)(6) to § 351.227(c)(3), as explained above. We have also moved the provision explaining that Commerce may request information concerning the product that is the subject of a covered merchandise inquiry with respect to another segment of the proceeding, such as an administrative review, from proposed § 351.227(m)(2) to § 351.227(d)(7). The changes we have made are reflected in the regulatory text adopted in this final rule.

Several commenters propose that Commerce allow interested parties an opportunity to comment and provide factual information prior to any decision to rescind a covered merchandise inquiry under proposed § 351.227(d)(5). These commenters indicate that there may be instances where Commerce decides to address its covered merchandise determination in a separate segment of the proceeding, but an interested party believes that the separate segment does not cover the product that is the subject of the referral. These commenters suggest that Commerce provide a period for interested parties to comment and provide factual information on a decision that a determination in another segment negates the need to conduct a covered merchandise inquiry, and further claim that this would serve as a procedural safeguard before rescission.

One commenter submitted rebuttal comments generally arguing that EAPA covered merchandise referrals and Commerce's AD/CVD proceedings should be kept separate, and that Commerce should not allow parties that are not a party to CBP's EAPA investigation to participate in covered merchandise inquires whatsoever.

Response:

Commerce is not adopting the proposal to allow interested parties an opportunity to comment and provide factual information prior to a decision to rescind a covered merchandise inquiry under § 351.227(d)(5). As stated in the *Proposed Rule,* Commerce recognizes the potential significant overlap between a covered merchandise inquiry, scope inquiry, circumvention inquiry, and any other segments of a proceeding that may address scope issues.[184] There may be situatiIns in which it may not be apparent that Commerce can address a covered merchandise referral in another segment of a proceeding until after Commerce initiates a covered merchandise inquiry under § 351.227(b)(1). Additionally, there may be situations in which CBP withdraws its request for a covered merchandise inquiry. In such situations, Commerce maintains its flexibility to rescind the covered merchandise inquiry. Although Commerce appreciates the concern that interested parties may not agree with a decision to rescind a covered merchandise inquiry, Commerce disagrees that it should provide a period for comment and submission of factual information in these instances. Commerce notes that it already provides interested parties multiple opportunities to comment and provide factual information under § 351.227(d), including after initiation of a covered merchandise inquiry. To the extent interested parties believe that Commerce should proceed with a covered merchandise inquiry after initiation, parties may provide comments to that effect at that time.

We disagree with the comment that Commerce should not allow parties that are not a party to CBP's EAPA investigation to participate in covered merchandise inquiries whatsoever. As also explained in response to similar comments submitted regarding proposed § 351.227(b) and (n), section 517 of the Act provides that Commerce should use its existing authority to determine whether the merchandise at issue is covered merchandise in responding to a covered merchandise referral from CBP.[185] By statute, Commerce provides interested parties the opportunity to comment and participate in AD/CVD proceedings.[186] Commerce believes that this authority equally applies when it makes covered merchandise determinations, which may apply more broadly to merchandise that is produced, exported, or imported by interested parties that are not a party to CBP's EAPA investigation itself. Thus, Commerce disagrees that it should not allow parties that are not a party to CBP's EAPA investigation to participate in Commerce's covered merchandise inquiries.

5. Section 351.227(e)—Covered Merchandise Determinations

Section 351.227(e) addresses covered merchandise determinations issued by Commerce either in connection with a covered merchandise inquiry or another segment of the proceeding under which Commerce addresses a covered merchandise referral. Apart from a minor revision to the text in § 351.227(e)(3), no changes are being made to this provision in this final rule.

One commenter notes that in proposed § 351.227(e)(2) and (3), Commerce specifies that a final determination as to whether merchandise is covered by the scope of an order shall be ''promptly'' transmitted to Commerce. This commenter requests that the term ''promptly'' be expressly defined to mean no later than seven days after publication of a final determination in the **Federal Register**. This commenter notes that defining ''promptly'' will provide additional clarity and consistency, and support transparency.

Response:

We are not adopting the proposal to define ''promptly'' in § 351.227(e)(2) and (3) to mean no later than seven days after publication of a final determination. As Commerce stated in the *Proposed Rule,* the term ''promptly'' is not defined in section 517(b)(4)(B) of the Act.[187] However, consistent with the use of the same term in revised §§ 351.225 and 351.226, it is Commerce's expectation that prompt conveyance and transmittal of a copy of the final covered merchandise determination to CBP normally would occur no more than five business days from the publication of the determination in the **Federal Register**. We further clarify that to the extent Commerce's covered merchandise determination is addressed through an ongoing scope inquiry, which would not generally result in a final scope ruling that is published in the **Federal Register**,[188] we expect that prompt conveyance and transmittal of the covered merchandise determination would normally occur no more than five business days from the date of issuance of the final scope ruling.

6. Section 351.227(f)—Basis for Covered Merchandise Determination

Section 351.227(f) in the *Proposed Rule* provided that Commerce may rely on the standards under § 351.227(j) and (k) of § 351.225, or the provisions of section 781 of the Act (paragraphs (h), (i), (j), or (k) of § 351.226), in reaching a covered merchandise determination. We have made minor revisions to clarify that Commerce may utilize the analyses described in any of the aforementioned

[184] *Id.* at 49490.

[185] *See* section 517(b)(4)(A)(i) of the Act.

[186] *See* section 782(g) of the Act.

[187] *See Proposed Rule,* 85 FR 49472 at 49490.

[188] Although final scope rulings are not published in the **Federal Register**, under § 351.225(o)), on a quarterly basis, Commerce publishes in the **Federal Register** a list of final scope rulings issued within the previous three months. Under § 351.225(o), Commerce may also include complete public versions of scope rulings on its website should it determine such placement is warranted.

provisions when conducting a covered merchandise inquiry.

(a) Circumvention Analysis To Address Covered Merchandise Referrals

One commenter argues that Commerce should refrain from conducting a circumvention inquiry within the framework of an EAPA investigation because of the harsh consequences parties may face in EAPA investigations. The commenter asserts that if Commerce cannot resolve the scope issue that is the basis of CBP's covered merchandise referral within a reasonable time, then CBP's EAPA investigation should be concluded with no finding of evasion. After such a conclusion, Commerce could then conduct its circumvention inquiry within the framework of its own statutory authority.

Response:

We disagree with this commenter. We have already addressed this commenter's arguments on proposed § 351.227(b) in relation to Commerce's authority to address a covered merchandise referral in another segment of the proceeding (*i.e.,* an ongoing circumvention inquiry), and incorporate our response herein. However, we are also addressing this commenter's arguments in our analysis of § 351.227(f) to the extent the commenter objects to Commerce's ability to use the circumvention criteria under section 781 of the Act (paragraphs (h), (i), (j), or (k) under § 351.226) when conducting a covered merchandise inquiry. Consistent with our analysis of comments under § 351.227(b) above, we believe that we have the authority to conduct an analysis for circumvention under section 781 of the Act and § 351.226, as appropriate, in the context of a covered merchandise inquiry. Congress expressly provided that Commerce should use its existing authority in responding to a covered merchandise referral from CBP. This includes the authority to bring circumventing merchandise within the scope of an AD/CVD order. Finally, as noted above, Commerce is not limited from examining a covered merchandise referral in the context of a circumvention proceeding, as appropriate.

(b) Application of Facts Available and Facts Available With an Adverse Inference in Covered Merchandise Inquiries

One commenter requests that, as Commerce stated with regard to § 351.225 in the *Proposed Rule,* Commerce should clarify that it may apply facts available or facts available with an adverse inference, pursuant to section 776 of the Act, where a party fails to provide information requested in a covered merchandise inquiry, or in a circumvention inquiry or other segment of the proceeding that Commerce uses to address a covered merchandise referral. This commenter states that this change is necessary to align § 351.227 with § 351.225, and to avoid adverse decisions based on the view that the two provisions are not parallel and must mean different things.

Response:

We agree and clarify herein that, just as with a scope ruling under § 351.225 and a circumvention determination under § 351.226, Commerce has the authority to apply facts available, including facts available with an adverse inference, pursuant to section 776 of the Act, to covered merchandise inquiries under § 351.227.

7. Sections 351.227(g)–(k)

As explained in the *Proposed Rule,* proposed §§ 351.227(g) through (k) in § 351.227 have been reserved to maintain consistency with §§ 351.225 and 351.226.

8. Section 351.227(l)—Suspension of Liquidation

Section 351.227(l) provides the rules for the suspension of liquidation and the requirement of cash deposits for entries of the product at issue in covered merchandise inquiries. The Act does not provide direction to Commerce regarding the suspension of liquidation for entries subject to a covered merchandise inquiry. Under § 351.227(l) in the *Proposed Rule,* Commerce proposed that, at the time of an affirmative preliminary or final covered merchandise determination, Commerce would direct CBP to begin the suspension of liquidation for any unliquidated entries not yet suspended and collect applicable cash deposits. Commerce received numerous comments on § 351.227(l) for §§ 351.225 and 351.226 but received only one comment on proposed § 351.227(l) concerning notice to sureties, which has already been addressed elsewhere in this final rule (see discussion regarding § 351.225(l)). After consideration of corresponding changes to similar language in §§ 351.225(l) and 351.226(l), Commerce is adopting certain changes to § 351.227(l) in this final rule, which are briefly described below. Also discussed herein are the specific applicability dates for § 351.227(l) as referenced in the Applicability Dates section of this preamble.

Section 351.227(l)(1), which describes Commerce's actions at the time of initiation of a covered merchandise inquiry, is slightly revised from the *Proposed Rule* to mirror changes in §§ 351.225(l)(1) and 351.226(l)(1), which are described above. Additionally, because § 351.227(l)(2) and (3) concerning Commerce's actions in the event of an affirmative preliminary or final covered merchandise determination largely mirror similar provisions in §§ 351.225 and 351.226, with a few exceptions described below, we are adopting the same changes to paragraphs (l)(2) and (l)(3) in § 351.227 that are being made to the paragraphs (l)(2) and (l)(3) in §§ 351.225 and 351.226. Section 351.227(l)(4), which we touch on briefly below, describes Commerce's actions in the event of a negative final covered merchandise determination, remains unchanged from the *Proposed Rule.* Lastly, Commerce is adding a new provision, paragraph (l)(5), to include specific reference to CBP's authority, described below.

New § 351.227(l)(2)(iii) and (l)(3)(iii) provide that, at the time of an affirmative preliminary or final covered merchandise determination, Commerce normally will direct CBP to begin the suspension of liquidation of certain unliquidated entries not previously suspended, which entered before the date of publication of the notice of initiation of the inquiry, and apply the applicable cash deposit rate. Under this framework, Commerce maintains the flexibility in covered merchandise inquiries to apply, depending on the nature of the product at issue in the covered merchandise referral, rules for the suspension of liquidation and cash deposits in a manner appropriate to the situation. This includes establishing a specific alternative retroactive suspension date. If Commerce considers an alternative date for not yet suspended entries pre-dating the date of initiation, Commerce may consult with CBP.

These rules differ in significant ways from the scope and circumvention suspension of liquidation rules under §§ 351.225 and 351.226, which reflects the unique nature of a covered merchandise inquiry. Specifically, in contrast to scope and circumvention inquiries, covered merchandise inquiries are a new type of proceeding and stem from a referral from CBP concerning potential evasion. Therefore, we find it appropriate to exercise our discretion on a case-by-case basis and may consult with CBP on whether to adopt an alternative date in light of the facts of a given case, including the circumstances which led to the referral. This will allow our practice to develop on a case-by-case basis, rather than

adopt more detailed procedures in this final rule.

With respect to § 351.227(l)(4), we have retained language to provide that when Commerce issues a final negative covered merchandise determination, entries subject to suspension of liquidation as a result of another segment of a proceeding, if any, will remain suspended until the other segment of the proceeding has concluded. Although perhaps less common in this context, it is possible that there could be a scenario in which it would not be appropriate to immediately direct CBP to liquidate entries without regard to duties. Therefore, to avoid confusion in this particular scenario, this language is retained in § 351.227(l)(4).

Lastly, new § 351.227(l)(5) provides language to clarify CBP's authority to take related action. Specifically, this language clarifies that the rules established by Commerce in § 351.227 do not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures. This is identical language to the language for §§ 351.225(l) and 351.226(l), which is explained above and not repeated here.

Finally, there is one clarification to this revised framework, as noted in the **DATES** section and the Applicability Dates section of this preamble, and as discussed in great detail above regarding § 351.225(l)(2)(iii) and (l)(3)(iii) for scope inquiries and § 351.226(l)(2)(iii) and (l)(3)(iii) for circumvention inquiries, regarding the effective date and applicability dates. For the reasons explained above, Commerce will not apply paragraphs (l)(2)(iii) and (l)(3)(iii) of § 351.227 in a way that would direct CBP to begin the suspension of liquidation of unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the effective date identified in the **DATES** section. However, as discussed above, the framework established in § 351.227 does not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures.

9. Section 351.227(m)—Applicability of Covered Merchandise Determination; Companion Orders

Section 351.227(m) addresses the effect and application of covered merchandise determinations. We received no comments on proposed § 351.227(m). However, because certain changes are being made to §§ 351.225 and 351.226, as discussed above, we have made conforming changes to paragraph (m) in § 351.227, as reflected in the regulatory text adopted in this final rule.

10. Section 351.227(n)—Service List

Section 351.227(n) provides the service procedures for covered merchandise inquiries. Given the unique nature of a covered merchandise referral, which originates from another agency, and is placed on the record of the relevant segment by Commerce once deemed sufficient, there is no need to adopt similar language from §§ 351.225(n) and 351.226(n) concerning the annual inquiry service list. Rather, as provided under § 351.227(b), once Commerce determines the referral is sufficient, Commerce will publish notice of its intent to address the covered merchandise referral in either a covered merchandise inquiry or another segment of a proceeding in the **Federal Register**, allow parties the opportunity to enter an appearance on the segment-specific service list, submit an APO application, and review and comment on the referral in accordance with its outlined procedures.

Several commenters generally support interested party participation in Commerce's segment of the proceeding used to address a covered merchandise referral, while a few commenters argue that Commerce should not allow a party that is not a party in CBP's EAPA investigation to participate in Commerce's segment of the proceeding, raising the same arguments raised regarding other provisions under § 351.227.

Response:

For the reasons discussed above, we disagree that Commerce should not allow a party that is not a party in CBP's EAPA investigation to participate in a segment of the proceeding used to address a covered merchandise referral. Consistent with the statute and Commerce's practice, parties that may have an interest in a determination of whether a product is covered by the scope of an order will have the opportunity to participate in that segment of the proceeding to address a covered merchandise referral.

11. Section 351.227(o)—Suspended Investigations; Suspension Agreements

Section 351.227(o) allows the covered merchandise referral procedures set forth in § 351.227 to apply to suspended investigations and suspension agreements. We received no comments on proposed § 351.227(o). However, we have made minor revisions to reflect that Commerce may, in general, use the procedures under § 351.227 in determining whether the product at issue is covered merchandise with respect to a suspended investigation or a suspension agreement.

Certifications—§ 351.228

Section 351.228, a new provision proposed in the *Proposed Rule,* sets out procedures for complying with certification requirements that Commerce may impose on interested parties in the context of AD and CVD proceedings.[189] It also sets out consequences for a party's failure to satisfy certification requirements. We received comments from various parties regarding § 351.228. After consideration of comments, we are adopting § 351.228 as proposed in the *Proposed Rule* with clarifying edits. Specifically, we are modifying § 351.228 to reflect updated paragraph numbering and to mirror similar language regarding the suspension of liquidation, application of cash deposits, and assessment of AD/CVDs in other parts of Commerce's regulations.

1. General Comments

Several commenters generally support adopting § 351.228, because it codifies Commerce's existing practice to require certifications, for various reasons, in certain proceedings. Particularly, these commenters referred to certifications in Commerce's circumvention determinations, such as where Commerce has required parties to certify that the importer did not import, and the exporter did not ship, merchandise from a third country to the United States that originates from the country that is subject to the AD and/or CVD order. One party also explained that such certification requirements will allow Commerce to target merchandise circumventing an order with ''greater precision'' and finely tune scope language to correspond with a scope's intent. Another commenter expressed approval of Commerce's imposition of cash deposits if certifications are not provided or are false or fraudulent. Other commenters generally oppose § 351.228. Several commenters contend that additional certifications, such as those proposed in § 351.228, have little benefit towards Commerce's AD/CVD goals, are unnecessary, and are burdensome.

Response:

Commerce agrees with the comments supporting § 351.228. As discussed in the *Proposed Rule,* § 351.228 is a codification of existing practice, although it may also be applicable in contexts where it has not yet been applied, as well. For this reason,

[189] *See Proposed Rule,* 85 FR 49472 at 49491.

because § 351.228 merely codifies existing practice, we disagree with comments in opposition.

Section 351.228 itself does not impose any additional requirements on parties. Instead, this provision adopts existing practice and enhances that practice to clarify the consequences for failure to provide certifications to all parties subject to any current or future certifications. To the extent that parties are faced with any additional burdens pursuant to such certifications, such potential burdens are directly related to the proceeding itself in which Commerce adopted the certification and relevant requirements. Furthermore, as detailed below, Commerce considers the benefit that certifications afford the agency as well as CBP, including the flexibility to create certification processes in various proceedings for various reasons, to outweigh the burden on the parties. Specifically, certifications strengthen Commerce's enforcement of the AD/CVD laws, including taking steps to prevent evasion and circumvention of AD and CVD orders by producers, exporters, and importers.

In a given case, Commerce considers the burden on parties to complete the certification requirements while also taking into consideration the information that Commerce and CBP need in their respective roles in administering and enforcing AD/CVD orders. Furthermore, each certification is narrowly tailored to the particular situation—for example, allowing Commerce to target merchandise circumventing an order with ''greater precision'' and finely tune scope language to correspond with a scope's intent.

Additionally, the certifications and related requirements currently in effect and codified pursuant to § 351.228 serve a different purpose from CBP's existing requirements for importers regarding the ''reasonable care'' standard. As explained below, certifications are an additional tool for Commerce and CBP to evaluate whether entries should be filed as either not subject to an AD and/or CVD order (*e.g.,* Type 01) or subject to an AD/CVD order (*e.g.,* Type 03), beyond current requirements. In instances in which certifications are required, parties would not be able to file an entry as not subject to an AD and/or CVD order without having the information or knowledge required of the certification, in light of Commerce's determination at issue. Although this information and knowledge may be inherent in a party's entry summary paperwork, the benefit of the certification is to ensure the party exercises reasonable care when determining the proper entry type.

2. Administrability and Vagueness

One commenter believes that § 351.228 is vague and not administrable. Specifically, the commenter requests that Commerce provide a list of proceedings in which certifications will be required and propose language that parties must use to certify their merchandise. Other commenters contend that Commerce requires flexibility in identifying proceedings where certification is appropriate. These commenters identify that Commerce has used certifications in circumvention inquiries, scope inquiries, and changed circumstances reviews, and Commerce should not limit its certification practice to specific proceedings because doing so would undermine its ability to address evasion. One commenter also contends that § 351.228 is unclear regarding to whom interested parties must transmit electronic certifications or how a party may demonstrate that it has complied.

Response:

Commerce is not providing an exhaustive list of every proceeding in which it intends to impose a certification requirement consistent with § 351.228. Rather, Commerce intends to evaluate proceedings on a case-by-case basis and determine whether a certification requirement under § 351.228 is necessary due to the specific circumstances of an individual proceeding. As explained above, Commerce has implemented a certification requirement as a result of circumvention determinations,[190] but it has also instituted certification requirements to carry out the terms of certain suspension agreements and for various AD and CVD orders.[191]

Further, because Commerce intends to evaluate the circumstances of each case individually and determine whether a certification requirement is appropriate, it has provided several methods by which a party may be required to satisfy a certification requirement under § 351.228. For example, under § 351.228(a)(1), Commerce may require an interested party to maintain a completed certification, and, under § 351.228(a)(2), provide a certification electronically at the time of entry or entry summary. Additionally, under § 351.228(a)(3), where Commerce requires a party to maintain a completed certification, it may require the party to provide the certification, to whatever agency inquires, upon request. Section 351.228 also states that Commerce may require a party to otherwise demonstrate compliance with a certification requirement. Because Commerce is implementing certification requirements under § 351.228 on a case-by-case basis, it intends to issue specific instructions, if necessary, in the context of each proceeding where it implements certification requirements. Finally, Commerce is not providing certification language generally applicable in all relevant cases, but as it has done in the past, if necessary, Commerce intends to issue the relevant certification language in the context of specific proceedings.[192]

3. Relationship to CBP Measures

Several commenters claim that, because CBP already has measures in place requiring parties to properly classify entries and mechanisms to address missing or fraudulent certifications, § 351.228 is redundant or infringes CBP's existing authority. One commenter affirms that CBP already requires importers to exercise reasonable care in filing entries as Type 01 (*e.g.,* not subject to an AD/CVD order), or Type 03 (*e.g.,* subject to an AD/CVD order), and § 351.228 is, therefore, redundant. Several commenters take issue with the language in § 351.228 pertaining to missing certifications, or false or fraudulent certifications, asserting that there are already procedures in place for CBP to address missing and fraudulent certifications.[193] Additionally, some

[190] *See, e.g., Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order,* 84 FR 29164 (June 21, 2019) (*Butt-Weld Pipe from China Final*) (where Commerce instituted a certification requirement for parties to certify that their merchandise was not circumventing an existing order); and *Steel Concrete Reinforcing Bar from Mexico: Final Affirmative Determination of Circumvention of the Antidumping Duty Order,* 85 FR 34705, 34706 (June 8, 2020) (where Commerce required certifications from importers to exclude a category of merchandise produced for an identified construction project and produced according to an engineer's structural design consistent with an industry standard).

[191] *See, e.g., Sugar from Mexico: Suspension of Countervailing Duty Investigation,* 79 FR 78044 (December 29, 2014) (where Commerce required importers, exporters, and producers to certify certain requirements with respect to entries of subject merchandise subject to the agreement.

[192] *See, e.g., Butt-Weld Pipe from China Final; Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order,* 83 FR 35205 (July 25, 2018). In both, its preliminary and final **Federal Register** notices in some circumvention cases, Commerce has provided certification language as an appendix.

[193] According to the commenter, importers that improperly declare goods face penalties under 19

Continued

commenters claim that § 351.228 infringes on CBP's authority to enforce collection of import documents and address fraud.[194] The same parties also raised the possibility that, where both CBP and Commerce investigate certifications, under § 351.228, both agencies could reach opposing or contradictory conclusions.

Response:

We disagree. Although CBP may already require parties to exercise reasonable care in filing their entries as not subject to an AD and/or CVD order (*e.g.,* Type 01) or subject to an AD and/or CVD order (*e.g.,* Type 03), the certifications and related requirements currently in effect and adopted pursuant to § 351.228 serve a different purpose, and, furthermore, are intended to complement, not supplant, CBP's existing authority. We note that Commerce frequently imposes certifications in instances in which CBP may not be able to ascertain certain identifying details relevant to the product's classification as either subject to or not subject to an AD and/or CVD proceeding through physical inspection or the relevant sales documentation accompanying the entry summary, and, thus, could not confirm through these means alone whether a particular entry has been properly designated as, for example, Type 01.[195] In such instances, both CBP and Commerce would rely on the certifications as an additional tool to ascertain whether the entry correctly was filed as an entry type not subject to an AD and/or CVD proceeding.

Additionally, as stated in the *Proposed Rule,* Commerce recognizes that CBP has its own independent authority to address import documentation related to negligence, gross negligence, or fraud.[196] However, enforcement of the AD/CVD laws, including taking steps to prevent evasion and circumvention of AD and CVD orders by producers, exporters, and importers, is well within Commerce's authority and is of paramount importance to Commerce. The addition of a certification requirement, where necessary based on a given case, strengthens the administration and enforcement of the AD and CVD orders by reducing the possibility that entries may be inaccurately filed by importers. Given the complex supply chains that may be involved with certain types of subject merchandise (which may involve input producers, intermediate processors, producers, exporters, trading companies, importers, *etc.*), certifications provide additional assurance that the producer, exporter, and/or importer sought adequate information regarding the relevant product in order to accurately certify a particular entry as not subject to an order.

Furthermore, as stated in the *Proposed Rule,* § 351.228 is not intended to supplant CBP's authority, nor is a formal finding by CBP required for Commerce to determine, within its own authority, that the certification is deficient and unreliable. Whether a certification contains ''material'' or ''fraudulent'' information is a determination that would be made by Commerce pursuant to its own authority and consideration of the normal meaning of those terms (although determinations by other agencies may be informative). As noted, CBP has its own individual authority and would continue to exercise that authority as appropriate, as well.

In sum, certifications are imposed on a case-specific basis in numerous contexts; such certifications do not infringe on CBP's authority and operate in a manner that is consistent with the broader framework pertaining to CBP's requirements for importers.

4. Certification in Entry Summaries

Several commenters suggested that certifications could be a recordkeeping requirement, submitted with a party's entry summary, or some other means to implement the certification scheme. Parties requested that Commerce require certifications as part of the entry summary processes, as opposed to a recordkeeping requirement. These parties argued that certification at entry would be relevant where certification is tied to end-use.

Response:

Commerce disagrees with the commenters that Commerce should restrict its discretion in this manner. Generally, Commerce's current certifications impose a recordkeeping requirement. The regulation as drafted provides Commerce the flexibility, on a case-by-case basis, to determine whether a recordkeeping requirement, filing upon entry summary, or some other means is an appropriate mechanism to enforce the certification scheme.

5. Other Comments

Numerous commenters recommended various additional changes to § 351.228. First, one commenter noted that certification requirements should not be unduly burdensome on importers/foreign producers and should not limit legitimate market access. Second, other commenters proposed that Commerce review certifications as a ''meaningful and regular part'' of annual reviews and/or implement an appeal process to allow for revisions to the certification scheme. Third, one commenter also proposes that Commerce articulate a notice requirement in the form of specific instructions to CBP, which would be available to all parties handling the entry to ensure that they are aware of the certification requirement. Fourth, one commenter requests that notice should be provided to an importer's surety when the importer has not properly certified its entries and CBP has begun suspending and collecting cash deposits on the entries. This commenter argues that this will help the surety manage its risk and protect the revenue and integrity of the AD/CVD process. Fifth, one commenter also points to Commerce's existing requirement to provide an annual non-reimbursement statement for goods covered by AD/CVD orders and states that Commerce has not explained the benefit of requiring additional certifications or an estimate for the cost of the additional paperwork burden. Sixth, one commenter requested that Commerce require parties to affirmatively state a product's country of origin, or if applicable country/countries of processing in its certification.

Response:

First, in Commerce's view, the regulations as drafted are necessary and do not limit legitimate market access.

Second, Commerce already provides parties with a mechanism whereby it may reconsider a determination

U.S.C. 1592, 31 U.S.C. 3729, and they are also subject to EAPA, under 19 U.S.C. 1517.

[194] The commenter cites to 19 U.S.C. 1509 and 19 CFR 151.11, regarding CBP's authority to collect missing certifications, and 19 CFR 101.9(b), regarding CBP's procedure for parties to file post summary correction. Commenters also cite to 19 U.S.C. 1592, which prohibits importation, or attempted importation by false documents or material omission, and 19 CFR 171, Appendix B, which provide CBP with a mechanism to determine whether fraud has occurred.

[195] For example, in the circumvention inquiry on certain corrosion-resistant steel products (CORE) from Vietnam, Commerce explained that CBP could not identify whether an entry of a CORE product from Vietnam contained substrate from China based on physical inspection. In addition, Commerce explained that ''sales documentation provided along with the entry package may not be helpful, as the source of the substrate may not be apparent from invoices, bills of lading, etc., especially for steel that has passed through multiple hands (producer, exporter, trading company) obscuring the source of the substrate.'' *See Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders,* 83 FR 23895 (May 23, 2018) and accompanying IDM at 27–28.

[196] Additionally, HSI has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CVDs. *See, e.g.,* 18 U.S.C. 542.

underlying a certification requirement as part of a changed circumstances or administrative review.[197] This process also allows Commerce flexibility to meaningfully review certifications and does not preclude Commerce from reviewing an existing certification in the context of an administrative review. However, Commerce intends to continue evaluating how it may incorporate a review of certifications in additional proceedings if it determines that such action is necessary and feasible.

Third, generally, where relevant, Commerce has provided notice in its preliminary and final determinations, as well as providing certification language in its customs instructions.[198] Commerce, therefore, intends to determine whether notice is relevant on a case-by-case basis and does not find it necessary to add a notice requirement to the existing language of § 351.228.

Fourth, as discussed above regarding § 351.225(l), (comment 12(f)), in the context of scope, we recognize and appreciate the unique role of sureties in the payment and collection of AD/CVDs, and that sureties need timely access to information to assess the risk that they assume when underwriting bonds for imports of merchandise subject to AD/CVD orders. As such, in response to these comments, Commerce intends to consult with CBP and explore whether and how sureties may be notified with respect to any certification requirement.

Fifth, we disagree with the commenter regarding the existing reimbursement certification for importers and additional burden to parties. The certification proposed in § 351.228 serves a different purpose from Commerce's importer reimbursement certification requirement. Whereas importer reimbursement certifications, described in § 351.402(f)(2), certify whether an importer was reimbursed AD or CVD duties by an exporter/producer, certifications under § 351.228 generally serve specialized purposes and are unrelated to reimbursement. For instance, Commerce has, upon making an affirmative determination of circumvention on a country-wide basis, permitted importers and exporters to certify that the importer did not import, and the exporter did not ship, merchandise from a third country to the United States that originates from the country that is subject to the AD and/or CVD order.[199] Additionally, with respect to any additional arguments regarding the potential cost and burden on parties, see the Classifications section in this final rule for further discussion.

Sixth, and finally, Commerce will consider the commenter's suggestion to require parties to affirmatively state a product's country of origin in its certification on a case-by-case basis. We do not believe such language needs to be adopted in the regulation itself at this time.

Importer Reimbursement Certification—§ 351.402(f)(2)

Section 351.402(f)(2) provides the requirement that importers certify with CBP prior to liquidation whether the importer has or has not entered into an agreement for the payment or reimbursement of AD/CVDs by the exporter or producer. In the *Proposed Rule,* Commerce proposed to modify this provision to better conform with CBP's procedures in collecting electronic, rather than paper, certifications and to clarify that, although the certification is required prior to liquidation, CBP could also accept the reimbursement certification in accordance with its protest procedures.[200] We received several comments both in support of, and in opposition to, the *Proposed Rule,* and no rebuttal comments.

After review of proposed § 351.402(f)(2) and the comments submitted pertaining to that section, we are modifying § 351.402(f)(2) in certain respects. Specifically, § 351.402(f)(2)(i), which does not require specific certification language, and, instead, allows for importers to certify to the substance of the certification prior to liquidation, now provides that the certification must contain the information necessary to link the certification to the relevant entry or entry line number(s). We are also adopting clarifying edits to reflect that § 351.402(f)(2)(iii) is an exception to § 351.402(f)(2)(i) in allowing for certifications to be filed during CBP's protest proceedings. In addition, we are modifying § 351.402(f)(2)(iii) to indicate that CBP may accept the certification in accordance with its protest procedures under 19 U.S.C. 1514, unless otherwise directed. We have left unchanged proposed § 351.402(f)(2)(ii), which allows the certification to be filed either electronically or in paper form in accordance with CBP's requirements, as applicable. We are also adopting minor clarifying edits to § 351.402(f)(2)(iii), which describes the entries subject to the certification requirement.

1. Streamlining Certification Requirements

A few commenters generally support the proposal to streamline the importer reimbursement certification process and make it more efficient and user-friendly. Several commenters object to the removal of express certification language. Some of these commenters argue that Commerce should reconsider and retain the current, specific language to prevent foreign producers and exporters from responding to the certification in a self-serving and non-specific manner. These commenters argue that any relaxation of these requirements appears to be inconsistent with Commerce's goals to improve enforcement of the AD/CVD laws, as well as prevent evasion of current trade remedies.

Response:

We disagree with comments objecting to the streamlining of the certification language and procedures. However, in reviewing comments, Commerce is modifying § 351.402(f)(2)(i) to provide some additional specificity and clarify that the certification must contain the information necessary to link the certification to the relevant entry or entry line number(s). As discussed in the *Proposed Rule,* under CBP's current requirements, parties may certify to the substance of the current regulatory certification language through a variety of electronic means. Commerce is aligning its regulation with these requirements, which allow for better tracking, tracing, and matching of entries, by entry or entry line number, to the certification (either a blanket or individual certification). This also allows for easier retrieval of certification information directly from CBP's Automated Commercial Environment (ACE) system. Therefore, we find that this is a significant improvement upon the previous requirement for paper certifications and remains consistent

[197] *See, e.g., Butt-Weld Pipe from China Final; see also Glycine from the People's Republic of China: Final Partial Affirmative Determination of Circumvention of the Antidumping Duty Order,* 77 FR 73426 (December 10, 2012).

[198] *See, e.g., Certain Cold-Rolled Steel Flats Products from the People's Republic of China: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders,* 82 FR 58178 (December 11, 2017); *see also Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders,* 83 FR 23891 (May 23, 2018).

[199] *See, e.g., Butt-Weld Pipe from China Final;* and *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders,* 83 FR 23891 (May 23, 2018).

[200] *See Proposed Rule,* 85 FR at 49472 at 49491–92.

with our goal of stronger enforcement while also improving administrability.

2. Acceptance of Certifications During Protest Proceedings

Several commenters object to proposed § 351.402(f)(2)(iii), which allows for missing certifications to be filed during CBP's protest proceedings under 19 U.S.C. 1514. These commenters argue that the proposal to allow a belated certificate runs contrary to the strong enforcement of trade remedy laws and is inconsistent with proposed § 351.402(f)(i)'s requirement that the importer must certify prior to liquidation. These commenters further argue that the *Proposed Rule* acknowledges this conflict but offers no rationale, and that to the extent administrability concerns exist, those are best addressed by CBP's regulations.

Certain commenters also argue that in past cases Commerce has asserted its authority not only to assess double AD duties, but to also establish cash deposit rates reflecting the reimbursement of duties prior to assessment during the administrative review process. They also argue that the proposed revisions state that the requirement to file a certificate prior to liquidation remains obligatory; but allows CBP, at its discretion, to accept certificates in accordance with its protest procedures. According to these commenters, this would seem to allow importers to raise arguments with a separate agency that the adjustment should not be applied because the importer has provided the certificate during the protest proceeding, and this might otherwise undermine an established agency practice in addressing circumstances where Commerce has already determined that reimbursement has taken place and imposed double cash deposits accordingly.

Commenters also argue that Commerce should make clear that, under § 351.402(f)(3), if the certification has not been filed by the time of the administrative review, Commerce may presume that the failure to have filed the certification by that date is due to the payment or reimbursement of duties by the exporter or producer. These commenters argue that the proposed regulation allows for parties to file the certification during the protest phase, after the review process has ended and liquidation has occurred, and, therefore, Commerce cannot properly complete the review without the certification.

Response:

In light of these comments, Commerce is modifying § 351.402(f)(2)(i) and (iii) in certain respects to clarify and better explain that acceptance of a certification during the protest phase is an exception to the general rule that certifications are due prior to liquidation. However, contrary to certain comments, we do not see this as setting up a potential abuse of the process, because: (1) Commerce has included this relevant language in CBP instructions for almost a decade, and we are merely codifying that language in the regulation; (2) we have not seen evidence of any abuse of this exception; and (3) nor have we heard any complaints from petitioners or CBP that there has been any abuse of this exception. Indeed, commenters were only able to point to three examples over the past 25 years where there has been a reimbursement scheme uncovered during the administrative review process, and those examples do not point to the unreasonableness of our policy choice in the *Proposed Rule*. Moreover, not all liquidations result in protests, and not all protests deal with importer reimbursement issues, so this issue has limited practical applicability.

Further, many of the comments at issue were focused more on a request to alter the deadline so that parties must submit their certification prior to the start of the administrative review (even earlier than the current deadline of prior to liquidation). In practice, most, if not all, companies filing certifications will do so upon entry summary—well before the start of the review. Additionally, during the course of the review, Commerce asks respondents directly if they have reimbursed or entered into any agreement to reimburse the importer—it is this information that we rely upon in conducting our AD calculations. If we discover there has been such reimbursement or agreement, we take that into account either by: (1) Making a deduction to export price or constructed export price pursuant to § 351.402(f)(1)(i): Or (2) when appropriate, applying facts available with an adverse inference pursuant to section 776(a)–(b) of the Act if the party has, for example, failed verification or otherwise failed to cooperate in this respect. The resulting assessment rate and cash deposit rate will then reflect the appropriate adjustment. If need be, in a given case, Commerce can explain in its CBP instructions that CBP should not accept certifications from a given importer during any protest proceeding based on any decisions made with respect to this issue in the administrative review. Therefore, in light of the above, Commerce is modifying § 351.402(f)(2)(iii) to indicate that CBP may accept the certification in accordance with its protest procedures under 19 U.S.C. 1514, unless otherwise directed.

3. Additional Notification

One commenter requests that Commerce and CBP provide additional notification to sureties through the Automated Surety Interface (ASI) with respect to any certification which will allow the sureties to more effectively secure and underwrite the duty obligations under AD and CVD laws.

Response:

For the reasons discussed above regarding § 351.225(l), (comment 12(f)), in the context of scope, and numerous other provisions, we recognize and appreciate the unique role of sureties in the payment and collection of AD/CVD cash deposits and duties, and that sureties need timely access to information to assess the risk that they assume when underwriting bonds for imports of merchandise subject to AD/CVD orders. As such, in response to these comments, Commerce intends to consult with CBP and explore whether and how sureties may be notified with respect to any importer reimbursement certification.

Procedural Amendments—§§ 351.103(d) Introductory Text and (d)(1) and 351.305(d)

1. Sections 351.103(d) Introductory Text and (d)(1)—Central Records Unit and Administrative Protective Order and Dockets Unit

To implement the substantive changes pertaining to scope inquiries (§ 351.225), circumvention inquiries (§ 351.226), and covered merchandise inquiries (§ 351.227), Commerce proposed to modify § 351.103(d)(1) to reflect that an interested party filing a scope ruling application or a circumvention request, as well as any publicly identified parties in a covered merchandise referral from CBP, under section 517 of the Act, need not file an entry of appearance. We received many positive comments in support of this provision. However, one commenter argued that Commerce should revisit § 351.103(d)(1) and remove the allowance of the entry of appearance to be filed as a cover letter to an application for APO access, to bring it into conformity with requirements for notices of appearances in other circumstances.

Response:

We note that the allowance for a cover letter/entry of appearance for APO filings already existed in the regulations before Commerce proposed amending them, so the comment is, in fact, not on revisions Commerce has made, but on

its existing regulations. That being said, the ability for parties to file their entry of appearance in their APO cover letter is intended to save time and resources and is not mandatory for filers. We see no reason to make this change, and, in fact, if we were to remove this option for APO filers, we find that it would only further burden the parties and Commerce's APO system with unnecessary additional paperwork.

In addition, Commerce is making two minor clarification and correction revisions to § 351.103(d) introductory text and (d)(1) unrelated to the comments raised. First, in paragraph (d) introductory text, Commerce is adding reference to the annual inquiry service list which must be used for requests for circumvention inquiries under § 351.226(n), to mirror the existing reference to the annual inquiry service list for scope ruling applications under § 351.225(n). Second, in paragraph (d)(1), Commerce is amending a typographical error following the phrase ''in a covered merchandise referral to'' with a citation to § 351.227, rather than the incorrect reference to § 351.226 as appeared in the *Proposed Rule*.

2. Section 351.305(d)—Access to Business Proprietary Information

Section 351.305(d) provides for additional importer filing requirements with Commerce, differing from the filing requirements of exporters, producers, or domestic producers, to obtain access to BPI through an APO application. In the *Proposed Rule,* Commerce proposed to amend § 351.305(d) to add reference to importers in circumvention inquiries and to exempt importers identified by CBP in a covered merchandise referral from these specific filing requirements. Commerce received only support from commenters on changes made to this provision and has not made any changes from the *Proposed Rule*.

Other Comments

In addition to the comments discussed above, Commerce also received some comments that did not relate to a particular provision in the *Proposed Rule*. Instead, they relate to §§ 351.213, 351.302, and 351.303, or pertain to our general rulemaking process or matters outside of the regulatory framework. For the following reasons, we are not making the requested changes to our regulations.

1. Amend Regulation on Administrative Reviews To Include the Enumerated Factor for Bona Fide Sales

One commenter argues that § 351.214(b)(2)(v)(D) through (E) and (f)(3) should be reproduced in § 351.213 so that the *bona fide* sales analysis proposed for new shipper reviews would also apply to annual administrative reviews of AD/CVD orders, especially when such reviews involve few or singular sales or entries. The commenter requests that the final rule should reproduce in § 351.213 governing administrative reviews the specific proposed § 351.214(b)(2)(v)(D) through (E) and (f)(3), which outline a number of documents a new shipper is required to include with a review request, and to mirror the factors listed in section 751(a)(2)(B)(iv)(I)–(VI) of the Act that pertain to new shipper reviews. In effect, the commenter proposes that a request for an annual administrative review include documentation concerning business activities and establishing the circumstances surrounding sales including prices, expenses, whether sales were resold for profit in the United States, and whether such sales were made at arm's-length prices. Additionally, the commenter argues that an annual administrative review could be rescinded if the information necessary to conduct a *bona fide* sales analysis is not on the administrative record. The commenter's rationale is that administrative reviews are more common and numerous than new shipper reviews. Applied to annual administrative reviews which involve few or singular sales or entries, the commenter claims that the *bona fide* sales analysis requirements would discourage meritless claims and conserve Commerce's resources in conducting reviews.

Another commenter responded, stating that Commerce should reject the commenter's suggestion that Commerce perform a *bona fides* analysis on the sales of exporters participating in administrative reviews. This commenter argues that Commerce should not erect artificial barriers to respondents' efforts and that such barriers would only work to create an unfair advantage for petitioners and could never create a level playing field, as the AD/CVD laws are intended. Additionally, several commenters proposed in rebuttal comments that Commerce analyze new shipper reviews within the administrative review process under § 352.213.

Response:

We have left unchanged § 351.213 governing administrative reviews.

As explained in the *Proposed Rule,* Commerce is amending § 351.214 pertaining to new shipper reviews to conform with changes to section 751(a)(2)(B) of the Act made by Congress with the enactment of section 433 of EAPA to address circumvention by new shippers in the context of new shipper reviews. While Commerce remains cognizant of the potential for misuse of administrative review processes in AD and CVD proceedings, amendments to § 351.213, which governs administrative review of orders and suspension agreements, is beyond the scope of the *Proposed Rule* and section 433 of EAPA. The *Proposed Rule* did not propose changes to this regulatory provision. Accordingly, any consideration or implementation of such proposals would require a notice and comment proceeding, which did not occur in this rulemaking with respect to § 351.213. Therefore, we find that these proposals are beyond the scope of the *Proposed Rule* and section 433 of EAPA.

Importantly, we agree that the *bona fide* sales analysis constitutes an important check on the misuse of administrative review processes to circumvent duty orders or obtain a contrived dumping margin. Commerce has a well-established practice of conducting a *bona fide* sales analysis in administrative reviews, where warranted.[201] The CIT has stated that Commerce's practice clearly demonstrates that Commerce is ''highly likely to examine objective, verifiable factors'' to confirm that a sale is not being made to circumvent or evade an antidumping duty order.[202] Therefore, while the documents necessary to perform a *bona fide* sales analysis are not required in a request for an annual administrative review, Commerce retains its well-established practice of conducting a *bona fide* sales analysis in such administrative reviews, where warranted, to address efforts to evade or dilute the effectiveness of its AD/CVD orders through the use of non-*bona fide* sales. Lastly, we have not adopted the commenters' rebuttal proposal that Commerce analyze new shipper reviews within the administrative review process under § 351.213. This commenters' proposal is also beyond the scope of this final rule, as such an amendment would require a notice and comment proceeding pertaining to § 351.213 governing administrative reviews. Moreover, such an amendment would be contrary to section 751(a)(2)(B) of the Act which provides

[201] *See, e.g., Silicon Metal From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 84 FR 69361 (Dec. 18, 2019); *see also, e.g., Certain Pasta From Turkey: Final Results and Rescission of Antidumping Duty Administrative Review; 2015–2016,* 83 FR 6516 (Feb. 14, 2018).

[202] *See Hebei New Donghua Amino Acid Co., Ltd.* v. *United States,* 374 F. Supp. 2d 1333, 1339–40 (CIT 2005).

new shippers a review process apart from the administrative review process to obtain an AD margin or CVD rate based on *bona fide* sales.

2. Section 351.302(c) and (d)—Requests for Extension

Several commenters suggest that Commerce modify § 351.302 to limit the number of days of extensions of time to complete questionnaire responses, for both initial and supplemental questionnaire responses, to a total of 30 calendar days. These commenters argue that by shortening the number of days available for extensions, Commerce will have more time to consider arguments and will have greater certainty concerning when filings will be made, alleviating stress over overlapping submissions across multiple cases. Several other commenters also argue that respondents have repeatedly requested extensions for questionnaire responses as a method of delaying the proceeding and limiting the time available for Commerce to conduct its investigation or review, and that Commerce should address this issue by limiting the extension of time for questionnaire responses to 30 days.

Other commenters challenge the above arguments, stating that Commerce already has complete control of the number and length of extensions it grants, and further argue that Commerce allows for such extensions because it is fully aware of the fact that first-time foreign respondents do not maintain their books and records in anticipation of the initiation of an AD or CVD investigation against their subject exports. These commenters also argue that the proposal of limiting extension requests should be rejected because the comments proposing this limit are not responsive to any provision in the *Proposed Rule,* establishing such a limit would be in violation of the requirements set forth in the Administrative Procedures Act, and establishing such a limitation in the regulation would deny Commerce the flexibility required to work with respondents to ensure accuracy and fairness in its decisions. They point out that each proceeding before Commerce and each company under review is unique, and, thus, the information that Commerce may seek in a particular proceeding can vary wildly, pointing to different administrative cases as examples of how great a variance there can be in the amount of information sought by Commerce in a given proceeding.

In addition, they argue that making such a change would contravene the United States' international obligations to provide parties with ample opportunity to present all evidence that they consider relevant in respect of the investigation under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement.

Finally, one commenter argues that adopting such a short, arbitrary limit on time would create significant risk of due process violations by denying parties the time required to gather and present information necessary to defend their interests.

Response:

Commerce has not adopted this proposal and will not be modifying § 351.302 at this time. The *Proposed Rule* did not cover or address this regulatory provision, and such an argument is outside the scope of the modifications and additions to regulations that we have proposed and upon which we have invited commentary. Any consideration or implementation of such a requirement would require a notice and comment, which did not occur in this rulemaking with respect to § 351.302.

Additionally, as mentioned by some of the other commenters, Commerce is already in full control of the number and length of extensions it grants, and there has been no evidence of the extension process being manipulated to prevent Commerce from having enough time to properly conduct its investigations or reviews. Given Commerce's current discretion to determine whether to grant an extension request, placing a maximum limit on the number of days that can be granted would only serve to limit Commerce's discretion in how it handles such requests, and further restrict Commerce's ability to ensure the accuracy and fairness of its decisions.

3. Section 351.303(g)—Certification of Documents

One commenter argues that Commerce's regulations in § 351.303(g), which require a company representative to certify as to the accuracy of information that does not belong to the company and that the company did not develop, has created an unnecessary burden on petitioners and petitioners' counsel. They suggest changes to § 351.303(g) restricting the certification requirement to requiring a certification from the company or government representative only when the factual information was provided by the company or government representative in question or by a company or government that is not represented by legal counsel.

Response:

Commerce has not adopted this proposal and is not modifying § 351.303(g) at this time. The *Proposed Rule* did not cover or address this regulatory provision, and such an argument is outside the scope of the modifications and additions to regulations that we have proposed and upon which we have invited commentary. Any consideration or implementation of such a requirement would require notice and comment, which did not occur in this rulemaking with respect to § 351.303.

4. Comments on Overall Drafting Approach

In general, many commenters commended Commerce on the updates and additions to its regulations, claiming that such changes were a long time coming and warranted. In particular, several commenters expressed general support and appreciation for Commerce's commitment and efforts to effectively administer the AD/CVD laws, and state that the proposed regulations are intended to close several loopholes that currently weaken the efficacy of the U.S. trade laws with reasonable, fair, and equitable modifications that strengthen its current regulations.

However, Commerce received criticism as well. One commenter, although complimentary of the *Proposed Rule,* argued that sureties should be treated as interested parties and was critical that the revised and new regulations do not provide for notifications to sureties of filings and determinations.

A few commenters expressed concern about the 30-day deadline for initial comments on the *Proposed Rule* and requested a rebuttal period, as well. In response, Commerce provided a 14-day-period for parties to file rebuttal comments, but did not provide extensions for the initial party comments. The commenters argued that 30 days for parties to file comments did not allow an adequate period of time for outside parties to consider the effects of the regulatory changes on importers. One commenter argued that because the regulatory changes were submitted during a national pandemic, when most offices are operating remotely, it made it difficult to review, absorb, and discuss the potential impact of these regulations with their clients in a 30-day time span. Furthermore, they pointed out that when Commerce revised its (comprehensive) regulations in 1996 and 1997, it allowed parties more time to provide comments.

Some commenters generally opposed the changes to the regulations, arguing

that they place too much responsibility and cost on the shoulders of importers and not enough responsibility on the shoulders of exporters and producers. They argue that Commerce should revise its *Proposed Rule* to focus primarily on foreign exporters with related importers, the parties that would be aware of schemes to circumvent and evade the AD and CVD laws, and not on unrelated importers with little to no knowledge of such schemes.

Finally, one commenter argues that the benefits of the proposed regulations in stopping companies from intentionally circumventing or evading AD or CVD orders would be outweighed by the negative impact the *Proposed Rule* would have on conscientious importers, particularly smaller companies, through the assignment and collection of retroactive AD/CVDs. The commenter points out that many sureties will not guarantee a bond associated with a product that has been subject to a circumvention inquiry or covered by the scope of an AD or CVD order, which creates a burden for small companies who simply cannot afford the additional costs resulting from a circumvention determination.

Commerce's Response:

First, Commerce disagrees with the argument made by commenters that 30 days is insufficient for parties to consider and respond to the changes made in the proposed regulations. Under 5 U.S.C. 553, which lays out the procedural requirements for revising federal regulations, 30 days is the standard that must be met by any agency when proposing changes to their regulations. Over the past 20 years of administering and enforcing the current iteration of the regulations, Commerce has discovered some inefficiencies and burdens that applied equally to our procedures for all interested parties—domestic producers, U.S. importers, and foreign exporters, alike. Over the years, we have heard complaints about those inefficiencies and burdens, but could do nothing about them without modifying our regulations. Furthermore, we have built a practice in some regards, like Commerce's substantial transformation test, which should be codified in the regulations, but are not. In addition, we have discovered that our regulations do not adequately address some matters, such as the problem of circumvention of our orders. In short, none of these problems or concerns should be new to those who practice AD and CVD law before Commerce.

Furthermore, comparing these regulations, which address new shipper reviews, scope rulings, circumvention determinations, and a few other matters, with the *1997 Final Rule* which revised nearly all of Commerce's regulations covering most of Commerce's AD and procedural practice is an unreasonable comparison. These are important regulations, but they are still limited in the areas to which they apply. Thus, we do not find the time limits Commerce provided to outside parties for comments on those regulations to be comparable to the time limits parties needed to comment on these regulations. We continue to believe that a 30-day period for parties to prepare and file initial comments on the *Proposed Rule* was sufficient.

That being said, Commerce recognized in response to early comments which it received from outside parties that the agency had not initially provided parties with an opportunity to file rebuttal comments, and that both Commerce and the public as a whole could benefit if parties had time to file rebuttal comments. Accordingly, Commerce granted 14 days after the close of the initial comment period for parties to file rebuttal comments, and the agency received many rebuttal comments, which we found to be helpful to our analysis. Thus, we extended the period in which parties could provide meaningful insight and commentary, and as noted, many took the agency up on its offer to prepare and file rebuttal comments. We consider that additional time for commentary further evidence that we met the statutory requirements of 5 U.S.C. 553.

Second, the changes and additions found in these final regulations are consistent with the requirements of the Act and are narrowly tailored to address Commerce's concerns. Commerce recognizes the issues expressed by several commenters regarding the potential effect the regulatory changes may have on various interested parties. As explained herein, in response to many of those comments, we have made modifications from the *Proposed Rule* to these final regulations.[203] That being said, we disagree with the commenters who argued that we should retain the current regulations unchanged, and forgo these updates and changes. These changes are necessary and will improve both the administration and enforcement of the various areas of AD and CVD law which they cover.

[203] For example, in response to the comment that Commerce should revise its *Proposed Rule* to focus primarily on foreign exporters with related importers in addressing circumvention and evasion, as discussed above under § 351.226(l), Commerce is modifying this provision to take into account such potential concerns.

Finally, we disagree that these improvements to our regulations will create an outsized burden for small importers, and in fact, we believe we have appropriately balanced the interests of all affected parties with the U.S. Government's statutory mandate and Commerce's policy to prevent circumvention and evasion of the application of AD and CVD orders.

5. Additional Unrelated Comments

Several commenters made comments unrelated to the regulations and their purpose, and as such these comments will not be summarized or addressed herein.

Classifications

Executive Order 12866

OMB has determined that this final rule is significant for purposes of Executive Order 12866.

Paperwork Reduction Act

This proposed rule contains no collection of information subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Executive Order 13132

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities as that term is defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* For that reason, no Initial Regulatory Flexibility Analysis was required. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble in this final rule and the preamble to the *Proposed Rule* and is not repeated here. The factual basis for the certification is found in the *Proposed Rule* and is repeated below.

Commerce did receive comments on the certification. For the reasons discussed below, Commerce states that the certification stands because the final rule will not have a significant economic impact on a substantial number of small entities.

The entities upon which this rulemaking could have an impact include foreign governments, foreign exporters and producers, some of whom are affiliated with U.S. companies, and

U.S. importers. Commerce currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Although this rule may indirectly impact small entities that are parties to individual AD and CVD proceedings, it will not have a significant economic impact on any such entities; the rule applies to administrative enforcement actions, and only clarifies and establishes streamlined procedures. It does not impose any significant costs on regulated entities. Therefore, the rule would not have a significant economic impact on a substantial number of small business entities.

Commerce received two comments in response to its determination not to prepare an Initial Regulatory Flexibility Analysis. One commenter argues that the rule will incur new additional costs to affected U.S. importers in terms of the paperwork burden for additional certifications under § 351.228, costs associated with the rebuilding of supply chains to address country-wide circumvention determinations under § 351.226, and the retroactive application of scope rulings under § 351.225. This commenter further argues that, contrary to Commerce's certification statement in the *Proposed Rule,* these are not enforcement actions but rather are new requirements or changed procedures that would directly impact U.S. importers. For these reasons, the commenter argues that Commerce should prepare a regulatory impact analysis inclusive of these costs to ensure that the rule does not impose significant costs on small entities.

In response to this comment, a second commenter agrees that Commerce should be required to prepare a regulatory flexibility analysis. This commenter points to comments from several other parties in arguing that a substantial number of small business will be directly adversely affected, not indirectly impacted as stated in Commerce's certification statement in the *Proposed Rule.* This commenter argues that, with respect to the proposed comment period for industry support comments in response to a petition under § 351.203(g), small and medium enterprises would have difficulty meeting such deadlines because these entities do not have the compliance or government relations expertise to monitor Commerce's electronic docket on ACCESS. Additionally, this commenter reiterates arguments from the first commenter regarding the retroactive effect of scope ruling and circumvention determinations under proposed §§ 351.225 and 351.226 and the impact on a substantial number of small entities.

Response:

As stated in the certification statement in the *Proposed Rule,* the proposed regulations, as further revised and adopted in this final rule, will not have a significant economic impact on a substantial number of small entities.

Regarding the number of small entities that may be indirectly impacted, as stated in the *Proposed Rule,* the entities upon which this rulemaking could have an impact include foreign governments, foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. Commerce currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Additionally, based on Commerce's experience in AD and CVD proceedings, Commerce estimates that the number of small entities impacted by these revised regulations will not be substantial.

Regarding the potential for a significant economic impact, although these revised regulations may indirectly impact small entities that are parties to individual AD and CVD proceedings, those impacts will not have a significant economic impact on any such entities.

Moreover, as a general matter, Commerce's proceedings, including each of the types of proceedings discussed in this rule (AD and CVD investigations, new shipper reviews, administrative reviews, scope inquiries, circumvention inquiries, and covered merchandise inquiries), afford fair notice and due process to all parties, including small businesses. Commerce will ensure that any small business that is potentially prejudiced by proceedings conducted in accordance with these regulations will receive appropriate legal notice, as well as a full and fair opportunity to present relevant information and arguments to Commerce, before a determination is made that may have some impact on such entity. We also note that, under the governing statute and in practice, Commerce will consider any difficulties experienced by interested parties, particularly small companies or those not represented by counsel, in supplying any information requested, and provide any assistance to such parties that is practicable.[204]

As summarized above, two commenters raised arguments regarding the impact on small entities arising from the certification requirements under § 351.228, country-wide circumvention determinations and retroactive application under § 351.226, the retroactive application of scope rulings under § 351.225, and the comment deadline for industry support under § 351.203(g).

First, as explained above in response to a similar comment pertaining to § 351.228, the regulation itself does not impose any burden; a determination of whether to implement a certification requirement is made on the record of an individual case—the regulation merely codifies existing practice. Further, any burden related to Commerce's determination, in a given case, to impose a certification requirement on importers is narrowly tailored to the facts of its determination and is otherwise a minimal burden. Moreover, any such burden resulting from a certification requirement is outweighed by its benefits. For example, companies that export or import under a certification scheme will potentially have less duty liability than other similarly situated importers or exporters.

Second, with respect to any rebuilding of supply chains to address country-wide circumvention determinations, Commerce's role by statute, and the purpose of the AD/CVD law, is not to manage the business operations of domestic importers, but to enforce the trade remedy laws and ensure that those laws will not be circumvented. In accordance with this framework, producers, exporters, and importers must determine how best to comply with an AD/CVD order pursuant to any number of business decisions, in light of the order and in response to a scope ruling, circumvention determination, or covered merchandise determination.

Third, as explained above, Commerce has revised its suspension of liquidation provisions under §§ 351.225(l) and 351.226(l) for scope and circumvention inquiries in light of comments from several parties. Commerce will now consider additional information under certain scenarios in scope inquiries to determine if the application of retroactive suspension is appropriate. Furthermore, Commerce will only apply its circumvention determinations to entries that precede the date of

[204] *See* section 782(c) of the Act.

initiation of the circumvention inquiry when it determines the facts on the record warrant such an application. Additionally, these revisions to Commerce's regulations will not impact any imports of entries that pre-date the effective date of the final rule, as explained in the **DATES** section and the Applicability Dates section of the preamble of this final rule, and in more detail under §§ 351.225(l) and 351.226(l). Through these revisions to the *Proposed Rule,* Commerce has reduced any impact on U.S. importers, which may include small entities, and further reduced the number of small entities that may be impacted. Therefore, the final rule will not have a direct, significant economic impact on a substantial number of small entities.

Fourth, and finally, with respect to the argument that the comment period for industry support would significantly impact a substantial number of small entities, we disagree. Under § 351.203(g), Commerce is establishing a deadline for comments on the issue of domestic industry support of an AD or CVD petition no later than five business days before the scheduled date of initiation, and rebuttal comments no later than two calendar days thereafter. Currently, there is no established comment period, meaning parties can comment up until the day of Commerce's decision. As stated in the certification statement, this is a clarification of Commerce's procedures and does not impose any direct cost, let alone a significant cost, on small entities. Further, the parties that normally comment on industry support include domestic producers of like products that may be considered small entities under the appropriate SBA small business size standard. Although Commerce is unable to estimate the number of producers that may be considered small entities, Commerce does not anticipate that the number affected by the proposed rule will be substantial. Typically, domestic producers that bring a petition or participate actively in an AD or CVD proceeding account for a large amount of the domestic production within an industry, so it is unlikely that many of these domestic producers will be small entities. Therefore, the proposed regulation, as adopted in this final rule, will not have a significant economic impact on a substantial number of small entities.

In sum, Commerce does not dispute that these new and revised regulations will have an impact on U.S. importers. However, the current regulations and Commerce's AD and CVD proceedings already have an impact on those entities. Thus, the question for purposes of a regulatory impact analysis is whether these revisions and additions are such that the changes will have an economic impact which is significant on a substantial number of small entities. They will not.

For these reasons, we continue to find that neither an Initial Regulatory Flexibility Analysis nor a Final Regulatory Flexibility Analysis is required and none has been prepared. Therefore, Commerce certified that the final rule will not have a significant impact on a substantial number of small business entities.

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: August 16, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

For the reasons stated in the preamble, the Department of Commerce amends 19 CFR part 351 as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.;* and 19 U.S.C. 3538.

■ 2. In § 351.103, effective November 4, 2021, revise paragraphs (d) introductory text and (d)(1) to read as follows:

§ 351.103 Central Records Unit and Administrative Protective Order and Dockets Unit.

* * * * *

(d) The APO/Dockets Unit will maintain and make available a public service list for each segment of a proceeding. The service list for an application for a scope ruling is described in § 351.225(n). The service list for a request for a circumvention inquiry is described in § 351.226(n).

(1) With the exception of a petitioner filing a petition in an investigation pursuant to § 351.202, an interested party filing a scope ruling application pursuant to § 351.225(c), an interested party filing a request for a circumvention inquiry pursuant to § 351.226(c), and those relevant parties identified by the Customs Service in a covered merchandise referral pursuant to § 351.227, all persons wishing to participate in a segment of a proceeding must file an entry of appearance. The entry of appearance must identify the name of the interested party, how that party qualifies as an interested party under § 351.102(b)(29) and section 771(9) of the Act, and the name of the firm, if any, representing the interested party in that particular segment of the proceeding. All persons who file an entry of appearance and qualify as an interested party will be included in the public service list for the segment of the proceeding in which the entry of appearance is submitted. The entry of appearance may be filed as a cover letter to an application for APO access. If the representative of the interested party is not requesting access to business proprietary information under APO, the entry of appearance must be filed separately from any other document filed with the Department. If the interested party is a coalition or association as defined in subparagraph (A), (E), (F) or (G) of section 771(9) of the Act, the entry of appearance must identify all of the members of the coalition or association.

* * * * *

■ 3. In § 351.203, effective October 20, 2021, add paragraph (g) to read as follows:

§ 351.203 Determination of sufficiency of petition.

* * * * *

(g) *Time limits for filing interested party comments on industry support.* For purposes of sections 702(c)(4)(E) and 732(c)(4)(E) of the Act, the Secretary will consider comments or information on the issue of industry support submitted no later than 5 business days before the date referenced in paragraph (b)(1) of this section by any interested party under section 771(9) of the Act. The Secretary will consider rebuttal comments or information to rebut, clarify, or correct such information on industry support submitted by any interested party no later than two calendar days from the time limit for filing comments.

■ 4. Effective October 20, 2021, revise § 351.214 to read as follows:

§ 351.214 New shipper reviews under section 751(a)(2)(B) of the Act.

(a) *Introduction.* Section 751(a)(2)(B) of the Act provides a procedure by which so-called ''new shippers'' can obtain their own individual dumping margin or countervailable subsidy rate on an expedited basis. In general, a new shipper is an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export, to the United States during the period of investigation. Furthermore, section

751(a)(2)(B)(iv) requires that the Secretary make a determination of whether the sales under review are bona fide. This section contains rules regarding requests for new shipper reviews and procedures for conducting such reviews, as well as requirements for determining whether sales are bona fide under section 751(a)(2)(B)(iv) of the Act. In addition, this section contains rules regarding requests for expedited reviews by non-investigated exporters in certain countervailing duty proceedings and procedures for conducting such reviews.

(b) *Request for new shipper review*—(1) *Requirement of sale or export.* Subject to the requirements of section 751(a)(2)(B) of the Act and this section, an exporter or producer may request a new shipper review if it has exported, or sold for export, subject merchandise to the United States and can demonstrate the existence of a bona fide sale.

(2) *Contents of request.* A request for a new shipper review must contain the following:

(i) If the person requesting the review is both the exporter and producer of the merchandise, a certification that the person requesting the review did not export subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(ii) If the person requesting the review is the exporter, but not the producer, of the subject merchandise:

(A) The certification described in paragraph (b)(2)(i) of this section; and

(B) A certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(iii)(A) A certification that, since the investigation was initiated, such exporter or producer has never been affiliated with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during the period of investigation, including those not individually examined during the investigation; and

(B) In an antidumping proceeding involving imports from a nonmarket economy country, a certification that the export activities of such exporter or producer are not controlled by the central government;

(iv) Certain information regarding the unaffiliated customer:

(A) A certification from the exporter or producer that it will provide, to the fullest extent possible, necessary information related to the unaffiliated customer in the United States during the new shipper review; and

(B) A certification by the unaffiliated customer of its willingness to participate in the new shipper review and provide information relevant to the new shipper review, if such information is requested by the Secretary, or an explanation by the producer/exporter of why such certification from the unaffiliated customer cannot be provided.

(v) Documentation establishing:

(A) The date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States;

(B) The volume of that shipment and any subsequent shipments, including whether such shipments were made in commercial quantities;

(C) The date of the first sale, and any subsequent sales, to an unaffiliated customer in the United States;

(D) The circumstances surrounding such sale(s), including but not limited to:

(*1*) The price of such sales;

(*2*) Any expenses arising from such sales;

(*3*) Whether the subject merchandise involved in such sales was resold in the United States at a profit;

(*4*) Whether such sales were made on an arms-length basis; and

(E) Additional documentation regarding the business activities of the producer or exporter, including but not limited to:

(*1*) The producer or exporter's offers to sell merchandise in the United States;

(*2*) An identification of the complete circumstance surrounding the producer or exporter's sales to the United States, as well as any home market or third country sales;

(*3*) In the case of a non-producing exporter, an explanation of the exporter's relationship with its producer/supplier; and

(*4*) An identification of the producer's or exporter's relationship to the first unaffiliated U.S. purchaser;

(vi) In the case of a review of a countervailing duty order, a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(c) *Deadline for requesting review.* An exporter or producer may request a new shipper review within one year of the date referred to in paragraph (b)(2)(v)(A) of this section.

(d) *Initiation of new shipper review*—(1) *In general.* If the requirements for a request for new shipper review under paragraph (b) of this section are satisfied, the Secretary will initiate a new shipper review under this section in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the 6–month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).

(2) *Semiannual anniversary month.* The semiannual anniversary month is the calendar month that is 6 months after the anniversary month.

(3) *Example.* An order is published in January. The anniversary month would be January, and the semiannual anniversary month would be July. If the Secretary received a request for a new shipper review at any time during the period February–July, the Secretary would initiate a new shipper review in August. If the Secretary received a request for a new shipper review at any time during the period August–January, the Secretary would initiate a new shipper review in February.

(4) *Exception.* If the Secretary determines that the requirements for a request for new shipper review under paragraph (b) of this section have not been satisfied, the Secretary will reject the request and provide a written explanation of the reasons for the rejection.

(e) *Suspension of liquidation.* When the Secretary initiates a new shipper review under this section, the Secretary will direct the Customs Service to suspend or continue to suspend liquidation of any unliquidated entries of the subject merchandise from the relevant exporter or producer at the applicable cash deposit rate.

(f) *Rescission of new shipper review*—(1) *Withdrawal of request for review.* The Secretary may rescind a new shipper review under this section, in whole or in part, if a producer or exporter that requested a review withdraws its request not later than 60 days after the date of publication of notice of initiation of the requested review.

(2) *Absence of entry and sale to an unaffiliated customer.* The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) As of the end of the normal period of review referred to in paragraph (g) of this section, there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise; and

(ii) An expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the time limits set forth in paragraph (i) of this section;

(3) *Absence of bona fide sale to an unaffiliated customer.* The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) Information that the Secretary considers necessary to conduct a bona fide sale analysis is not on the record; or

(ii) The producer or exporter seeking a new shipper review has failed to demonstrate to the satisfaction of the Secretary the existence of a bona fide sale to an unaffiliated customer.

(4) *Notice of rescission.* If the Secretary rescinds a new shipper review (in whole or in part), the Secretary will publish in the **Federal Register** notice of ''Rescission of Antidumping (Countervailing Duty) New Shipper Review'' or, if appropriate, ''Partial Rescission of Antidumping (Countervailing Duty) New Shipper Review.''

(g) *Period of review*—(1) *Antidumping proceeding*—(i) *In general.* Except as provided in paragraph (g)(1)(ii) of this section, in an antidumping proceeding, a new shipper review under this section normally will cover, as appropriate, entries, exports, or sales during the following time periods:

(A) If the new shipper review was initiated in the month immediately following the anniversary month, the twelve-month period immediately preceding the anniversary month; or

(B) If the new shipper review was initiated in the month immediately following the semiannual anniversary month, the period of review will be the six-month period immediately preceding the semiannual anniversary month.

(ii) *Exceptions.* (A) If the Secretary initiates a new shipper review under this section in the month immediately following the first anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first anniversary month.

(B) If the Secretary initiates a new shipper review under this section in the month immediately following the first semiannual anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first semiannual anniversary month.

(2) *Countervailing duty proceeding.* In a countervailing duty proceeding, the period of review for a new shipper review under this section will be the same period as that specified in § 351.213(e)(2) for an administrative review.

(h) *Procedures.* The Secretary will conduct a new shipper review under this section in accordance with § 351.221.

(i) *Time limits*—(1) *In general.* Unless the time limit is waived under paragraph (j)(3) of this section, the Secretary will issue preliminary results of review (see § 351.221(b)(4)) within 180 days after the date on which the new shipper review was initiated, and final results of review (see § 351.221(b)(5)) within 90 days after the date on which the preliminary results were issued.

(2) *Exception.* If the Secretary concludes that a new shipper review is extraordinarily complicated, the Secretary may extend the 180-day period to 300 days, and may extend the 90-day period to 150 days.

(j) *Multiple reviews.* Notwithstanding any other provision of this subpart, if a review (or a request for a review) under § 351.213 (administrative review), § 351.214 (new shipper review), § 351.215 (expedited antidumping review), or § 351.216 (changed circumstances review) covers merchandise of an exporter or producer subject to a review (or to a request for a review) under this section, the Secretary may, after consulting with the exporter or producer:

(1) Rescind, in whole or in part, a review in progress under this subpart;

(2) Decline to initiate, in whole or in part, a review under this subpart; or

(3) Where the requesting producer or exporter agrees in writing to waive the time limits of paragraph (i) of this section, conduct concurrent reviews, in which case all other provisions of this section will continue to apply with respect to the exporter or producer.

(k) *Determinations based on bona fide sales.* In determining whether the U.S. sales of an exporter or producer made during the period covered by the review are bona fide, the Secretary shall consider the factors identified at section 751(a)(2)(B)(iv) of the Act. In accordance with section 751(a)(2)(B)(iv)(VII) of the Act, the Secretary shall consider the following factors:

(1) Whether the producer, exporter, or customer was established for purposes of the sale(s) in question after the imposition of the relevant antidumping or countervailing duty order;

(2) Whether the producer, exporter, or customer has lines of business unrelated to the subject merchandise;

(3) The quantity of sales; and

(4) Any other factor that the Secretary determines to be relevant with respect to the future selling behavior of the producer or exporter, including any other indicia that the sale was not commercially viable.

(l) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters*—(1) *Request for review.* If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (see § 351.204(d)) may request a review under this paragraph (l). An exporter must submit a request for review within 30 days of the date of publication in the **Federal Register** of the countervailing duty order. A request must be accompanied by a certification that:

(i) The requester exported the subject merchandise to the United States during the period of investigation;

(ii) The requester is not affiliated with an exporter or producer that the Secretary individually examined in the investigation; and

(iii) The requester has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(2) *Initiation of review*—(i) *In general.* The Secretary will initiate a review in the month following the month in which a request for review is due under paragraph (l)(1) of this section.

(ii) *Example.* The Secretary publishes a countervailing duty order on January 15. An exporter would have to submit a request for a review by February 14. The Secretary would initiate a review in March.

(3) *Conduct of review.* The Secretary will conduct a review under this

paragraph (l) in accordance with the provisions of this section applicable to new shipper reviews, subject to the following exceptions:

(i) The period of review will be the period of investigation used by the Secretary in the investigation that resulted in the publication of the countervailing duty order (*see* § 351.204(b)(2));

(ii) The final results of a review under this paragraph (l) will not be the basis for the assessment of countervailing duties; and

(iii) The Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or de minimis (see § 351.204(e)(1)), provided that the Secretary has verified the information on which the exclusion is based.

(m) *Exception from assessment in regional industry cases.* For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

■ 5. Effective November 4, 2021, revise § 351.225 to read as follows:

§ 351.225 Scope rulings.

(a) *Introduction.* Questions sometimes arise as to whether a particular product is covered by the scope of an antidumping or countervailing duty order. Such questions may arise for a variety of reasons given that the description of the merchandise subject to the scope is written in general terms. The Secretary will initiate and conduct a scope inquiry and issue a scope ruling to determine whether or not a product is covered by the scope of an order at the request of an interested party or on the Secretary's initiative. A scope ruling that a product is covered by the scope of an order is a determination that the product has always been covered by the scope of that order. This section contains rules and procedures regarding scope rulings, including scope ruling applications, scope inquiries, and standards used in determining whether a product is covered by the scope of an order. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and §§ 351.312 through 351.313) apply to this section.

(b) *Self-initiation of a scope inquiry.* If the Secretary determines from available information that an inquiry is warranted to determine whether a product is covered by the scope of an order, the Secretary may initiate a scope inquiry and publish a notice of initiation in the **Federal Register**.

(c) *Scope ruling application*—(1) *Contents.* An interested party may submit a scope ruling application requesting that the Secretary conduct a scope inquiry to determine whether a product, which is or has been in actual production by the time of the filing of the application, is covered by the scope of an order. The Secretary will make available a scope ruling application, which the applicant must complete and serve in accordance with the requirements of paragraph (n) of this section.

(2) *Requested information.* To the extent reasonably available to the applicant, the scope ruling application must include the following requested information and relevant supporting documentation.

(i) A detailed description of the product and its uses, as necessary:

(A) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product;

(B) The country(ies) where the product is produced, the country from where the product is exported, and if imported, the declared country of origin;

(C) The product's tariff classification under the Harmonized Tariff Schedule of the United States and copies of any Customs rulings relevant to the tariff classification;

(D) The uses of the product;

(E) Clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product; and

(F) A description of parts, materials, and the production process employed in the production of the product;

(ii) A concise public summary of the product's description under paragraphs (c)(2)(i)(A) through (C) of this section.

(iii) The name and address of the producer, exporter, and importer of the product.

(iv) A narrative history of the production of the product at issue, including a history of earlier versions of the product if this is not the first model of the product.

(v) The volume of annual production of the product for the most recently completed fiscal year.

(vi) If the product has been imported into the United States as of the date of the filing of the scope ruling application:

(A) An explanation as to whether an entry of the product has been declared by an importer, or determined by the Customs Service, as subject to an order, and

(B) Relevant documentation, including dated copies of the Customs Service entry summary forms (or electronic entry processing system documentation) identifying the product upon importation and other related commercial documents, including invoices and contracts, which reflect the details surrounding the sale and purchase of that imported product.

(vii) A statement as to whether the product undergoes any additional processing in the United States after importation, or in a third country before importation, and a statement as to the relevance of this processing to the scope of the order.

(viii) The applicant's statement as to whether the product is covered by the scope of the order, including:

(A) An explanation with specific reference to paragraph (j) and (k) of this section, as appropriate;

(B) Citations to any applicable legal authority; and

(C) Whether there are companion orders as described in paragraph (m)(2) of this section.

(ix) Factual information supporting the applicant's position, including full copies of prior scope determinations and relevant excerpts of other documents identified in paragraph (k)(1) of this section.

(d) *Initiation of a scope inquiry and other actions based on a scope ruling application*—(1) *Initiation of a scope inquiry based on a scope ruling application.* Except as provided under paragraph (d)(2) of this section, within 30 days after the filing of a scope ruling application, the Secretary will determine whether to accept or reject the scope ruling application.

(i) If the Secretary determines that a scope ruling application is incomplete or otherwise unacceptable, the Secretary may reject the scope ruling application and will provide a written explanation of the reasons for the rejection. If the scope ruling application is rejected, the applicant may resubmit the full application at any time, with all identified deficiencies corrected.

(ii) If the Secretary does not reject the scope ruling application or initiate the scope inquiry within 31 days after the filing of the application, the application will be deemed accepted and the scope inquiry will be deemed initiated.

(2) *Addressing the scope issue in another segment of the proceeding.* Within 30 days after the filing of a scope ruling application, if the Secretary determines upon review of the application that the scope issue before the Secretary should be addressed in an ongoing segment of the proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227, rather than

initiating a scope inquiry, the Secretary will notify the applicant of its intent to address the scope issue in such other segment.

(3) *Notice of scope applications.* On a monthly basis, the Secretary will publish a notice in the **Federal Register** listing scope applications filed with the Secretary.

(e) *Deadlines for scope rulings*—(1) *In general.* The Secretary shall issue a final scope ruling within 120 days after the date on which the scope inquiry was initiated under paragraph (b) or (d) of this section.

(2) *Extension.* The Secretary may extend the deadline in paragraph (e)(1) of this section by no more than 180 days if the Secretary determines that good cause exists to warrant an extension. Situations in which good cause has been demonstrated may include:

(i) If the Secretary has issued questionnaires to the applicant or other interested parties; received responses to those questionnaires; and determined that an extension is warranted to request further information or consider and address the parties' responses on the record adequately; or

(ii) The Secretary has issued a preliminary scope ruling (*see* paragraph (g) of this section).

(3) *Alignment with other segments.* If the Secretary determines it is appropriate to do so, the Secretary may align the deadlines under this paragraph with the deadlines of another segment of the proceeding.

(f) *Scope inquiry procedures.* (1) Within 30 days of the Secretary's self-initiation of a scope inquiry under paragraph (b) of this section, interested parties are permitted one opportunity to submit comments and factual information addressing the self-initiation. Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Within 30 days of the initiation of a scope inquiry under paragraph (d)(2) of this section, an interested party other than the applicant is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the scope ruling application. Within 14 days of the filing of such rebuttal, clarification, or correction, the applicant is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(3) Following initiation of a scope inquiry under paragraph (b) or (d) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 14 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within seven days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(4) If the Secretary issues a preliminary scope ruling under paragraph (g) of this section, which is not issued concurrently with the initiation of the scope inquiry, the Secretary will establish a schedule for the filing of scope comments and rebuttal comments. Unless otherwise specified, any interested party may submit scope comments within 14 days after the issuance of the preliminary scope ruling, and any interested party may submit rebuttal comments within 7 days thereafter. Unless otherwise specified, no new factual information will be accepted in the scope or rebuttal comments.

(5) If the Secretary issues a preliminary scope ruling concurrently with the initiation of a scope inquiry under paragraph (g) of this section, paragraphs (f)(1) through (4) of this section will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(6) If the Secretary determines it is appropriate to do so, the Secretary may rescind, in whole or in part, a scope inquiry under this section and will notify interested parties.

(7) If the Secretary determines it is appropriate to do so, the Secretary may alter or extend any time limits under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the scope inquiry.

(g) *Preliminary scope ruling.* The Secretary may issue a preliminary scope ruling, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product subject to a scope inquiry is covered by the scope of the order. In determining whether to issue a preliminary scope ruling, the Secretary may consider the complexity of the issues and arguments raised in the scope inquiry. The Secretary may issue a preliminary scope ruling concurrently with the initiation of a scope inquiry under paragraph (b) or (d) of this section.

(h) *Final scope ruling.* The Secretary will issue a final scope ruling as to whether the product that is the subject of the scope inquiry is covered by the scope of the order, including an explanation of the factual and legal conclusions on which the final scope ruling is based. The Secretary will promptly convey a copy of the final scope ruling in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (*see* § 351.102(b)(36)), subject to the notice requirements for Governments of an FTA country under § 356.6 and § 356.7.

(i) *Other segments of the proceeding.* (1) Notwithstanding any other provision of this section, the Secretary may, but is not required to, address scope issues in another segment of the proceeding, such as an administrative review under § 351.213, a circumvention inquiry under § 351.226, or a covered merchandise inquiry under § 351.227 without conducting or completing a scope inquiry under this section. For example, the Secretary may rescind a scope inquiry under paragraph (f)(6) of this section and determine whether the product at issue is covered by the scope of the order in another segment of the proceeding (including another scope inquiry).

(2) During the pendency of a scope inquiry or upon issuance of a final scope ruling under paragraph (h) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purpose of an administrative review under § 351.213.

(j) *Country of origin determinations.* In considering whether a product is covered by the scope of the order at issue, the Secretary may need to determine the country of origin of the product. To make such a determination, the Secretary may use any reasonable method and is not bound by the determinations of any other agency, including tariff classification and country of origin marking rulings issued by the Customs Service.

(1) In determining the country of origin, the Secretary may conduct a substantial transformation analysis that considers relevant factors that arise on a case-by-case basis, including:

(i) Whether the processed downstream product is a different class or kind of merchandise than the upstream product;

(ii) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product;

(iii) The intended end-use of the downstream product;

(iv) The cost of production/value added of further processing in the third country or countries;

(v) The nature and sophistication of processing in the third country or countries; and

(vi) The level of investment in the third country or countries.

(2) In conducting a country of origin determination, the Secretary also may consider where the essential component of the product is produced or where the essential characteristics of the product are imparted.

(k) *Scope rulings.* (1) In determining whether a product is covered by the scope of the order at issue, the Secretary will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.

(i) The following primary interpretive sources may be taken into account under paragraph (k)(1) introductory text of this section, at the discretion of the Secretary:

(A) The descriptions of the merchandise contained in the petition pertaining to the order at issue;

(B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue;

(C) Previous or concurrent determinations of the Secretary, including prior scope rulings, memoranda, or clarifications pertaining to both the order at issue, as well as other orders with same or similar language as that of the order at issue; and

(D) Determinations of the Commission pertaining to the order at issue, including reports issued pursuant to the Commission's initial investigation.

(ii) The Secretary may also consider secondary interpretive sources under paragraph (k)(1) introductory text of this section, such as any other determinations of the Secretary or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence. However, in the event of a conflict between these secondary interpretive sources and the primary interpretive sources under paragraph (k)(1)(i) of this section, the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue.

(2)(i) If the Secretary determines that the sources under paragraph (k)(1) of this section are not dispositive, the Secretary will then further consider the following factors:

(A) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product;

(B) The expectations of the ultimate users;

(C) The ultimate use of the product;

(D) The channels of trade in which the product is sold; and

(E) The manner in which the product is advertised and displayed.

(ii) In the event of a conflict between the factors under paragraph (k)(2)(i) of this section, paragraph (k)(2)(i)(A) will normally be allotted greater weight than the other factors.

(3) If merchandise contains or consists of two or more components and the product at issue in the scope inquiry is a component of that merchandise as a whole, the Secretary may adopt the following analysis:

(i) The Secretary will analyze the scope language under paragraph (k)(1) of this section, and, if necessary, the factors under paragraph (k)(2) of this section, to determine if the component product, standing alone, would be covered by an order;

(ii) If the Secretary determines that the component product would otherwise be covered by the scope of an order as a result of the analysis under (k)(3)(i) of this section, the Secretary will consider the scope language under paragraph (k)(1) of this section to determine whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order; and

(iii) If the Secretary determines the analysis under (k)(3)(ii) of this section does not resolve whether the component product's inclusion in the merchandise as a whole results in its exclusion from the scope of the order, then the Secretary will consider, as appropriate, the following relevant factors that may arise on a product-specific basis:

(A) The practicability of separating the in-scope component for repackaging or resale, considering the relative difficulty and expense of separating the components;

(B) The measurable value of the in-scope component as compared to the measurable value of the merchandise as a whole; and

(C) The ultimate use or function of the in-scope component relative to the ultimate use or function of the merchandise as a whole.

(l) *Suspension of liquidation.* (1) When the Secretary initiates a scope inquiry under paragraph (b) or (d) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the scope inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.

(2) If the Secretary issues a preliminary scope ruling under paragraph (g) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry; and

(iii)(A) *In general.* Subject to paragraph (l)(2)(iii)(B) of this section, the Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of initiation of the scope inquiry.

(B) *Exception.* If the Secretary determines it is appropriate to do so, the Secretary may, at the timely request of an interested party or at the Secretary's discretion, direct the Customs Service to begin the suspension of liquidation and apply the applicable cash deposit rate under paragraph (l)(2)(iii)(A) of this section at an alternative date. In response to a timely request from an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(3) If the Secretary issues a final scope ruling under paragraph (h) of this section that the product at issue is

covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate until appropriate liquidation instructions are issued;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry until appropriate liquidation instructions are issued; and

(iii)(A) *In general.* Subject to paragraph (l)(3)(iii)(B) of this section, the Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of initiation of the scope inquiry until appropriate liquidation instructions are issued.

(B) *Exception.* If the Secretary determines it is appropriate to do so, the Secretary may, at the timely request of an interested party or at the Secretary's discretion, direct the Customs Service to begin the suspension of liquidation and apply the applicable cash deposit rate under paragraph (l)(3)(iii)(A) of this section at an alternative date until appropriate liquidation instructions are issued. In response to a timely request from an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(4) If the Secretary issues a final scope ruling under paragraph (h) of this section that the product is not covered by the scope of the order, and entries of the product at issue are not otherwise subject to suspension of liquidation as a result of another segment of the proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227, the Secretary will order the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(5) Nothing in this section affects the Customs Service's authority to take any additional action with respect to the suspension of liquidation or related measures.

(m) *Applicability of scope rulings; companion orders*—(1) *Applicability of scope rulings.* In conducting a scope inquiry under this section, the Secretary shall consider, based on the available record evidence, whether the scope ruling should be applied:

(i) On a producer-specific, exporter-specific, importer-specific basis, or some combination thereof; or

(ii) To all products from the same country with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter or importer of those products.

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the scope ruling application pertaining to both orders only on the record of the antidumping duty proceeding. Should the Secretary determine to initiate a scope inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue for both orders only on the record of the antidumping proceeding. Once the Secretary issues a final scope ruling on the record of the antidumping duty proceeding, the Secretary will include a copy of that scope ruling on the record of the countervailing duty proceeding.

(n) *Service of scope ruling application; annual inquiry service list; entry of appearance.* (1) The requirements of § 351.303(f) apply to this section, except that an interested party that submits a scope ruling application under paragraph (c) of this section must serve a copy of the application on all persons on the annual inquiry service list for that order, as well as the companion order, if any, as described in paragraph (m)(2) of this section. If a scope ruling application is rejected and resubmitted pursuant to paragraph (d)(1) of this section, service of the resubmitted application is not required under this paragraph, unless otherwise specified.

(2) For purposes of this section, the ''annual inquiry service list'' will include the petitioner(s) and those parties that file a request for inclusion on the annual inquiry service list for a proceeding, in accordance with the Secretary's established procedures.

(3) A new ''annual inquiry service list'' will be established on a yearly basis. Parties filing a request for inclusion on that list must file a request during the anniversary month of the publication of the antidumping or countervailing duty order. Only the petitioner and the government of the foreign country at issue in an antidumping or countervailing duty order will be automatically placed on the new annual inquiry service list once the previous year's list has been replaced.

(4) Once a scope inquiry has been self-initiated or a scope ruling application is accepted by the Secretary, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than the scope ruling applicant under paragraph (c) of this section that wish to participate in the scope inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Publication of list of final scope rulings.* On a quarterly basis, the Secretary will publish in the **Federal Register** a list of final scope rulings issued within the previous three months. This list will include the case name, and a brief description of the ruling. The Secretary also may include complete public versions of its scope rulings on its website, should the Secretary determine such placement is warranted.

(p) *Suspended investigations; suspension agreements.* The Secretary may apply the procedures set forth in this section in determining whether a product at issue is covered by the scope of a suspended investigation or a suspension agreement (*see* § 351.208).

(q) *Scope clarifications.* The Secretary may issue a scope clarification in any segment of a proceeding providing an interpretation of specific language in the scope of an order or addressing whether a product is covered or excluded by the scope of an order at issue based on previous scope determinations covering the same or similar products. Such a scope clarification may take the form of an interpretive footnote to the scope when the scope is published or issued in instructions to the Customs Service.

■ 6. Effective November 4, 2021, add § 351.226 to subpart B to read as follows:

§ 351.226 Circumvention inquiries.

(a) *Introduction.* Section 781 of the Act addresses the circumvention of antidumping and countervailing duty orders. This provision recognizes that circumvention seriously undermines the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings and frustrates the purposes for which these laws were enacted. Section 781 of the Act allows

the Secretary to apply antidumping and countervailing duty orders in such a way as to prevent circumvention by including within the scope of the order four distinct categories of merchandise. The Secretary will initiate and conduct a circumvention inquiry at the request of an interested party or on the Secretary's initiative, and issue a circumvention determination as provided for under section 781 of the Act and the rules and procedures in this section. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) apply to this section.

(b) *Self-initiation of circumvention inquiry.* If the Secretary determines from available information that an inquiry is warranted into the question of whether the elements necessary for a circumvention determination under section 781 of the Act exist, the Secretary may initiate a circumvention inquiry and publish a notice of initiation in the **Federal Register**.

(c) *Circumvention inquiry request*—(1) *In general.* An interested party may submit a request for a circumvention inquiry that alleges that the elements necessary for a circumvention determination under section 781 of the Act exist and that is accompanied by information reasonably available to the interested party supporting these allegations. The circumvention inquiry request must be served in accordance with the requirements of paragraph (n) of this section.

(2) *Contents of request.* To the extent reasonably available to the requestor, a circumvention inquiry request must include the following requested information under paragraph (c)(1) of this section and relevant supporting documentation:

(i) A detailed description of the merchandise allegedly circumventing the antidumping or countervailing duty order, including:

(A) The physical characteristics (including chemical, dimensional or technical characteristics) of the product;

(B) The country(ies) where the product is produced, the country from where it is exported, and the declared country of origin;

(C) The product's tariff classification under the Harmonized Tariff Schedule of the United States and copies of any Customs rulings relevant to the tariff classification;

(D) The uses of the product;

(E) Clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product; and

(F) A description of parts, materials, and the production process employed in the production of the product.

(ii) A concise public summary of the product's description under paragraphs (c)(2)(i)(A) through (C) of this section.

(iii) The name and address of the producer, exporter, and importer of the product. If the full universe of parties allegedly circumventing the order(s) is unknown, then examples are sufficient.

(iv) A statement of the requestor's position as to the nature of the alleged circumvention under section 781 of the Act, such as a description of the procedures, channels of trade, and foreign countries involved (including a description of the processes occurring in each country), as appropriate.

(v) A statement of the requestor's position as to whether the circumvention inquiry, if initiated, should be conducted on a country-wide basis.

(vi) Factual information supporting this position, including import and export data relevant to the merchandise allegedly circumventing the antidumping or countervailing duty order.

(d) *Initiation of a circumvention inquiry and other actions based on a request*—(1) *Initiation of a circumvention inquir*y. Except as provided under paragraph (d)(2) of this section, within 30 days after the filing of a request for a circumvention inquiry, the Secretary will determine whether to accept or reject the request. If it is not practicable to determine whether to accept or reject a request within 30 days, the Secretary may extend that deadline by an additional 15 days.

(i) If the Secretary determines that the request is incomplete or otherwise unacceptable, the Secretary may reject the request, and will provide a written explanation of the reasons for the rejection. If the request is rejected, the requestor may resubmit the full request at any time, with all identified deficiencies corrected.

(ii) If the Secretary determines that a request for a circumvention inquiry satisfies the requirements of paragraph (c) of this section, the Secretary will accept the request and initiate a circumvention inquiry. The Secretary will publish a notice of initiation in the **Federal Register**.

(2) *Other actions based on a request for a circumvention inquiry.* Where applicable, the Secretary may take one of the following actions within the applicable timeline under paragraph (d)(1) of this section:

(i) If the Secretary determines upon review of a request for a circumvention inquiry that a scope ruling is warranted before the Secretary can conduct a circumvention analysis, the Secretary may either initiate the circumvention inquiry under paragraph (d)(1)(ii) of this section and address the scope issue in the circumvention inquiry (*see* § 351.225(i)(1)), or defer initiation of the circumvention inquiry pending the completion of any ongoing or new segment of the proceeding addressing the scope issue. When initiation is deferred pending another segment of the proceeding, if the result of that other segment is that the product at issue is not covered by the scope of the antidumping and/or countervailing duty order(s) at issue, the Secretary may immediately initiate the circumvention inquiry upon the issuance of the final decision in that other segment; or

(ii) If the Secretary determines upon review of the request for a circumvention inquiry that the circumvention issue should be addressed in an ongoing segment of the proceeding, such as a covered merchandise inquiry under § 351.227, rather than initiating a circumvention inquiry, the Secretary will notify the requestor of its intent to address the circumvention issue in such other segment.

(e) *Deadlines for circumvention determinations*—(1) *Preliminary determination.* The Secretary will issue a preliminary determination under paragraph (g)(1) of this section no later than 150 days from the date of publication of the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section.

(2) *Final determination.* In accordance with section 781(f) of the Act, the Secretary shall, to the maximum extent practicable, issue a final determination under paragraph (g)(2) of this section no later than 300 days from the date of publication of the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section. If the Secretary concludes that the inquiry is extraordinarily complicated and additional time is necessary to issue a final circumvention determination, then the Secretary may extend the 300-day deadline by no more than 65 days.

(3) *Alignment with other segments.* If the Secretary determines it is appropriate to do so, the Secretary may align the deadlines under this paragraph with the deadlines of another segment of the proceeding.

(f) *Circumvention inquiry procedures.* (1) Within 30 days of the publication of the notice of the Secretary's self-initiation of a circumvention inquiry under paragraph (b) of this section, interested parties are permitted one opportunity to submit comments and

factual information addressing the self-initiation. Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Within 30 days of the publication of the notice of initiation of a circumvention inquiry under paragraph (d) of this section, an interested party other than the requestor is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the request. Within 14 days of the filing of such rebuttal, clarification, or correction, the requestor is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the interested party's rebuttal, clarification or correction.

(3) Following initiation of a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 14 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within 7 days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information contained in the interested party's rebuttal, clarification or correction.

(4) If the Secretary issues a preliminary circumvention determination under paragraph (g)(1) of this section, which is not issued concurrently with the initiation of the circumvention inquiry, the Secretary will establish a schedule for the filing of comments and rebuttal comments. Unless otherwise specified, any interested party may submit comments within 14 days after the issuance of the preliminary circumvention determination, and any interested party may submit rebuttal comments within 7 days thereafter. Unless otherwise specified, no new factual information will be accepted in the comments or rebuttal comments.

(5) If the Secretary issues a preliminary circumvention determination concurrently with the initiation of the circumvention inquiry under paragraph (g)(1) of this section, paragraphs (f)(1) through (4) will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(6) If the Secretary determines it is appropriate to do so, the Secretary may rescind, in whole or in part, a circumvention inquiry, under this section and will notify interested parties. Situations in which the Secretary may rescind a circumvention inquiry include:

(i) The requestor timely withdraws its request for a circumvention inquiry under paragraph (c) of this section;

(ii) The Secretary issues a final determination in another segment of a proceeding, and has determined that the merchandise at issue in the circumvention inquiry is covered by the scope of the antidumping or countervailing duty order;

(iii) The Secretary has initiated a circumvention inquiry under paragraph (b) or (d) of this section to examine circumvention under two or more provisions under paragraph (h), (i), (j), or (k) of this section, and determines that it is not necessary to issue a final circumvention determination with respect to one of those paragraphs. For example, if the Secretary initiates a circumvention inquiry to examine whether merchandise is altered in minor respects under paragraph (j) of this section or later-developed merchandise under paragraph (k) of this section, the Secretary may rescind the inquiry in part to address only one of those provisions; or

(iv) The Secretary has initiated a covered merchandise inquiry under § 351.227 and determined that it can address the necessary elements for a circumvention determination under section 781 of the Act in that proceeding.

(7) If the Secretary determines it is appropriate to do so, the Secretary may alter or extend any time limits under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the circumvention inquiry.

(8)(i) The Secretary will notify the Commission in writing of the proposed inclusion of products in an order prior to issuing a final determination under paragraph (g)(2) of this section based on a determination under:

(A) Section 781(a) of the Act (paragraph (h) of this section) with respect to merchandise completed or assembled in the United States (other than minor completion or assembly);

(B) Section 781(b) of the Act (paragraph (i) of this section) with respect to merchandise completed or assembled in other foreign countries; or

(C) Section 781(d) of the Act (paragraph (k) of this section) with respect to later-developed products that incorporate a significant technological advance or significant alteration of an earlier product.

(ii) If the Secretary notifies the Commission under paragraph (f)(8)(i) of this section, upon the written request of the Commission, the Secretary will consult with the Commission regarding the proposed inclusion, and any such consultation will be completed within 15 days after the date of such request. If, after consultation, the Commission believes that a significant injury issue is presented by the proposed inclusion of a product within an order, the Commission may provide written advice to the Secretary as to whether the inclusion would be inconsistent with the affirmative injury determination of the Commission on which the order is based.

(9) During the pendency of a circumvention inquiry or upon issuance of a final circumvention determination under paragraph (g)(2) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the circumvention inquiry for purposes of an administrative review under § 351.213.

(g) *Circumvention determinations*—(1) *Preliminary determination.* The Secretary will issue a preliminary determination, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the elements necessary for a circumvention determination under section 781 of the Act exist. The preliminary determination will be published in the **Federal Register**. The Secretary may publish notice of a preliminary determination concurrently with the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section.

(2) *Final determination.* The Secretary will issue a final determination as to whether the elements necessary for a circumvention determination under section 781 of the Act exist, in which case the merchandise at issue will be included within the scope of the order. As part of its determination, the Secretary will include an explanation of the factual and legal conclusions on

which the final determination is based. The final determination will be published in the **Federal Register**. Promptly after publication, the Secretary will convey a copy of the final determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (see § 351.102(b)(36)).

(h) *Products completed or assembled in the United States.* Under section 781(a) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order imported parts or components referred to in section 781(a)(1)(B) of the Act that are used in the completion or assembly of the merchandise in the United States at any time such order is in effect. In determining the value of parts or components (including such purchases from another person) under section 781(a)(1)(D) of the Act, or of processing performed (including by another person) under section 781(a)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act—or, in the case of nonmarket economies, on the basis of section 773(c) of the Act.

(i) *Products completed or assembled in other foreign countries.* Under section 781(b) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order, at any time such order is in effect, imported merchandise completed or assembled in a foreign country other than the country to which the order applies. In determining the value of parts or components (including such purchases from another person) under section 781(b)(1)(D) of the Act, or of processing performed (including by another person) under section 781(b)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act—or, in the case of nonmarket economies, on the basis of section 773(c) of the Act.

(j) *Minor alterations of merchandise.* Under section 781(c) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order articles altered in form or appearance in minor respects. The Secretary may consider such criteria including, but not limited to, the overall physical characteristics of the merchandise, (including chemical, dimensional, and technical characteristics), the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products. The Secretary also may consider the circumstances under which the products enter the United States, including but not limited to the timing of the entries and the quantity of merchandise entered during the circumvention review period.

(k) *Later-developed merchandise.* In determining whether later-developed merchandise is within the scope of an antidumping or countervailing duty order, the Secretary will apply section 781(d) of the Act. In determining whether merchandise is ''later-developed'' the Secretary will examine whether the merchandise at issue was commercially available at the time of the initiation of the underlying antidumping or countervailing duty investigation.

(l) *Suspension of liquidation.* (1) When the Secretary publishes a notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the circumvention inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.

(2) If the Secretary issues an affirmative preliminary determination under paragraph (g)(1) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the inquiry; and

(iii)(A) *In general.* Subject to paragraph (l)(2)(iii)(B) of this section, if the Secretary determines that it is appropriate to do so, the Secretary may direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the inquiry. The Secretary may take action under this provision at the timely request of an interested party or at the Secretary's discretion. In response to a timely request from an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(B) *Exception.* If the Secretary has determined to address a covered merchandise referral (*see* § 351.227) in a circumvention inquiry under § 351.226, the rules of § 351.227(l)(2)(iii) will apply.

(3) If the Secretary issues an affirmative final determination under paragraph (g)(2) of this section that the product at issue is covered by the scope of the order, the following rules will apply:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate until appropriate liquidation instructions are issued;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the inquiry until appropriate liquidation instructions are issued; and

(iii)(A) *In general.* Subject to paragraph (l)(3)(iii)(B) of this section, if the Secretary determines that it is appropriate to do so, the Secretary may direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the inquiry until appropriate liquidation instructions are issued. The Secretary may take action under this provision at the timely request of an interested party or at the Secretary's discretion. In response to a timely request from an interested party, the Secretary will only consider an alternative date based on a specific argument supported by evidence establishing the appropriateness of that alternative date.

(B) *Exception.* If the Secretary has determined to address a covered merchandise referral (see § 351.227) in a circumvention inquiry under § 351.226, the rules of § 351.227(l)(3)(iii) will apply.

(4) If the Secretary issues a negative final determination under paragraph (g)(2) of this section, and entries of the product are not otherwise subject to suspension of liquidation as a result of another segment of the proceeding, such as a covered merchandise inquiry under § 351.227, the Secretary will order the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(5) Nothing in this section affects the Customs Service's authority to take any additional action with respect to the suspension of liquidation or related measures.

(m) *Applicability of circumvention determination; companion orders*—(1) *Applicability of circumvention determination.* In conducting a circumvention inquiry under this section, the Secretary shall consider, based on the available record evidence, the appropriate remedy to address circumvention and to prevent evasion of the order. Such remedies may include:

(i) The application of the determination on a producer-specific, exporter-specific, importer-specific basis, or some combination thereof;

(ii) The application of the determination on a country-wide basis to all products from the same country as the product at issue with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics), regardless of producer, exporter, or importer of those products;

(iii) The application of the determination on a country-wide basis to all products from the same country as the product at issue with similar relevant physical characteristics, (including chemical, dimensional and technical characteristics), regardless of producer, exporter, or importer of those products; and

(iv) The implementation of a certification requirement under 19 CFR 351.228.

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the request pertaining to both orders only on the record of the antidumping duty proceeding. Should the Secretary determine to initiate a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue for both orders only on the record of the antidumping proceeding. Once the Secretary issues a final circumvention determination on the record of the antidumping duty proceeding, the Secretary will include a copy of that determination on the record of the countervailing duty proceeding.

(n) *Service of circumvention inquiry request; annual inquiry service list; entry of appearance.* (1) The requirements of § 351.303(f) apply to this section, except that an interested party that submits a circumvention inquiry request under paragraph (c) of this section must serve a copy of that inquiry request on all persons on the annual inquiry service list for that order, as well as the companion order, if any, as described in paragraph (m)(2) of this section. The procedures and description pertaining to the ''annual inquiry service list'' are set forth in § 351.225(n)(1) through (3).

(2) Once a circumvention inquiry is self-initiated or a circumvention inquiry request is accepted by the Secretary, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than the interested party requesting a circumvention inquiry that wish to participate in the circumvention inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Suspended investigations; suspension agreements.* The Secretary may, in accordance with section 781 of the Act, apply the procedures set forth in this section in determining whether the product at issue circumvented a suspended investigation or a suspension agreement (*see* § 351.208).

■ 7. Effective November 4, 2021, add § 351.227 to subpart B to read as follows:

§ 351.227 Covered merchandise referrals.

(a) *Introduction.* The Trade Facilitation and Trade Enforcement Act of 2015 contains Title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title ''Enforce and Protect Act of 2015'' or ''EAPA'') (Pub. L. 114–125, sections 401, 421, 130 Stat. 122, 155, 161 (2016)). The Enforce and Protect Act of 2015 added section 517 to the Act, which established a new framework by which the Customs Service can conduct civil administrative investigations of potential duty evasion of an antidumping and/or countervailing duty order (referred to herein as an ''EAPA investigation''). Section 517(b)(4)(A)(i) of the Act provides a procedure whereby if, during the course of an EAPA investigation, the Customs Service is unable to determine whether the merchandise at issue is covered merchandise within the meaning of section 517(a)(3) of the Act, it shall refer the matter to the Secretary to make such a determination (referred to herein as a ''covered merchandise referral''). Section 517(b)(4)(B) of the Act directs the Secretary to determine whether the merchandise is covered merchandise and promptly transmit the determination to the Customs Service. The Secretary will consider a covered merchandise referral and issue a covered merchandise determination in accordance with the rules and procedures in this section. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) apply to this section.

(b) *Actions with respect to covered merchandise referral.* Within 20 days after receiving a covered merchandise referral from the Customs Service pursuant to section 517(b)(4)(A)(i) of the Act that the Secretary determines to be sufficient, the Secretary will take the following action.

(1) Initiate a covered merchandise inquiry and publish a notice of initiation in the **Federal Register**; or

(2) If the Secretary determines upon review of the covered merchandise referral that the issue can be addressed in an ongoing segment of the proceeding, such as a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226, rather than initiating the covered merchandise inquiry, the Secretary will publish a notice of its intent to address the covered merchandise referral in such other segment in the **Federal Register**.

(c) *Deadlines for covered merchandise determinations*—(1) *In general.* When the Secretary initiates a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary shall issue a final covered merchandise determination within 120 days from the date of publication of the notice of initiation.

(2) *Extension.* The Secretary may extend the deadline in paragraph (c)(1) of this section by no more than 150 days if the Secretary determines that good cause exists to warrant an extension. Situations in which good cause has been demonstrated may include:

(i) If the Secretary has issued questionnaires to interested parties; received responses to those questionnaires; and determined that an extension is warranted to request further information or consider and address the parties' responses on the record adequately;

(ii) The Secretary has issued a preliminary covered merchandise

determination (*see* paragraph (e)(1) of this section); or

(iii) The Secretary has determined to address a scope or circumvention issue from another segment of the proceeding involving the same or similar products in the covered merchandise inquiry, pursuant to § 351.225(d)(2) or (i) or § 351.226(f)(6)(iv).

(3) *Alignment with other segments.* If the Secretary determines it is appropriate to do so, the Secretary may align the deadlines under this paragraph with the deadlines of another segment of the proceeding.

(d) *Covered merchandise inquiry procedures.* (1) Within 30 days of the date of publication of the notice of an initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, interested parties are permitted one opportunity to submit comment and factual information addressing the initiation. Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Following initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 14 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within 7 days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(3) If the Secretary issues a preliminary covered merchandise determination under paragraph (e)(1) of this section, which is not issued concurrently with the initiation of a covered merchandise inquiry, the Secretary will establish a schedule for the filing of comments and rebuttal comments. Unless otherwise specified, any interested party may submit comments within 14 days after the issuance of the preliminary covered merchandise determination, and any interested party may submit rebuttal comments within 7 days thereafter. Unless otherwise specified, no new factual information will be accepted in the comments or rebuttal comments.

(4) If the Secretary issues a preliminary covered merchandise determination concurrently with the initiation of the covered merchandise inquiry under paragraph (e)(1) of this section, paragraphs (d)(1) through (3) will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(5) If the Secretary determines it appropriate to do so, the Secretary may rescind, in whole or in part, a covered merchandise inquiry under this section and will notify interested parties. Situations in which the Secretary may rescind a covered merchandise inquiry include:

(i) The Customs Service withdraws its request for a covered merchandise inquiry under paragraph (b) of this section; or

(ii) The Secretary has initiated a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226 and determines that it can address the covered merchandise referral in such other segment of the proceeding.

(6) If the Secretary determines it is appropriate to do so, the Secretary may alter or extend any time limits under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the covered merchandise inquiry.

(7) During the pendency of a covered merchandise inquiry or upon issuance of a final covered merchandise determination under paragraph (e)(2) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the covered merchandise inquiry for purpose of an administrative review under § 351.213.

(e) *Covered merchandise determinations*—(1) *Preliminary determination.* The Secretary may issue a preliminary determination, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. In determining whether to issue a preliminary determination, the Secretary may consider the complexity of the issues and arguments raised in the context of the covered merchandise inquiry. The preliminary determination will be published in the **Federal Register**. The Secretary may publish notice of a preliminary determination concurrently with the notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section.

(2) *Final determination.* The Secretary will issue a final determination as to whether the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. As part of its determination, the Secretary will include an explanation of the factual and legal conclusions on which the final determination is based. The final determination will be published in the **Federal Register**. Promptly after publication, the Secretary will:

(i) Convey a copy of the final determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (see § 351.102(b)(36)); and

(ii) Transmit a copy of the final covered merchandise determination to the Customs Service in accordance with section 517(b)(4)(B) of the Act.

(3) *Covered merchandise determinations in other segments of the proceeding.* If the Secretary addresses the covered merchandise referral in another segment of the proceeding as provided for under paragraph (b)(2) or (d)(5)(ii) of this section, the Secretary will promptly transmit a copy of the final action in that segment to the Customs Service in accordance with section 517(b)(4)(B) of the Act.

(f) *Basis for covered merchandise determination.* In determining whether a product is covered by the scope of the order under this section, the Secretary may utilize the analysis described in paragraphs (j) and (k) of § 351.225 or any provision under section 781 of the Act (paragraph (h), (i), (j), or (k) of § 351.226).

(g)–(k) [Reserved]

(l) *Suspension of liquidation.* (1) When the Secretary publishes a notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the covered merchandise inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order.

(2) If the Secretary issues an affirmative preliminary covered merchandise determination under paragraph (e)(1) of this section that the product at issue is covered by the scope

of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the covered merchandise inquiry; and

(iii) The Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the covered merchandise inquiry.

(3) If the Secretary issues an affirmative final covered merchandise determination under paragraph (e)(2) of this section that the product at issue is covered by the scope of the order, the Secretary will take the following actions:

(i) The Secretary will direct the Customs Service to continue the suspension of liquidation of previously suspended entries and apply the applicable cash deposit rate until appropriate liquidation instructions are issued;

(ii) The Secretary will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the covered merchandise inquiry until appropriate liquidation instructions are issued; and

(iii) The Secretary normally will direct the Customs Service to begin the suspension of liquidation and require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the covered merchandise inquiry until appropriate liquidation instructions are issued.

(4) If the Secretary issues a negative final covered merchandise determination under paragraph (e)(2) of this section that the product at issue is not covered by the scope of the order, and entries of the product at issue are not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a circumvention inquiry under § 351.226, the Secretary will direct the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(5) Nothing in this section affects the Customs Service's authority to take any additional action with respect to the suspension of liquidation or related measures.

(m) *Applicability of covered merchandise determination; companion orders*—(1) *Applicability of covered merchandise determination.* In conducting a covered merchandise inquiry under this section, the Secretary shall consider, based on the available record evidence, whether the covered merchandise determination should be applied:

(i) On a producer-specific, exporter-specific, importer-specific basis, or some combination thereof; or

(ii) To all products from the same country with the same relevant physical characteristics, (including chemical, dimensional and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter or importer of those products.

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, and should the Secretary determine to initiate a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue only on the record of the antidumping duty proceeding. Once the Secretary issues a final covered merchandise determination on the record of the antidumping duty proceeding, the Secretary will include a copy of that determination on the record of the countervailing duty proceeding and notify the Customs Service in accordance with paragraph (l) of this section.

(n) *Service list.* Once the Secretary initiates a covered merchandise inquiry under paragraph (b)(1) of this section, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than those relevant parties identified by the Customs Service in the covered merchandise referral that wish to participate in the covered merchandise inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Suspended investigations; suspension agreements.* The Secretary may apply the procedures set forth in this section in determining whether the product at issue is covered merchandise with respect to a suspended investigation or a suspension agreement (*see* § 351.208).

■ 8. Effective October 20, 2021, add § 351.228 to subpart B to read as follows:

§ 351.228 Certification by importer or other interested party.

(a) *Certification requirements.* (1) The Secretary may determine in the context of an antidumping or countervailing duty proceeding that an importer or other interested party shall:

(i) Maintain a certification for entries of merchandise into the customs territory of the United States;

(ii) Provide a certification by electronic means at the time of entry or entry summary; or

(iii) Otherwise demonstrate compliance with a certification requirement as determined by the Secretary, in consultation with the Customs Service.

(2) Where the certification is required to be maintained by the importer or other interested party under paragraph (a)(1) of this section, the Secretary and/or the Customs Service may require the importer or other interested party to provide such a certification to the requesting agency upon request.

(b) *Consequences for no provision of a certificate; provision of a false certificate.* (1) The Secretary may instruct the Customs Service to suspend liquidation of entries of the importer or entries associated with the other interested party and require a cash deposit of estimated duties at the applicable rate if:

(i) The importer or other interested party has not provided to the Secretary or the Customs Service, as appropriate, the certification described under paragraph (a) of this section either as required or upon request for such entries; or

(ii) The importer or other interested party provided a certification in accordance with paragraph (a) of this section for such entries, but the certification contained materially false, fictitious or fraudulent statements or representations, or contained material omissions.

(2) Under paragraph (b)(1)(i) or (ii) of this section, the Secretary may also instruct the Customs Service to assess antidumping or countervailing duties,

as the case may be, at the applicable rate.

■ 9. In § 351.305, effective November 4, 2021, revise paragraph (d) to read as follows:

§ 351.305 Access to business proprietary information.

* * * * *

(d) *Additional filing requirements for importers.* If an applicant represents a party claiming to be an interested party by virtue of being an importer, then the applicant shall submit, along with the Form ITA–367, documentary evidence demonstrating that during the applicable period of investigation or period of review the interested party imported subject merchandise. For a scope segment of a proceeding pursuant to § 351.225 or a circumvention segment of a proceeding pursuant to § 351.226, the applicant must present documentary evidence that the interested party imported subject merchandise, or that it has taken steps towards importing the merchandise subject to the scope or circumvention inquiry. For a covered merchandise referral segment of a proceeding pursuant to § 351.227, an applicant representing an interested party that has been identified by the Customs Service as the importer in a covered merchandise referral is exempt from the requirements of providing documentary evidence to demonstrate that it is an importer for purposes of that segment of a proceeding.

■ 10. In § 351.402, effective October 20, 2021, revise paragraph (f)(2) to read as follows:

§ 351.402 Calculation of export price and constructed export price; reimbursement of antidumping and countervailing duties.

* * * * *

(f) * * *

(2) *Reimbursement certification.* (i) The importer must certify with the Customs Service prior to liquidation (except as provided for in paragraph (f)(2)(iii) of this section) whether the importer has or has not been reimbursed or entered into any agreement or understanding for the payment or for the refunding to the importer by the manufacturer, producer, seller, or exporter for all or any part of the antidumping and countervailing duties, as appropriate. Such certifications should identify the commodity and country and contain the information necessary to link the certification to the relevant entry or entry line number(s).

(ii) The reimbursement certification may be filed either electronically or in paper in accordance with the Customs Service's requirements, as applicable.

(iii) If an importer does not provide its reimbursement certification prior to liquidation, the Customs Service may accept the reimbursement certification in accordance with its protest procedures under 19 U.S.C. 1514, unless otherwise directed.

(iv) Reimbursement certifications are required for entries of the relevant commodity that have been imported on or after the date of publication of the antidumping notice in the **Federal Register** that first suspended liquidation in that proceeding.

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LIST OF PUBLIC LAWS

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