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Presidential Documents

Title 3—

The President

Executive Order 14069 of March 15, 2022

Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency

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

Section 1. *Policy.* It is the policy of my Administration to eliminate discriminatory pay practices that inhibit the economy, efficiency, and effectiveness of the Federal workforce and the procurement of property and services by the Federal Government. The Office of Personnel Management anticipates issuing a proposed rule that will address the use of salary history in the hiring and pay-setting processes for Federal employees, consistent with Executive Order 14035 of June 25, 2021 (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce). The purpose of this order is to direct the consideration of parallel efforts with respect to Federal procurement.

Sec. 2. *Economy, Efficiency, and Effectiveness in Federal Procurement.* Consistent with applicable law and subject to the availability of appropriations, the Federal Acquisition Regulatory Council, in consultation with the Secretary of Labor and the heads of other executive departments and agencies as appropriate, shall consider issuing proposed rules to promote economy, efficiency, and effectiveness in Federal procurement by enhancing pay equity and transparency for job applicants and employees of Federal contractors and subcontractors. In doing so, the Federal Acquisition Regulatory Council shall specifically consider whether any such rules should limit or prohibit Federal contractors and subcontractors from seeking and considering information about job applicants' and employees' existing or past compensation when making employment decisions. The Federal Acquisition Regulatory Council shall also consider the inclusion of appropriate accountability measures in any such rules.

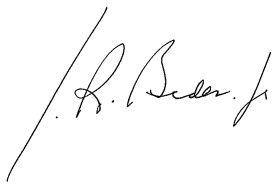
Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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



THE WHITE HOUSE,
March 15, 2022.

[FR Doc. 2022–05949
Filed 3–17–22; 8:45 am]
Billing code 3395–F2–P

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DEPARTMENT OF ENERGY

2 CFR Part 910

RIN 1991–AC16

Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

AGENCY: Office of Management, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) publishes a final rule to make technical and administrative changes as a result of the Office of Management and Budget (OMB) revisions to its regulations on Grants and Agreements. The changes are required in order to align DOE's regulations with the revised OMB regulations and to remove reference to an expired statutory cost share pilot program. The final rule also makes technical changes to correct pre-existing numbering errors in the regulatory text.

DATES: This rule is effective March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Bonnell, U.S. Department of Energy, Office of Management, 950 L'Enfant Plaza SW, Washington, DC 20024; (202) 287–1747 or *Richard.Bonnell@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Title 2 CFR part 910 adopts OMB's guidance, which updated its regulations, in subparts A through F of 2 CFR part 200 as DOE's policies and procedures for uniform administrative requirements, cost principles, and audit requirement for Federal awards. DOE is amending 2 CFR part 910 to align with the OMB's recent revisions to its regulations on Grants and Agreements published on August 13, 2020, at 85 FR 49506, which became effective on November 12, 2020. DOE further amends its regulation at 2 CFR 910.130 to remove reference to an expired statutory cost share pilot program. This final rule also makes technical changes to correct pre-existing numbering errors in the regulatory text.

II. Discussion of Final Rule

DOE amends its Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 910 as follows:

1. Section 910.122, paragraph (a) is revised to change the reference to Non-Federal entity from 2 CFR 200.69 to 2 CFR 200.1.

2. Section 910.128, paragraph (f)(1)(i) is revised to change the reference to Specific Conditions from 2 CFR 200.207 to 2 CFR 200.208; paragraph (f)(1)(iv) is revised to change the reference to Remedies for Noncompliance from 2 CFR 200.338 to 2 CFR 200.339; paragraph (f)(1)(v) is revised to change the reference to Federal awarding agency or pass-through entity review from 2 CFR 200.324 to 2 CFR 200.325; and paragraph (f)(2)(iii) is revised to change the reference to Termination from 2 CFR 200.339 to 2 CFR 200.340.

3. Section 910.130, paragraph (b)(3) is deleted to implement the September 27, 2020, expiration of the Cost-Share Pilot Program enacted by Congress at section 108 of the Department of Energy Research and Innovation Act, Public Law 115–246; (e) is revised to change the references to the terms Development and Research from 2 CFR 200.87 to 2 CFR 200.1.

4. Section 910.350, paragraph (a) is revised to change the reference to Non-Federal entity from 2 CFR 200.69 to 2 CFR 200.1.

5. Section 910.352 is revised to change the reference to the General Provisions for Selected Items of Cost from 2 CFR 200.400 through 200.475 to 2 CFR 200.420 through 2 CFR 200.476.

6. Section 910.360, paragraph (c)(1) is revised to change the reference to Remedies for non-compliance from 2 CFR 200.338 to 2 CFR 200.339; and paragraph (c)(2) is revised to change the references to Federal awarding agency review of risk posed by applicants from 2 CFR 200.205 to 2 CFR 200.206 and the reference to Specific conditions from 2 CFR 200.207 and 2 CFR 200.208.

7. Section 910.370, paragraph (b) is revised to change the reference to all of the legally available remedies for non-compliance from 2 CFR 200.338 through 2 CFR 200.342 to 2 CFR 200.339 through 2 CFR 200.343.

8. Section 910.372, paragraph (a) is revised to change the reference to Federal awarding agency review of risk posed by applicants from 2 CFR 200.205 to 2 CFR 200.206 and the reference to Specific Conditions from 2 CFR 200.207 to 2 CFR 200.208.

9. Appendix A to Subpart D—Patent and Data Provisions, paragraph (1)(a) is revised to change the reference to the definition of ''[n]onprofit organization'' from 2 CFR 200.70 to 2 CFR 200.1.

10. Section 910.501, paragraph (f) is revised to change the reference to Subrecipient and contractor determinations from 2 CFR 200.330 to 2 CFR 200.331; and paragraph (h) is revised to change the reference to Requirements for pass-through entities from 2 CFR 200.331 to 2 CFR 200.332.

11. In section 910.502, the following redesignations are made in order to correct numbering errors in the initial publication of 2 CFR part 910 and are made in order to improve clarity and readability of the section. Paragraph (b) *Not applicable.* is deleted; paragraph (a) *Loan and loan guarantees (loans)* is redesignated as paragraph (b); The introductory text beginning ''*Determining Federal awards expended*'' is designated as paragraph (a); Paragraphs (d), (e), (f), (g), (h), and (i) are redesignated as paragraphs (e), (f), (g), (h), (i), and (j); and paragraph (d) *See Paragraph (b)* is added.

12. Section 910.505 is revised to change the reference to Remedies for noncompliance from 2 CFR 200.338 to 2 CFR 200.339.

13. Section 910.507, paragraph (a) pertaining to auditor guidance when a program-specific audit guide is available is revised to incorporate the language changes in 2 CFR 200.507. The following redesignations are due to numbering errors at time of initial publication of 2 CFR part 910 and made in order to improve clarity and readability of the section. Paragraphs (a)(1), (2), (3), and (4) pertaining to auditor requirements when a program-specific audit guide is not available are redesignated as paragraphs (b)(1), (2), (3), and (4). Paragraph (a)(5) pertaining to report submissions for program-

specific audits is redesignated as paragraph (c)(1). In this final rule, additional conforming changes are made to paragraphs (a)(6) and (7) which are redesignated as (c)(2) and (3) and paragraph (b) redesignated as (d).

14. Section 910.513, paragraph (c) is revised to change the reference to Information contained in a Federal award from 2 CFR 200.210 to 2 CFR 200.211; and paragraph (c)(3)(iii) is revised to change the reference to Cooperative audit resolution from 2 CFR 200.25 to 2 CFR 200.1.

15. In section 910.514, the following redesignations are made in order to correct numbering errors in the initial publication of 2 CFR part 910 and made in order to improve clarity and readability of the section. Paragraph (b)(1) *Internal control.* is redesignated as paragraph (c); the paragraph that begins 'The compliance supplement provides guidance . . . .' is designated as paragraph (c)(1); Paragraph (3)(i) is revised to remove the period and add '; and' at the end; Paragraph (5) *Compliance.* is redesignated as paragraph (d); the paragraph that begins 'In addition to the requirements of GAGAS, ...' is designated as paragraph (d)(1); Paragraphs (6), (7), and (8) are redesignated as paragraphs (d)(2), (d)(3), and (d)(4); Paragraph (c) ''Audit follow-up.'' is redesignated as paragraph (e); and paragraph (f) *Not applicable* is added to correspond with 2 CFR 200 formatting.

16. In section 910.515, the following redesignations are made in order to correct numbering errors in the initial publication of 2 CFR part 910 and made in order to improve clarity and readability of the section. Paragraph (d)(2)(i) is redesignated as paragraph (d)(3); and the sentence beginning 'Audit findings (*e.g.,* internal control findings, compliance findings, questioned costs, or fraud) . . .' is designated as paragraph (d)(3)(i).

17. In section 910.519, the following redesignations are made in order to correct numbering errors in the initial publication of 2 CFR part 910 and made in order to improve clarity and readability of the section. Paragraph (a)(1) *Current and prior audit experience.* is redesignated as paragraph (b); the text that begins 'Weaknesses in internal control over DOE programs . . . .' is designated as paragraph (b)(1); Paragraph (a)(4) *Oversight exercised by DOE.* is redesignated as paragraph (c); the text that begins 'Oversight exercised by DOE could be used . . . .' is designated as paragraph (c)(1); paragraph (a)(5) is redesignated as paragraph (c)(2); paragraph (a)(6) *Inherent risk of the Federal program.* is redesignated as paragraph (d); the text that begins 'The nature of a Federal program . . . .' is designated as paragraph (d)(1); and paragraphs (a)(7), (a)(8), and (a)(9) are redesignated as paragraphs (d)(2), (d)(3) and (d)(4).

18. In section 910.520, the following redesignations are made in order to correct numbering errors in the initial publication of 2 CFR part 910 and made in order to improve clarity and readability of the section. Paragraph (a) designation is moved to the second sentence beginning 'Compliance audits were performed on an annual . . . .'.

III. Regulatory Review

A. Administrative Procedure Act

DOE finds good cause to waive notice and comment on these regulations pursuant to 5 U.S.C. 553(b)(B) and the 30-day delay effective date pursuant to 5 U.S.C. 553(d). Notice and comment are unnecessary and contrary to the public interest because this final rule merely adopts recent amendments made by OMB to its rule on Grants and Agreements that published on August 13, 2020, at 85 FR 49506 and that became effective on November 12, 2020. DOE has concluded that there is good cause to publish this rule without prior opportunity for public comment because the action aligns DOE's regulations with OMB's, for which OMB solicited comment with (a 60-day public comment period (85 FR 3766, Jan. 22, 2020). OMB, received over 2,500 comments from the public, federal agencies, and the Council of the Inspectors General on Integrity and Efficiency Grant Reform Workgroup, which OMB reviewed and addressed (85 FR 49506, Aug. 13, 2020). As part of that process, OMB reconvened agency representatives, including DOE, to review the comments and make changes to the proposed revisions as appropriate. This final rule aligns DOE's regulations with OMB's revised regulations. A delay in effective date is unnecessary and contrary to the public interest for these same reasons. In addition, this rule makes a non-discretionary change to remove a reference to an expired cost-share program and it makes technical changes to correct numbering errors. Therefore, these regulations are being published as final regulations and are effective March 18, 2022.

B. Executive Order 12866

This final rule has been determined to not be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

C. National Environmental Policy Act

DOE has determined that the rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of appendix A to subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's website: *https://www.gc.doe.gov.*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment. As discussed previously, DOE has determined that providing notice and opportunity for public comment on this rule is unnecessary and contrary to the public interest. Therefore, no regulatory flexibility analysis has been prepared for this rule.

E. Paperwork Reduction Act

This final rule imposes no new information or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*). The information collection necessary to administer DOE financial assistance under 2 CFR part 910 is subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* The information

collection provisions of this part were previously approved by OMB under OMB Control No. 1910–0400.

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

F. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For regulatory actions likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a),(b)). UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *https://energy.gov/gc/office-general-counsel.*) DOE examined this rule according to UMRA and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and tribal government, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

G. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and 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. No further action is required by Executive Order 13132.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' 61 FR 4729 (February 7, 1996), imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b), Executive Order 12988 specifically requires that Federal agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

J. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that:

(1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant regulatory action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Congressional Review

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this document. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

IV. Approval of the Office of the Secretary

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

List of Subjects in 2 CFR Part 910

Accounting, Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on February 10, 2022, by John R. Bashista, Director, Office of Acquisition Management and Senior Procurement Executive, Department of Energy and S. Keith Hamilton, Deputy Associate Administrator for Acquisition and Project Management and Senior Procurement Executive, National Nuclear Security 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 February 24, 2022.

Treena V. Garrett,

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

For the reasons set forth in the preamble, the Department of Energy amends part 910 of chapter IX, title 2 of the Code of Federal Regulations as set forth below.

PART 910—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 910 continues to read as follows:

Authority: 42 U.S.C. 7101, *et seq.;* 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.;* 2 CFR part 200.

§ 910.122 [Amended]

■ 2. Section 910.122 is amended in paragraph (a) by removing ''Part 910'' and ''2 CFR 200.69'' and adding in their places ''this part'' and ''2 CFR 200.1'', respectively.

§ 910.128 [Amended]

■ 3. Section 910.128 is amended:
■ a. In paragraph (f)(1)(i) by removing ''2 CFR 200.207'' and adding in its place ''2 CFR 200.208'';
■ b. In paragraph (f)(1)(iv) by removing ''2 CFR 200.338'' and adding in its place ''2 CFR 200.339'';
■ c. In paragraph (f)(1)(v) by removing ''2 CFR 200.324'' and adding in its place ''2 CFR 200.325''; and
■ d. In paragraph (f)(2)(iii) by removing ''2 CFR 200.339 (a)(1)–(2)'' and adding in its place ''2 CFR 200.340(a)(1) and (2)''.

§ 910.130 [Amended]

■ 3. Section 910.130 is amended:
■ a. In paragraph (b)(1) by adding at the end of the paragraph ''or'';
■ b. In paragraph (b)(2) by removing ''; or'' and adding in its place a period;
■ c. By removing paragraph (b)(3); and
■ d. In paragraph (e):
■ i. In the definition for ''Development'' by removing ''2 CFR 200.87'' and adding in its place ''2 CFR 200.1''; and
■ ii. In the definition for ''Research'' by removing ''2 CFR 200.87'' and adding in its place ''2 CFR 200.1''.

§ 910.350 [Amended]

■ 4. Section 910.350 is amended in paragraph (a) by removing ''2 CFR 910.122'', ''part 910'', and ''2 CFR 200.69'' and adding in their places ''§ 910.22'', ''this part'', and ''2 CFR 200.1'', respectively.

§ 910.352 [Amended]

■ 5. Section 910.352 is amended by removing ''2 CFR 200.400 through 200.475'' and adding in its place ''2 CFR 200.400 through 200.476''.

§ 910.360 [Amended]

■ 6. Section 910.360 is amended:
■ a. In paragraph (c)(1) by removing ''2 CFR 200.338'' and adding in its place ''2 CFR 200.339''; and
■ b. In paragraph (c)(2) by removing ''2 CFR 200.205 and 200.207'' and ''2 CFR 910.372'' and adding in their places ''2 CFR 200.206 and 200.208'' and ''§ 910.372'', respectively.

§ 910.370 [Amended]

■ 7. Section 910.370 is amended in paragraph (b) by removing ''2 CFR 200.338 through 200.342'' and adding in its place ''2 CFR 200.339 through 200.343''.

§ 910.372 [Amended]

■ 8. Section 910.372 is amended in paragraph (a) introductory text by removing ''2 CFR 200.205'' and adding in its place ''2 CFR 200.206'' and removing ''2 CFR 200.207'' and adding in its place ''2 CFR 200.208''.

Appendix A to Subpart D of Part 910 [Amended]

■ 9. Appendix A to subpart D of part 910 is amended in section 1., paragraph (a), in the definition of ''Nonprofit organization'', by removing ''2 CFR 200.70'' and adding in its place ''2 CFR 200.1''.

§ 910.501 [Amended]

■ 10. Section 910.501 is amended:
■ a. In paragraph (e) by removing ''Part'' and adding in its place ''part'';
■ b. In paragraph (f) by removing ''Part'' and ''Section 2 CFR 200.330 Subrecipient and contractor determinations'' and adding in their places ''part'' and ''The provisions of 2 CFR 200.331, Subrecipient and contractor determinations,'', respectively; and
■ c. In paragraph (h) by removing ''Part'' and ''2 CFR 200.331'' and adding in their places ''part'' and ''2 CFR 200.332,''.

■ 11. Section 910.502 is revised to read as follows:

§ 910.502 Basis for determining DOE awards expended.

(a) *Determining Federal awards expended.* The determination of when a Federal award is expended must be based on when the activity related to the DOE award occurs. Generally, the activity pertains to events that require the non-Federal entity to comply with Federal statutes, regulations, and the terms and conditions of DOE awards, such as: Expenditure/expense transactions associated with awards including grants, cost-reimbursement contracts under the FAR, compacts with Indian Tribes, cooperative agreements, and direct appropriations; the disbursement of funds to subrecipients; the use of loan proceeds under loan and loan guarantee programs; the receipt of property; the receipt of surplus property; the receipt or use of program income; the distribution or use of food commodities; the disbursement of amounts entitling the for-profit entity to an interest subsidy; and the period when insurance is in force.

(b) *Loan and loan guarantees (loans).* Loan and loan guarantees issued by the DOE Loan Program Office corresponding to Title XVII of the Energy Policy Act of 2005, as amended, 42 U.S.C. 16511–16516 (''Title XVII'') are exempt from these provisions.

(1) Not applicable.
(2) Not applicable.
(3) Not applicable.
(c) Not applicable.

(d) *Prior loan and loan guarantees (loans).* See paragraph (b) of this section.

(e) *Endowment funds.* The cumulative balance of DOE awards for endowment funds that are federally restricted are considered DOE awards expended in each audit period in which the funds are still restricted.

(f) *Free rent.* Free rent received by itself is not considered a DOE award expended under this Part. However, free rent received as part of a DOE award to carry out a DOE program must be included in determining DOE awards expended and subject to audit under this part.

(g) *Valuing non-cash assistance.* DOE non-cash assistance, such as free rent, food commodities, donated property, or donated surplus property, must be valued at fair market value at the time of receipt or the assessed value provided by DOE.

(h) Not applicable.

(i) Not applicable.

(j) Not applicable.

§ 910.505 [Amended]

■ 12. Section 910.505 is amended by removing ''Part'' and ''2 CFR 200.338'' and adding in their places ''part'' and ''2 CFR 200.339,'', respectively.

■ 13. Section 910.507 is revised to read as follows:

§ 910.507 Compliance audits.

(a) *Program-specific audit guide available.* In some cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to internal controls, compliance requirements, suggested audit procedures, and audit reporting requirements. A listing of current program-specific audit guides can be found on the OMB website in the compliance supplement, in part 8, appendix VI, Program-Specific Audit Guides, which includes a website where a copy of the guide can be obtained. When a current program-specific audit guide is available, the auditor must follow generally accepted government auditing standards (GAGAS) and the guide when performing a compliance audit.

(b) *Program-specific audit guide not available.* (1) When a program-specific audit guide is not available, the auditee and auditor must conduct the compliance audit in accordance with GAAS and GAGAS.

(2) If audited financial statements are available, for-profit recipients should submit audited financial statements to DOE as a part of the compliance audit. (If the recipient is a subsidiary for which separate financial statements are not available, the recipient may submit the financial statements of the consolidated group.)

(3) The auditor must:

(i) Not applicable;

(ii) Obtain an understanding of internal controls and perform tests of internal controls over the DOE program consistent with the requirements of § 910.514 Scope of audit;

(iii) Perform procedures to determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of DOE awards that could have a direct and material effect on the DOE program consistent with the requirements of § 910.514 Scope of audit;

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of § 910.511 Audit findings follow-up, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding; and

(v) Report any audit findings consistent with the requirements of § 910.516 Audit findings.

(4) The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) must state that the audit was conducted in accordance with this part and include the following:

(i) An opinion (or disclaimer of opinion) as to whether the financial statement(s) (if available) of the DOE program is presented fairly in all material respects in accordance with the stated accounting policies;

(ii) A report on internal control related to the DOE program, which must describe the scope of testing of internal control and the results of the tests;

(iii) A report on compliance which includes an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the terms and conditions of DOE awards which could have a direct and material effect on the DOE program; and

(iv) A schedule of findings and questioned costs for the DOE program that includes a summary of the auditor's results relative to the DOE program in a format consistent with § 910.515 Audit reporting, paragraph (d)(1) and findings and questioned costs consistent with the requirements of § 910.515 Audit reporting, paragraph (d)(3).

(c) *Report submission for program-specific audits.* (1) The audit must be completed and the reporting required by paragraph (c)(2) or (3) of this section submitted within the earlier of 30 calendar days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a different period is specified in a program-specific audit guide. Unless restricted by Federal law or regulation, the auditee must make report copies available for public inspection. Auditees and auditors must ensure that their respective parts of the reporting package do not include protected personally identifiable information.

(2) When a program-specific audit guide is available, the compliance audits must be submitted (along with audited financial statements if audited financial statements are available), to the appropriate DOE Contracting Officer as well as to the DOE Office of the Chief Financial Officer.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit must consist of, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The compliance audit must be submitted (along with audited financial statements if audited financial statements are available), to the appropriate DOE Contracting Officer as well as to the DOE Office of the Chief Financial Officer.

(d) *Other sections of this part may apply.* Compliance audits are subject to:

(1) Section 910.500 Purpose through § 910.503 Relation to other audit requirements, paragraph (d);

(2) Section 910.504 Frequency of audits through § 910.506 Audit costs;

(3) Section 910.508 Auditee responsibilities and § 910.509 Auditor selection;

(4) Section 910.511 Audit findings follow-up;

(5) Section 910.512 Report submission, paragraphs (e) through (h);

(6) Section 910.513 Responsibilities;

(7) Section 910.516 Audit findings and § 910.517 Audit documentation;

(8) Section 910.521 Management decision; and

(9) Other referenced provisions of this part unless contrary to the provisions of this section, a program-specific audit guide, or program statutes and regulations.

§ 910.513 [Amended]

■ 14. Section 910.513 is amended:

■ a. In paragraph (c) introductory text by removing ''2 CFR 200.210'' and adding in its place ''2 CFR 200.211''; and

■ b. In paragraph (c)(3)(iii) by removing ''2 CFR 200.25'' and adding in its place ''2 CFR 200.1,''.

■ 15. Section 910.514 is revised to read as follows:

§ 910.514 Scope of audit.

(a) *General.* The audit must be conducted in accordance with GAGAS. The audit must cover the entire operations of the auditee, or, at the option of the auditee, such audit must include a series of audits that cover departments, agencies, and other organizational units that expended or otherwise administered DOE awards during such audit period, provided that each such audit must encompass the schedule of expenditures of DOE awards for each such department, agency, and other organizational unit, which must be considered to be a for-profit entity. The financial statements (if available) and schedule of expenditures of DOE awards must be for the same audit period.

(b) *Financial statements.* If financial statements are available, the auditor must determine whether the schedule of expenditures of DOE awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

(c) *Internal control.* (1) The compliance supplement provides guidance on internal controls over Federal programs based upon the guidance in Standards for Internal Control in the Federal Government issued by the Comptroller General of the United States and the Internal Control—Integrated Framework, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(2) In addition to the requirements of GAGAS the auditor must perform procedures to obtain an understanding of internal control over DOE programs sufficient to plan the audit to support a low assessed level of control risk of noncompliance for major programs.

(3) Except as provided in paragraph (c)(4) of this section, the auditor must:

(i) Plan the testing of internal control over compliance to support a low assessed level of control risk for the assertions relevant to the compliance requirements; and

(ii) Perform testing of internal control as planned in paragraph (c)(3)(i) of this section.

(4) When internal control over some or all of the compliance requirements are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(3) of this section are not required for those compliance requirements. However, the auditor must report a significant deficiency or material weakness in accordance with § 910.516 Audit findings, assess the related control risk at the maximum, and consider whether additional compliance tests are required because of ineffective internal control.

(d) *Compliance.* (1) In addition to the requirements of GAGAS, the auditor must determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that may have a direct and material effect.

(2) The principal compliance requirements applicable to most Federal programs and the compliance requirements of the largest Federal programs are included in the compliance supplement.

(3) For the compliance requirements related to Federal programs contained in the compliance supplement, an audit of these compliance requirements will meet the requirements of this part. Where there have been changes to the compliance requirements and the changes are not reflected in the compliance supplement, the auditor must determine the current compliance requirements and modify the audit procedures accordingly. For those Federal programs not covered in the compliance supplement, the auditor should follow the compliance supplement's guidance for programs not included in the supplement.

(4) The compliance testing must include tests of transactions and such other auditing procedures necessary to provide the auditor sufficient appropriate audit evidence to support an opinion on compliance.

(e) *Audit follow-up.* The auditor must follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with § 910.511 Audit findings follow-up paragraph (b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor must perform audit follow-up procedures.

(f) Not applicable.

■ 16. Section 910.515 is revised to read as follows:

§ 910.515 Audit reporting.

The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) must state that the audit was conducted in accordance with this part and include the following:

(a) An opinion (or disclaimer of opinion) as to whether the financial statements (if available) are presented fairly in all material respects in accordance with generally accepted accounting principles and an opinion (or disclaimer of opinion) as to whether the schedule of expenditures of DOE awards is fairly stated in all material respects in relation to the financial statements (if available) as a whole.

(b) A report on internal control over financial reporting and compliance with Federal statutes, regulations, and the terms and conditions of the DOE award, noncompliance with which could have a material effect on the financial statements. This report must describe the scope of testing of internal control and compliance and the results of the tests, and, where applicable, it will refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(c) A report on compliance and report and internal control over compliance. This report must describe the scope of testing of internal control over compliance, include an opinion or modified opinion as to whether the auditee complied with Federal statutes, regulations, and the terms and conditions of DOE awards which could have a direct and material effect and refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(d) A schedule of findings and questioned costs which must include the following three components:

(1) A summary of the auditor's results, which must include:

(i) The type of report the auditor issued (if applicable) on whether the financial statements (if available) audited were prepared in accordance with GAAP (*i.e.,* unmodified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(ii) Where applicable, a statement about whether significant deficiencies or material weaknesses in internal control were disclosed by the audit of the financial statements (if available);

(iii) A statement (if applicable) as to whether the audit disclosed any noncompliance that is material to the financial statements (if available) of the auditee;

(iv) Where applicable, a statement about whether significant deficiencies or material weaknesses in internal control over major programs were disclosed by the audit;

(v) The type of report the auditor issued on compliance (*i.e.,* unmodified

opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(vi) A statement as to whether the audit disclosed any audit findings that the auditor is required to report under § 910.516 Audit findings, paragraph (a);

(vii) Not applicable.

(viii) Not applicable.

(ix) Not applicable.

(2) Findings relating to the financial Statements (if available) which are required to be reported in accordance with GAGAS.

(3) Findings and questioned costs for DOE awards which must include audit findings as defined in § 910.516 Audit findings, paragraph (a).

(i) Audit findings (*e.g.,* internal control findings, compliance findings, questioned costs, or fraud) that relate to the same issue should be presented as a single audit finding.

(ii) Audit findings that relate to both the financial statements (if available) and DOE awards, as reported under paragraphs (d)(2) and (3) of this section, respectively, should be reported in both sections of the schedule. However, the reporting in one section of the schedule may be in summary form with a reference to a detailed reporting in the other section of the schedule.

(e) Nothing in this part precludes combining of the audit reporting required by this section with the reporting required by § 910.512 Report submission, paragraph (b), when allowed by GAGAS.

■ 17. Section 910.519 is revised to read as follows:

§ 910.519 Criteria for Federal program risk.

(a) *General.* The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring that could be material to the DOE program. The auditor must consider criteria, such as described in paragraphs (b), (c), and (d) of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a particular DOE program with auditee management and DOE.

(b) *Current and prior audit experience.* (1) Weaknesses in internal control over DOE programs would indicate higher risk. Consideration should be given to the control environment over DOE programs and such factors as the expectation of management's adherence to Federal statutes, regulations, and the terms and conditions of DOE awards and the competence and experience of personnel who administer the DOE programs.

(i) A DOE program administered under multiple internal control structures may have higher risk. The auditor must consider whether weaknesses are isolated in a single operating unit (*e.g.,* one college campus) or pervasive throughout the entity.

(ii) When significant parts of a DOE program are passed through to subrecipients, a weak system for monitoring subrecipients would indicate higher risk.

(2) Prior audit findings would indicate higher risk, particularly when the situations identified in the audit findings could have a significant impact on a DOE program or have not been corrected.

(3) DOE programs not recently audited as major programs may be of higher risk than Federal programs recently audited as major programs without audit findings.

(c) *Oversight exercised by DOE.* (1) Oversight exercised by DOE could be used to assess risk. For example, recent monitoring or other reviews performed by an oversight entity that disclosed no significant problems would indicate lower risk, whereas monitoring that disclosed significant problems would indicate higher risk.

(2) Federal agencies, with the concurrence of OMB, may identify Federal programs that are higher risk. OMB will provide this identification in the compliance supplement.

(d) *Inherent risk of the Federal program.* (1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have high risk for noncompliance with requirements of 2 CFR 200.430 Compensation—personal services, but otherwise be at low risk.

(2) The phase of a Federal program in its life cycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, statutes, regulations, or the terms and conditions of Federal awards may increase risk.

(3) The phase of a Federal program in its life cycle at the auditee may indicate risk. For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to start-up or closeout of program activities and staff.

(4) Programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

■ 18. Section 910.520 is revised to read as follows:

§ 910.520 Criteria for a low-risk auditee.

An auditee that meets all of the following conditions for each of the preceding two audit periods may qualify as a low-risk auditee and be eligible for reduced audit coverage.

(a) Compliance audits were performed on an annual basis in accordance with the provisions of this Subpart, including submitting the data collection form to DOE within the timeframe specified in § 910.512 Report submission. A for-profit entity that has biennial audits does not qualify as a low-risk auditee.

(b) The auditor's opinion on whether the financial statements (if available) were prepared in accordance with GAAP, or a basis of accounting required by state law, and the auditor's in relation to opinion on the schedule of expenditures of DOE awards were unmodified.

(c) There were no deficiencies in internal control which were identified as material weaknesses under the requirements of GAGAS.

(d) The auditor did not report a substantial doubt about the auditee's ability to continue as a going concern.

(e) None of the DOE programs had audit findings from any of the following in either of the preceding two audit periods:

(1) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control as required under § 910.515 Audit reporting, paragraph (c);

(2) Not applicable.

(3) Not applicable.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 21 and 163

[Docket No. OCC–2020–0037]

RIN 1557–AE77

Exemptions to Suspicious Activity Report Requirements

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Final rule.

SUMMARY: This final rule modifies the requirements for national banks and

Federal savings associations, including Federal branches and agencies of foreign banks licensed or chartered by the OCC, to file suspicious activity reports (SARs). It amends the OCC's SAR regulations to allow the OCC to issue exemptions from the requirements of those regulations upon request from a financial institution subject to those regulations. The rule harmonizes the OCC's legal authority with the preexisting exemption authority of the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury. This rule will make it possible for the OCC to facilitate changes required by the Anti-Money Laundering Act of 2020. The final rule will also make it possible for the OCC to grant relief to national banks or Federal savings associations that develop innovative solutions intended to meet Bank Secrecy Act requirements more efficiently and effectively.

DATES: This rule is effective on May 1, 2022.

FOR FURTHER INFORMATION CONTACT: Jina Cheon, Counsel; Henry Barkhausen, Counsel; or Scott Burnett, Counsel, Chief Counsel's Office (202) 649–5490; Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Introduction

OCC regulations require national banks and Federal savings associations to file suspicious activity reports (SARs) under certain conditions. These regulations also provide for (i) board of director notification; (ii) filing exceptions; (iii) SAR confidentiality; (iv) recordkeeping requirements; (v) supporting documentation requirements; and (vi) limitations on liability. Requirements related to SARs are codified at 12 CFR 21.11 for national banks and 12 CFR 163.180 for Federal savings associations. On January 22, 2021, the OCC, the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) (collectively, the agencies or Federal banking agencies) published substantially similar proposed rules that would amend their respective SAR regulations to allow the agencies to issue exemptions from the requirements of those regulations.[1] The OCC is adopting its proposed rule in final form.

II. Background

The OCC has long required its regulated institutions to report potential violations of law arising from transactions that flow through those institutions.[2] The OCC required such reporting because fraud, abusive insider transactions, check-kiting schemes, money laundering, and other financial crimes can pose serious threats to a financial institution's continued viability and, if unchecked, can undermine the public confidence in the Nation's financial system generally.[3]

In 1992 Congress passed the Annunzio-Wylie Anti-Money Laundering Act, which redesigned the criminal referral process applicable to financial institutions including OCC-supervised entities and made the reporting of certain suspicious transactions a requirement of the Bank Secrecy Act (BSA).[4] The Act permitted the U.S. Department of the Treasury (Treasury) to require financial institutions, including national banks and Federal savings associations, to ''report any suspicious transaction relevant to a possible violation of law or regulation.'' [5] As a result, the Treasury, in consultation with the Federal banking agencies and law enforcement, developed the modern SAR form and reporting process, which standardized the reporting forms and created a centralized database that could be accessed by multiple law enforcement and regulatory agencies.

To implement this new reporting system, the Financial Crimes Enforcement Network of Treasury (FinCEN) issued its implementing SAR regulations in 1996 for financial institutions subject to the requirements of the BSA to, among other things, specifically address the reporting of money laundering transactions and transactions designed to evade the BSA's reporting requirements.[6] To further implement this new reporting process and reduce unnecessary reporting burdens, the OCC and the other Federal banking agencies contemporaneously amended their criminal referral form regulations to incorporate the new SAR form and reporting database, align their regulatory reporting requirements with FinCEN's BSA reporting requirements, and further refine the reporting processes.[7]

As a result of this redesign and FinCEN's implementing regulations, national banks and Federal savings associations now must file SARs under both OCC and FinCEN regulations. The OCC's regulations are not identical but are substantially similar to the BSA reporting obligations required by FinCEN. Both the OCC's and FinCEN's SAR regulations require banks to file SARs relating to money laundering, transactions that are designed to evade the reporting requirements of the BSA, and transactions that have no business or apparent lawful purpose or are not the sort in which the particular customer would normally be expected to engage and the bank knows of no reasonable explanation for the transactions after examining the available facts, including the background and possible purpose of the transactions.[8] Furthermore, with respect to the SAR confidentiality requirements in the BSA, both the OCC's and FinCEN's SAR regulations require banks to maintain the confidentiality of a SAR and any information that would reveal the existence of the SAR unless an exception applies.[9]

While the OCC and FinCEN regulations contain substantively similar requirements, including requiring reporting in certain common contexts and requiring institutions to maintain the confidentiality of SARs, the OCC and the other Federal banking

[1] 86 FR 6572 (Jan. 22, 2021) (OCC); 86 FR 6576 (Jan. 22, 2021) (Board); 86 FR 6580 (Jan. 22, 2021) (FDIC); 86 FR 6586 (Jan. 22, 2021) (NCUA).

[2] The OCC first codified this requirement in 1971 at 12 CFR 7.5225, which required national banks to submit a report of ''any state of facts growing out of the affairs of the bank known or suspected to involve criminal violation of any other section of the United States Code'' to the OCC, the Federal Bureau of Investigations (FBI), the U.S. attorney for the bank's district, and the bank's bonding company. 36 FR 17000, 17012 (Aug. 26, 1971). In 1986 the OCC repealed 12 CFR 7.5225 and adopted its criminal referral form regulation, 12 CFR 21.11, which required national banks to report specified suspicious transactions on a standardized criminal referral form. 51 FR 25866 (July 17, 1986). As explained below, the OCC revised 12 CFR 21.11 in the 1990s to conform to the new SAR reporting form and system.

[3] 54 FR 25839 (June 20, 1989).

[4] Public Law 102–550, 106 Stat. 3672 (1992).

[5] 31 U.S.C. 5318(g)(1). The quoted text is from section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, which was originally codified at 31 U.S.C. 5314(g). The text was moved as part of the Violent Crime Control and Law Enforcement Act of 1994.

[6] 61 FR 4326 (Feb. 5, 1996). Before FinCEN's SAR regulation was adopted in 1996 and the accompanying revisions to the OCC's regulation, the OCC's criminal referral regulation did not have a specific provision that required the reporting of money laundering transactions. However, the criminal referral regulation broadly encompassed money laundering and structuring transactions as explained in the **SUPPLEMENTARY INFORMATION** section to the final rule enhancing the criminal referral process. 54 FR 25839, 25840 (June 20, 1989). Congress authorized the Secretary of the Treasury to administer the BSA, and the Secretary has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the Act. Treasury Order 180–01 (Jan. 14, 2020).

[7] 61 FR 4332 (Feb. 5, 1996) (OCC).

[8] *See* 12 CFR 21.11(c)(4) and 163.180(d)(3)(i)–(iv) (OCC); 31 CFR 1020.320(a)(2).

[9] 12 CFR 21.11(k) and 163.180(d)(12) (OCC); 31 CFR 1020.320(e) (FinCEN).

agencies require reporting in broader circumstances (*e.g.,* insider abuse at any dollar amount).[10] These violations and abuse situations can pose serious threats to financial institutions' continued viability and, if unchecked, can undermine the public confidence in the Nation's financial industry.

The OCC and FinCEN SAR regulations provide: (i) That SARs are not required for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities; (ii) that SARs are confidential and shall not be disclosed except as authorized; (iii) for SAR recordkeeping requirements and supporting documentation; (iv) that supporting documentation shall be deemed to have been filed with the SAR; and (v) that supporting documentation shall be made available to appropriate law enforcement agencies upon request.[11] The regulations also provide a limitation on liability for any national bank, Federal savings association, or other financial institution and any director, officer, employee, or agent of a national bank, Federal savings association, or other financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency, or files a SAR pursuant to the regulations or pursuant to any other authority.[12] The OCC's regulations contain a provision requiring that national banks and Federal savings associations promptly notify their board of directors when a SAR has been filed.[13]

Although neither the OCC's SAR regulations nor FinCEN's SAR regulation expressly address exemptions, FinCEN has general authority to grant exemptions from the requirements of the BSA, which includes granting exemptions under its SAR reporting regulations.[14] FinCEN's regulation provides that ''[t]he Secretary [of Treasury], in his sole discretion, may by written order or authorization make exceptions to or grant exemptions from the requirements of [the BSA]. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to transactions or classes of transactions.'' [15] The Secretary delegated this exemption authority to FinCEN.[16]

The OCC's authority to issue SAR exemptions derives from its authority to require national banks and Federal savings associations to comply with OCC-imposed SAR requirements. The OCC has broad statutory authority to issue regulations for national banks and Federal savings associations. Among other relevant sources of authority, 12 U.S.C. 161 provides that the Comptroller may call for ''special reports.'' Twelve U.S.C. 93a also provides that the Comptroller ''is authorized to prescribe rules and regulations to carry out the responsibilities of the office.'' [17] The OCC has long viewed SAR requirements and their predecessor reporting requirements to be part of the OCC's mission of assuring safety and soundness.[18] The OCC's legal authority to require reports necessarily includes the authority to modify those reporting requirements, including the authority, if necessary, to issue exemptions. However, the OCC's SAR regulations currently contain no express exemption provisions similar to FinCEN's general authority to grant exemptions from the requirements of the BSA.

This disparity in exemption authority makes it more difficult for the OCC to grant relief if a national bank or Federal savings association has a novel SAR-related proposal that does not squarely fit within the regulatory requirements but would be consistent with anti-money laundering regulatory and safety and soundness standards. As financial technology and innovation continue to develop in the area of monitoring and reporting financial crime and terrorist financing, the OCC has identified a need for regulatory flexibility to grant exemptive relief when appropriate. In 2018 FinCEN and the Federal banking agencies issued a statement encouraging banks to take innovative approaches to meet their BSA/anti-money laundering (BSA/AML) compliance obligations.[19] That statement explained that banks are encouraged to consider, evaluate, and, when appropriate, responsibly implement innovative approaches for BSA/AML compliance. Today, innovative approaches and technological developments in SAR monitoring, investigation, and filings may involve, among other things: (i) Automated form population using natural language processing, transaction data, and customer due diligence information; (ii) automated or limited investigation processes depending on the complexity and risk of a particular transaction and appropriate safeguards; and (iii) enhanced monitoring processes using more and better data, optical scanning, artificial intelligence, or machine learning capabilities. The OCC anticipates that requests for exemptive relief pertaining to innovation or other matters may involve, among other things, expanded investigations and SAR timing issues, SAR disclosures and sharing, continued SAR filings for ongoing activity, outsourcing of SAR processes, the role of agents of national banks and Federal savings associations, the use of shared utilities and data, and the use and sharing of de-identified data (commonly referred to as anonymized data).

The OCC expects that new technologies will continue to prompt additional innovative approaches related to SAR filing and monitoring. Some of these approaches may not strictly comply with certain provisions of the OCC's SAR regulations. For example, certain approaches involving SAR-sharing across institutions may violate prohibitions against disclosures of SARs in 12 CFR 21.11(k) but would enable an institution to file more complete, useful SARs without substantively undermining the purposes of the SAR disclosure prohibition.

After the posting of the proposed rule on the OCC website, but before its publication in the **Federal Register**, Congress passed the Anti-Money Laundering Act of 2020 (AMLA of 2020).[20] The AMLA of 2020 included multiple provisions that will affect suspicious activity reporting. Section 6202 of the AMLA of 2020 provides that SARs ''filed under this subsection shall be guided by the compliance program of a covered financial institution with respect to the Bank Secrecy Act, including the risk assessment processes of the covered institution.'' Section 6212 of the AMLA of 2020 directs Treasury to establish a pilot program on SAR sharing. Section 6204 of the AMLA Act of 2020 requires the Treasury Secretary, in consultation with various relevant stakeholders, to conduct a formal review of the financial institutions' Currency Transaction Report (CTR) and SAR reporting requirements, including processes for submission, regulations implementing the BSA, and any

[10] *See* 12 CFR 21.11; 163.180 (OCC); 12 CFR 208.62 (Board); 12 CFR 390.353 (FDIC); 12 CFR 748.1 (NCUA).

[11] 12 CFR 21.11 and 163.180 (OCC); 31 CFR 1020.320 (FinCEN).

[12] 12 CFR 21.11(l) and 163.180(d)(12)(iv) (OCC); 31 CFR 1020.320(l) (FinCEN).

[13] 12 CFR 21.11(h) and 163.180(d)(9).

[14] *See* 31 U.S.C. 5318(a)(7) with implementing regulations at 31 CFR 1010.970.

[15] 31 CFR 1010.970(a).

[16] Treasury Order 180–01 (Jan. 14, 2020).

[17] *See also* 12 U.S.C. 1463(a)(2).

[18] 12 U.S.C. 1.

[19] Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (Dec. 3, 2018), available at *https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-130a.pdf.*

[20] Public Law 116–283 (Jan. 1, 2021).

proposed changes to those reports to reduce unnecessary burdens while ensuring that the reports continue to serve their intended purpose. Certain provisions of the AMLA of 2020 may require the OCC to apply SAR requirements in ways that may potentially conflict with the OCC's current SAR regulation. While FinCEN has authority to address conflicts between the AMLA of 2020 and FinCEN's regulations, either through FinCEN's preexisting exemption authority or through authority granted by the AMLA of 2020, the OCC's SAR regulations do not expressly permit parallel exemptions. For example, FinCEN's pilot program on SAR sharing might allow sharing of SARs in ways that would arguably be inconsistent with the OCC's requirements on SAR confidentiality.[21] The OCC's adoption of exemption authority in its SAR regulation will remove any legal uncertainty related to national banks and Federal savings associations participation in such FinCEN programs.

III. The Proposal and Final Rule

The proposed rule would have allowed the OCC to issue exemptions from the requirements of its SAR regulations. Specifically, the proposed rule would have added a provision to 12 CFR 21.11 and 12 CFR 163.180 that would provide that the OCC may exempt a national bank or Federal savings association from requirements in those regulatory provisions. The OCC is finalizing the proposed rule with some modifications, which are described below.[22]

IV. Comments

The OCC received seven comments on its proposed rule.[23] Some commenters supported the proposed rule while others opposed it. Some commenters noted that they support a regulatory framework that encourages innovation and that the proposed rule would foster responsible innovation and improve the quality of reporting over time.

A. Comments Opposing the Proposed Rule

Commenters opposing the proposed rule asserted that the proposed rule provided no persuasive justification or authority to issue an exemption. These commenters also suggested that the history of money laundering and SAR deficiencies at major financial institutions is inconsistent with the OCC adopting exemptions to the SAR requirements. Commenters opposing the proposed rule also noted that criminals may seek out financial institutions that have been granted exemptions and that the proposed rule may jeopardize U.S. officials' access to a key investigative tool. Also, according to these commenters, the rule should address a significant Government Accountability Office (GAO) report on SARs and CTRs.[24]

The OCC has evaluated these concerns and does not believe the final rule will weaken reporting processes. The amendments in the final rule will conform the OCC's exemption authority to FinCEN's exemption authority. The OCC's SAR regulations and FinCEN's SAR regulation feature significant overlap. Many SARs are required to be filed by both FinCEN's SAR regulation and the OCC's SAR regulations. The final rule will only allow the OCC to issue exemptions from the requirements of the OCC's SAR regulations. Under the final rule, national banks and Federal savings associations will continue to be required to comply with FinCEN's SAR regulation. For requests requiring separate FinCEN and OCC approvals, the OCC intends to coordinate with FinCEN, and FinCEN would have to issue a parallel exemption. Currently, if FinCEN issues an exemption or uses other authority to modify the application of the requirements of its SAR regulations, the OCC may not be able to issue a parallel exemption.

The final rule will maintain national banks' and Federal savings associations' core reporting responsibilities. The final rule's exemption authority, like FinCEN's exemption authority, is drafted broadly and flexibly to handle unexpected situations. However, the OCC does not expect to use this exemption authority to issue sweeping exemptions that would undermine the value provided by SARs. The final rule includes factors the OCC will consider before granting an exemption, which will help ensure that any exemptions are appropriate.

While some commenters suggested that the OCC lacks legal authority to issue the final rule, as discussed above, the OCC has broad statutory authority to issue regulations for national banks and Federal savings associations. For example, 12 U.S.C. 161 provides that the Comptroller may call for ''special reports'' and 12 U.S.C. 93a provides that the Comptroller ''is authorized to prescribe rules and regulations to carry out the responsibilities of the office.'' [25] The OCC has long viewed SAR requirements and their predecessor reporting requirements to be part of the OCC's mission of assuring safety and soundness.[26] The OCC's legal authority to require reports includes the authority to modify reporting requirements and issue exemptions, if appropriate.

One commenter suggested that the OCC consider GAO's 2020 report on anti-money laundering compliance.[27] The OCC considered this report, which recommended that FinCEN better support the use of SARs by law enforcement. This final rule will not affect the mechanisms that law enforcement agencies use to access SARs. Also, the OCC could approve exemptions that would result in additional SARs being filed, for example, through the use of automation.[28] The OCC will consider whether any exemption request is consistent with the purposes of the BSA, and these purposes include requiring reports or records that are ''highly useful'' in ''criminal, tax, or regulatory investigations.'' [29] Accordingly, the OCC will consider the usefulness of potential SARs that would be affected by an exemption request. In determining whether an exemption request is consistent with the purposes of the Bank Secrecy Act, the OCC intends to consult with FinCEN, as appropriate.

The exemption authority in the final rule is consistent with the OCC's support for the reallocation of bank

[21] 12 CFR 21.11(k); 12 CFR 163.180(d)(12).

[22] This final rule, like the OCC's general SAR requirements, applies to Federal branches and agencies of foreign banks licensed or chartered by the OCC. *See* 12 CFR 21.11(a).

[23] The other agencies that simultaneously published proposed rules received two additional comment letters that were not received by the OCC; however, the OCC has considered and addressed those comments in this **SUPPLEMENTARY INFORMATION** section. One comment suggested that the agencies extend the comment period. The OCC concluded that a longer comment period was not necessary, and an extension of the comment period is not legally required.

[24] GAO, *Anti-Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied* (Sept. 22, 2020), available at *https://www.gao.gov/products/gao-20-574.*

[25] *See also* 12 U.S.C. 1463(a)(2).

[26] 12 U.S.C. 1.

[27] GAO, *Anti-Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied* (Sept. 22, 2020), available at *https://www.gao.gov/products/gao-20-574.*

[28] *See* OCC Interpretive Letter 1166 (Sept. 27, 2019) (recognizing automated SAR generation as consistent with SAR regulation).

[29] 31 U.S.C. 5311; 12 U.S.C. 1818(s)(1) (''Each appropriate Federal banking agency shall prescribe regulations requiring insured depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions with the requirements of subchapter II of chapter 53 of Title 31.'').

compliance resources to their most effective uses. The AMLA of 2020 provided that compliance programs should ensure that ''more attention and resources of financial institutions should be directed toward higher-risk customers and activities, consistent with the risk profile of a financial institution, rather than toward lower risk customers and activities.'' [30] Accordingly, it may be appropriate to allow national banks and Federal savings associations to tailor their monitoring for suspicious activity so banks might not file SARs in certain specified situations involving lower risk customers and activities. The agencies' SAR regulations already contemplate lower risk scenarios by having specific dollar thresholds below which financial institutions are not required to file SARs. Similarly, it is unlikely that criminals will target national banks and Federal savings associations that have received exemptions, as one commenter suggested, because the OCC does not expect to issue exemptions that would relieve national banks and Federal savings associations of their general obligation to monitor for suspicious activity or file appropriate SARs. The OCC will weigh any potential for criminals to target a national bank or Federal savings association in evaluating particular exemption requests. Should information come to light after the OCC approves an exemption that criminals are potentially targeting an institution because of its exemption, the final rule provides the OCC with authority, at its sole discretion, to revoke the exemption.

Some commenters suggested that the proposal was not supported by adequate evidence and was therefore inconsistent with the requirements of the Administrative Procedure Act. One commenter argued that the proposed rule did not provide any data on costs or cost savings that might accrue at a financial institution if a SAR exemption were granted or on what financial institutions, if any, have requested SAR exemptions in the past. The commenter noted that the proposed rule estimates that only five financial institutions per year would request SAR exemptions but provided no basis in research or data for that prediction since it is possible that all financial institutions would want an exemption.

The OCC acknowledges that it is difficult to predict exactly how many or what type of exemptions might be requested or ultimately granted. That is why the exemption language in the final rule, like FinCEN's exemption language, is drafted broadly and flexibly. As discussed above, this rule is intended to make the limited changes necessary to match the exemption authority already possessed by FinCEN. The OCC is not committing to offer or grant any particular exemptions. The final rule only creates the authority to issue exemptions in the future. The proposed rule included an estimate of five exemption requests per year for purposes of the burden estimates required by the Paperwork Reduction Act. However, this estimate of future exemption requests is approximate and does not represent an estimate of exemption requests that the OCC expects to actually grant. The OCC will carefully examine any exemption requests received and may issue few or no exemptions if they do not satisfy the OCC's scrutiny.

B. Process for Issuing Exemptions

The final rule contains some requirements that are not included in FinCEN's SAR regulation. Under the final rule, for exemption requests involving OCC-only SAR requirements, a national bank or Federal savings association will be required to seek an exemption only from the OCC. For exemption requests that will also require an exemption from FinCEN's SAR regulation (for example, exemption requests related to SAR filings required by 12 CFR 21.11(c)(4), related to SAR timing requirements in 12 CFR 21.11(d), or related to SAR confidentiality in 12 CFR 21.11(k)), a national bank will need to seek and obtain an exemption from both the OCC and FinCEN to be afforded exemptive relief.[31]

Commenters suggested that the OCC work together with the other Federal banking agencies and FinCEN to create one standard and one system for any institution to use when applying for an exemption. Similarly, commenters suggested that the OCC work together with the other Federal banking agencies and FinCEN to create a single-filing process whereby an OCC-supervised institution files solely with OCC and any need for a FinCEN approval involving the same application would be obtained by OCC. Commenters suggested that the agencies should streamline the application process so that it is only necessary to seek approval from a bank's prudential regulator. Commenters recommended that the agencies not require institutions to duplicate work when multiple agencies' approval is required.

One commenter suggested that the agencies use an interagency rulemaking to create a single, streamlined SAR regulation that includes a process for obtaining an exemption. According to this commenter, when a bank requests an exemption, it should only have to submit a single application to its primary prudential supervisor and not multiple agencies. Other commenters recommended that the agencies provide templates of application forms or similar tools to facilitate applications.

The OCC acknowledges the value of a simple, straightforward application process and the importance of coordination among the agencies administering SAR requirements. The agencies are currently coordinating and considering whether to provide specific forms or issue guidance describing application processes in more detail. However, the final rule only makes the limited textual changes to the OCC's SAR regulations necessary to provide exemption authority paralleling FinCEN's exemption authority. These limited changes do not preclude the OCC or other agencies from taking additional action later to streamline the process for requests for SAR exemptions.

Under the final rule, for exemption requests involving OCC-only SAR requirements, a national bank or Federal savings association only needs to seek an exemption from the OCC. For exemption requests that also require an exemption from FinCEN's SAR regulation, a national bank or Federal savings association will need to seek an exemption from both the OCC and FinCEN.

One commenter suggested that the agencies reconcile differences between their SAR exemption proposals. The proposed rule provided that a national bank or Federal savings association ''requesting an exemption that also requires an exemption from the requirements of FinCEN's SAR regulation must submit a request in writing to both the OCC and FinCEN for approval.'' The rules proposed by the Board, FDIC, and NCUA provided that those agencies would have sought FinCEN's concurrence for any exemption request that will also require an exemption from FinCEN's SAR regulations. The OCC's final rule, like the proposed rule, does not specifically provide for concurrence from FinCEN, but this difference should not functionally affect applications for exemptions. Under the proposed rules of any of the agencies, financial

[30] Section 6101(b)(2)(B)(ii), codified at 31 U.S.C. 5318(h)(2)(B)(iv)(II).

[31] The final rule, like the proposed rule, uses the term ''exemption'' while FinCEN's exemption authority in 31 CFR 1010.970 uses both the terms ''exemption'' and ''exception.'' The OCC does not believe there is a substantive distinction between exemptions and exceptions in this context.

institutions would have have been required to submit applications to both FinCEN and their functional regulator and receive approvals from both.

The OCC intends to coordinate with the other agencies to develop standardized procedures or forms for handling certain exemption requests. This is consistent with past practice where the agencies have developed such processes or forms after issuing underlying regulations. For example, certain OCC regulations require OCC ''prior approval'' before national banks and Federal savings associations take particular actions, and the OCC has separately issued the licensing forms and procedures necessary to obtain this approval.[32] The final rule only makes the limited changes to the OCC's SAR regulations necessary to clarify its authority to issue exemptions.

Under the final rule, a national bank or Federal savings association requesting an exemption from the requirements of 12 CFR 21.11 or 12 CFR 163.180 must submit a request in writing to the OCC.

C. Standards for Issuing an Exemption

The proposed rule listed separate factors that the OCC would consider for exemptions involving OCC-only exemptions versus exemptions that would also require exemptions from FinCEN. The final rule, however, provides a single set of factors that the OCC will consider for all exemption requests. Specifically, upon receipt of any exemption request, the OCC will consider whether the exemption is consistent with the purposes of the BSA and with safe and sound banking, and may consider other appropriate factors.

Commenters raised a variety of concerns about these factors. One commenter stated that the proposed exemption authority contains no limitations or caveats and argued that the absence of additional standards, criteria, and procedures renders the proposed rule unworkable and susceptible to legal challenge. Similarly, this commenter stated that the proposed rule did not address how supervisory concerns related to BSA/AML deficiencies or a lower supervisory rating due to repeated deficiencies would affect the exemption process. The commenter also observed that the proposed rule provided no process for an internal supervisory review or audit of the SAR exemption decisions being made by the OCC, which raises concerns about consistent decision-making. Similarly, another commenter stated that the proposed rule is overly broad and could inadvertently permit the wholesale exemption of entire institutions or categories of institutions from SAR requirements. According to this commenter, the proposed rule does not provide concrete standards or a clear process, and the deficiencies could be exploited, running counter to the interests of financial transparency and anti-money laundering objectives.

Another commenter suggested that the agencies specify additional factors they may consider when evaluating exemption requests. Specifically, the commenter suggested that the agencies should consider whether the bank's exemption request would, if granted, improve law enforcement and other end users' use of SAR data (*e.g.,* the request increases submission speed and enhances data consistency) or allow the requesting bank to reallocate resources to higher value monitoring and reporting processes. Another commenter suggested that, in reviewing a request, the agencies should consider whether the exemption would, if granted, enhance usefulness to law enforcement and whether the exemption would, if granted, enable the institution to redeploy resources in a manner suitable for the institution.

Another commenter expressed concern that the proposal's singular focus on high-tech solutions will disadvantage small and mid-sized institutions that cannot afford, build, or implement such novel, innovative solutions to meet their SAR requirements. According to this commenter, smaller institutions still struggle under manual SAR processes and lower-tier technology. Another commenter stated that it was unclear how the proposed rule would cover other institutions besides traditional national banks and Federal savings associations, including branches and agencies of foreign banks, trust companies, and service corporations.

Another commenter suggested that the agencies provide clear guidance governing how exemption requests will be evaluated and how the various considerations will be weighed, such as whether more weight will be given to broad machine learning applications and algorithms or whether the agencies will favor requests that focus on cost and time savings, regardless of technical sophistication. The commenter expressed concerns that requests submitted by small institutions may not be able to match the technology used by larger institutions.

The OCC acknowledges the concerns raised by these commenters and expects to consider various potential factors when evaluating requests. However, it is difficult to anticipate every possible exemption request, and, as a consequence, rigid or inflexible procedures could limit the OCC's future ability to consider, and deny or issue, exemptions. FinCEN's regulation authorizing exemptions does not contain a prescribed list of factors that will be considered before exemptions are issued.[33] Nor does FinCEN's regulation describe the process FinCEN will use when evaluating an exemption request. It would create inconsistency and be potentially problematic for the OCC's regulation to include factors or processes that are not included in FinCEN's regulation. That would make the exemption provisions not truly parallel and could pose difficulties for financial institutions applying for exemptions. For example, financial institutions might have to submit different applications to the OCC and FinCEN to address different potential factors and processes. This would create an additional burden and would undermine the value of creating parallel exemption processes.

The final rule contains a set of factors that the OCC will consider in reviewing all requests in addition to considering ''any other appropriate factor.'' Specifically, the OCC will consider whether the exemption is consistent with the purposes of the BSA and with safe and sound banking, and may consider other appropriate factors. Although FinCEN's general exemption provision, 31 CFR 1010.970(a), does not have these factors, these are the same factors that the OCC and FinCEN consider as part of exemption determinations involving customer identification program requirements.[34] The OCC has determined that it is appropriate to commit to considering them in the context of suspicious activity reporting because they should be relevant to any request for an exemption. The OCC's commitment to considering these factors should not promote inconsistency with FinCEN since the OCC does not expect FinCEN to issue exemptions that would be inconsistent with these factors. Requiring consideration of these factors

[32] *See, e.g.,* 12 CFR 5.45 and 5.46 (requiring prior approval for certain increases in capital). Separate licensing forms provide a mechanism for this approval, available at *https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/licensing-filing-forms.html.*

[33] 31 CFR 1010.970(a).

[34] 31 CFR 1020.220(b) (''The Federal functional regulator and the Secretary shall consider whether the exemption is consistent with the purposes of the Bank Secrecy Act and with safe and sound banking, and may consider other appropriate factors.'').

will help ensure that any issued exemptions are appropriate. Although the OCC acknowledges the relevance of other factors raised by the commenters (such as the different technological resources of large versus small financial institutions), it is not appropriate or necessary to embed such factors into the regulation itself. Many of the additional factors suggested by commenters are already covered by the three factors in the final rule.

The final rule provides that the OCC will consider ''any other appropriate factors,'' and the OCC expects to consider other factors that may be relevant to particular exemption requests. The OCC's SAR regulations apply to all national banks and Federal savings associations, and the new exemption language will similarly cover all national banks and Federal savings associations. Although it is possible that the terms of certain exemptions may be tailored to particular types of national banks or Federal savings associations (for example, trust banks), the OCC will not pre-judge how exemptions may be applied to different types of national banks and Federal savings association. FinCEN's exemption provision does not distinguish between different types of banking organizations, and it would be inconsistent for the OCC's exemption provision to do this. The final rule, like the OCC's SAR regulations, applies to Federal branches and agencies of foreign banks licensed or chartered by the OCC.

In the proposed rule, the list of factors that the OCC would consider for exemption requests that would not require an exemption from FinCEN did not include considering whether the exemption was consistent with the purposes of the BSA. (The proposal included this factor for requests that would also require an exemption from FinCEN.) The reporting requirements now contained in the OCC's SAR regulations predate the BSA and continue to be broader than FinCEN's SAR requirements in certain ways (*i.e.,* requiring SARs in certain situations that would not require SARs under FinCEN's SAR regulation). However, the OCC agrees with the arguments made by certain commentators and has determined it is reasonable to consider whether any exemption request is consistent with the purposes of the BSA, regardless of whether the exemption request implicates FinCEN's SAR regulation. The proposed rule explained how the BSA and successive legislation has shaped reporting requirements and developed the current SAR regime. Also, it could be inconsistent and confusing to consider separate sets of factors for OCC-only SAR exemptions versus requests requiring exemptions from both the OCC and FinCEN. The proposed rule specified that the OCC would consider any ''appropriate factors,'' and the OCC is now specifying that whether a request is consistent with the purposes of the BSA is such an appropriate factor for all exemption requests. The proposed rule explained the background and history of the SAR requirements and detailed the interaction between the OCC's SAR requirements and the BSA, which establishes how the BSA is still relevant to OCC-only SAR requirements.

Some commenters recommended that the OCC consider additional factors as part of exemption determinations. However, the final rule already covers many of the factors identified by commenters. One commenter suggested that the agencies should consider whether an exemption request will improve law enforcement and other BSA end users' use of SAR data. However, the statutory purposes of the BSA include requiring reports that are ''highly useful'' to various users of SARs, including law enforcement. Another commenter suggested that the proposed rule did not explain how supervisory concerns related to BSA/AML deficiencies or a lower CAMELS rating [35] due to repeated deficiencies would affect the exemption process. Those supervisory concerns would implicate all of the factors listed in the final rule. The OCC would not likely approve an exemption request when a national bank or Federal savings association previously failed to prevent money laundering or if granting the exemption could contribute to unsafe or unsound practices. ''[O]ther appropriate factors'' could also include outstanding supervisory concerns regarding BSA/AML compliance.

The OCC and other agencies have already provided guidance on the principles relevant to responsible innovation that are applicable to innovative approaches for complying with SAR requirements. Specifically, the OCC has ''define[d] Responsible Innovation as the use of new or improved financial products, services and processes to meet the evolving needs of consumers, businesses, and communities in a manner that is consistent with sound risk management and is aligned with the bank's overall business strategy.'' [36] Similarly, in 2018 FinCEN and the Federal banking agencies issued a statement encouraging banks to take innovative approaches to meet their BSA/AML compliance obligations.[37] That statement explained that banks are encouraged to consider, evaluate, and, when appropriate, responsibly implement innovative SAR compliance approaches.

Pursuant to the final rule, a national bank or Federal savings association requesting an exemption from the requirements of the OCC's SAR regulations will have to submit a request in writing to the OCC (and potentially also to FinCEN). Upon receiving a written request from a national bank or Federal savings association, the OCC will consider the request and provide a written response.

The OCC may notify the other Federal banking agencies or FinCEN and consider their comments before granting any exemption. The final rule provides that the OCC may grant an exemption for a specified time period. One commenter stated that the proposed rule's broad statement that it ''may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to transactions or classes of transactions'' offered no guidance on the menu of available relief measures or which measures should be used in which circumstances. This language arises from the regulation that includes FinCEN's exemption authority.[38] The OCC removed this language from the final rule to avoid any confusion and because the OCC has not used language like this in exemption provisions in other regulations.[39] The removal of this language should not have any substantive effect in the context of the OCC's SAR regulations or limit the OCC's ability to issue exemptions.

D. Issuance of Exemptions, Publication, and Modifications

The proposed rule provided that the OCC would provide a written response to a national bank or Federal savings association that submits an exemption request. Commenters suggested that the OCC provide a clear timeline for responding to a request for an

[35] The Uniform Financial Institutions Rating System, commonly referred to as the CAMELS rating system.

[36] *https://www.occ.gov/topics/supervision-and-examination/responsible-innovation/index-responsible-innovation.html.*

[37] Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing (Dec. 3, 2018), available at *https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-130a.pdf.*

[38] 31 CFR 1010.970.

[39] *See, e.g.,* 12 CFR 100.2 (''The Comptroller of the Currency may, for good cause and to the extent permitted by statute, waive the applicability of any provision of parts 1 through 197 of this chapter I, as applicable, with respect to Federal savings associations.''). Similarly, other FinCEN exemption provisions have not used language like this. *See, e.g.,* 31 CFR 1020.220(b).

exemption, for example 30 days or 45 days. Several commenters suggested that the OCC should publish approved exemption decisions so that other financial institutions are aware of the OCC's analysis regarding a particular process or new technology (and would not have to apply separately for exemptions). One commenter recommended that the agencies clarify how they will handle requests may contain trade secrets, proprietary information, and other sensitive business information.

The OCC recognizes the value of a timely, transparent review and decision process, and the OCC, in consultation with the other agencies, may develop standardized timelines for the consideration of requests or the publication of any exemptions. However, at present, including such procedures within the OCC's regulation would be inconsistent with FinCEN's exemption regulation. The OCC, in consultation with the other agencies, also is reviewing and potentially revising SAR requirements as part of changes made by the AMLA of 2020. The OCC, in consultation with the other agencies, may refine SAR requirements in ways that align with the commenters' concerns, but it is not possible to make these commitments while other potential SAR changes are still ongoing. This final rule only makes the limited and incremental changes necessary for the OCC's exemption authority to be consistent with FinCEN's rule. The OCC routinely handles sensitive or confidential information submitted by national banks and Federal savings associations, and the OCC expects to follow appropriate protocols in handling any such information submitted along with exemption requests.

The OCC acknowledges commenters' concerns about making approved exemptions public and transparent. The final rule does not resolve whether or not the OCC will publish approved exemptions or redacted versions of them. The OCC expects to determine whether publication is appropriate in the course of developing standardized procedures for handling exemptions and in coordination with FinCEN and the other Federal banking agencies. The OCC also notes that, to the extent that an exemption request involves a substantive legal interpretation or action, such determinations are regularly published by the OCC with appropriate redactions.

Several comments addressed the process for issuing an exemption, including recommending governance mechanisms to ensure the accountability of OCC officials making exemption decisions. The OCC takes such process concerns seriously but does not believe it is appropriate to address them in this regulation. The OCC has separate governance mechanisms to address the appropriate delegation of authority within its organizational structure. It would be anomalous to embed additional internal rules of agency procedure within the OCC's SAR regulations. Additionally, such process requirements would be inconsistent with FinCEN's exemption provision and would undermine the value of consistent exemption provisions.

One commenter recommended that the agencies should make it clear that banks are not required to run parallel systems by running both their existing process and the innovative process simultaneously. Although the OCC expects to resolve this issue in specific exemption requests, the OCC notes that the Interagency Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing states ''that pilot programs undertaken by banks, in conjunction with existing BSA/AML processes, are an important means of testing and validating the effectiveness of innovative approaches.'' [40]

Under the proposed rule, the OCC also could have revoked previously granted exemptions. The proposed rule provided that the OCC would provide written notice to a national bank or Federal savings association of the OCC's intention to revoke an exemption. The notice would have included the basis for the revocation and would provide an opportunity for the national bank or Federal savings association to submit a response to the OCC. One commenter stated that the proposed rule offers no standards or criteria for determining when to extend or revoke a SAR exemption. Another commenter suggested that the OCC create an appeal process so an applicant may make changes and re-submit without having to completely re-apply for an exemption. One commenter recommended giving financial institutions a timeline for revocation so they have the opportunity to prepare and re-direct resources. Another commenter recommended that, before an exemption is revoked, the agencies should provide reasonable notice to allow the institution ample time to reinstitute and test their pre-existing SAR monitoring processes. Another commenter recommended that the rule's procedures should include an appeal mechanism or second review so that a denied application can be revised or amended to address any objections raised by an agency. Another commenter suggested that the agencies should provide a sufficient timeline before revoking an exemption.

The OCC is finalizing the revocation provisions as proposed. FinCEN's exemption provision provides that exemptions ''shall be revocable in the sole discretion of the Secretary.'' [41] The OCC similarly believes it is appropriate to communicate in the final rule that exemptions are not permanent and may be revoked. Although the OCC recognizes the potential value of the additional procedures or checks suggested by the commenters (for example, an appeal mechanism), it is unnecessary to include such features and internal processes in the regulation. The final rule provides for an opportunity for notice and response before revocation, which would promote fairness and due process. In addition, additional procedures or checks would be inconsistent with FinCEN's regulation. To support a coordinated regulatory response, the OCC intends to cooperate with FinCEN when considering whether to revoke an exemption, to the extent possible. Although the OCC plans to carefully evaluate exemption requests so as to avoid where possible the need for revocation, it would be inappropriate to add other mandatory pre-revocation procedures because the procedures could interfere with the potential need for expedited revocation.

E. Other Comments

Several commenters raised issues not directly relevant to this rulemaking. One commenter supported a broader effort to review and harmonize supervisory expectations, perhaps even through a single rulemaking. Another commenter supported other efforts to improve SAR regulations, including a streamlined form, narrative improvements, and reporting thresholds. Another commenter recommended that the agencies recognize the new priorities in the AMLA of 2020, including the goal to update and modernize the overall AML system. One commenter suggested that the agencies change the focus in their proposed rules to recognize that the goal is providing useful information for law enforcement through the risk-based approach while also protecting the financial institution and confidence in the banking system.

[40] *See* ''Joint Interagency Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing 2,'' (Dec. 3, 2018), available at *https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-130a.pdf.*

[41] 31 CFR 1010.970(a).

The OCC is undertaking reviews of, and potentially changes to, reporting requirements as part of implementing the AMLA of 2020. The OCC will evaluate these comments in the context of this broader review of SAR requirements and AML requirements generally. This final rule only makes the limited, incremental changes necessary to conform the OCC's SAR exemption authority to FinCEN's.

V. Administrative Law Matters

A. Congressional Review Act

For purposes of the Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major'' rule.[42] If OMB deems a final rule is ''major,'' the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[43] The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies or geographic regions, or (3) a significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.[44] As required by the Congressional Review Act, the OCC will submit the final rule and other appropriate reports to Congress and the GAO for review.

B. Solicitation of Comments and Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act[45] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies sought to present the final rule in a simple, straightforward manner and did not receive any comments on the use of plain language in the proposed rule.

C. Paperwork Reduction Act

Certain provisions of the final rule contain are a ''collection of information'' within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the act's requirements, agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC reviewed the rule and determined that it revises information collection requirements previously approved by the OMB under OMB Control No. 1557–0180. The OCC submitted the revised information collection to the OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and § 1320.11 of the OMB's implementing regulations (5 CFR 1320).

Current Actions. The rule revises 12 CFR 21.11 and 12 CFR 163.180 to allow national banks and Federal savings associations to submit written requests for exemptions from the requirements of the OCC's SAR regulations. The burden estimates below are based on the estimated number of national banks and Federal savings associations that might request exemptions each year and the estimated number of hours required to submit a request.

Title of Information Collection: Minimum Security Devices and Procedures, Reports of Suspicious Activities, and Bank Secrecy Act Compliance Program.

Frequency: Event generated.

Affected public: Businesses or other for-profit.

Estimated number of respondents: 5.

Total estimated annual burden: 250 hours.

D. Regulatory Flexibility Act

In general, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency, in connection with a final rule, to prepare a final regulatory flexibility analysis describing the rule's impact on small entities (defined by the Small Business Administration for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million or less). However, under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 1,117 institutions (national banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 669 are small entities.[46] Because the final rule imposes no new mandates, it will have only de minimis costs to OCC-supervised small entities. Therefore, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a final regulatory flexibility analysis is not required.

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA) of 1994 (12 U.S.C. 4802(a)) in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with principles of safety and soundness and the public interest (1) any administrative burdens that the final rule would place on depository institutions, including small depository institutions and customers of depository institutions, and (2) the benefits of the final rule. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[47] The OCC considered the changes made by this final rule and believes that the effective date of May 1, 2022, will provide OCC-regulated institutions with adequate time to comply with the rule. The final rule will not impose any new administrative compliance requirements, and the OCC believes that the burdens of preparing a request for exemption are justified by the agency's need to evaluate information and factors relevant to the exemption request and to promote consistency.

F. OCC Unfunded Mandates Reform Act of 1995

The OCC analyzed the final rule under the factors in the Unfunded Mandates Reform Act (UMRA) of 1995

[42] 5 U.S.C. 801 *et seq.*

[43] 5 U.S.C. 801(a)(3).

[44] 5 U.S.C. 804(2).

[45] Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (1999), codified at 12 U.S.C. 4809.

[46] Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining whether it should classify an institution as a small entity. The OCC used December 31, 2020, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the U.S. Small Business Administration's *Table of Size Standards.*

[47] 12 U.S.C. 4802(b).

2 U.S.C. 1501 *et seq.* Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year ($157 million as adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

The final rule will not impose new mandates on any national banks or Federal savings associations. Therefore, the OCC concludes that the final rule will not result in an expenditure of $157 million or more annually by state, local, and tribal governments, or by the private sector. As a result, the OCC finds that the final rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

List of Subjects

12 CFR Part 21

Crime, Currency, National banks, Reporting and recordkeeping requirements, Security measures.

12 CFR Part 163

Accounting, Administrative practice and procedure, Advertising, Crime, Currency, Investments, Mortgages, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 21—MINIMUM SECURITY DEVICES AND PROCEDURES, REPORTS OF SUSPICIOUS ACTIVITIES, AND BANK SECRECY ACT COMPLIANCE PROGRAM

■ 1. Revise the authority citation for part 21 to read as follows:

Authority: 12 U.S.C. 1, 93a, 161, 1462a, 1463, 1464, 1818, 1881–1884, and 3401–3422; 31 U.S.C. 5318.

■ 2. In § 21.11, add paragraph (m) to read as follows:

§ 21.11 Suspicious Activity Report.

* * * * *

(m) *Exemptions.* (1) The Office of the Comptroller of the Currency (OCC) may grant a national bank an exemption from the requirements of this section. A national bank requesting an exemption must submit a request in writing to the OCC. In reviewing such requests, the OCC will consider whether the exemption is consistent with the purposes of the Bank Secrecy Act (if applicable) and safe and sound banking, and may consider other appropriate factors. Any exemption will apply only as expressly stated in the exemption. (A national bank requesting an exemption that also requires relief from the requirements of applicable regulations issued by the Department of the Treasury at 31 CFR chapter X must submit a request in writing to both the OCC and FinCEN for approval.)

(2) The OCC will respond in writing to a national bank that submits a request pursuant to paragraph (m)(1) of this section after considering whether the exemption is consistent with the factors in paragraph (m)(1) of this section. Any exemption granted by the OCC under paragraph (m)(1) of this section will continue for the time specified by the OCC.

(3) The OCC may extend the period of time or may revoke an exemption granted under paragraph (m)(1) of this section. Exemptions or extensions may be revoked in the sole discretion of the OCC. Before revoking an exemption, the OCC will provide written notice to the national bank of the OCC's intention to revoke an exemption. Such notice will include the basis for the revocation and will provide an opportunity for the national bank to submit a response to the OCC. The OCC will consider any response before deciding whether or not to revoke an exemption and provide written notice to the national bank of the OCC's final decision to revoke an exemption.

(4) With respect to requests for exemptions that will also require relief from the requirements of applicable regulations issued by the Department of the Treasury at 31 CFR chapter X, upon receiving approval from both the OCC and FinCEN, the requestor will be relieved of its obligations under this section to the extent stated in such approvals.

PART 163—SAVINGS ASSOCIATIONS—OPERATIONS

■ 3. Revise the authority citation for part 163 to read as follows:

Authority: 12 U.S.C. 1, 93a, 1462a, 1463, 1464, 1467a, 1817, 1820, 1828, 1831o, 3806, 5101 *et seq.,* 5412(b)(2)(B); 31 U.S.C. 5318; 42 U.S.C. 4106.

■ 4. In § 163.180, add paragraph (f) to read as follows:

§ 163.180 Suspicious Activity Reports and other reports and statements.

* * * * *

(f) *Exemptions.* (1) The OCC may grant a Federal savings association or service corporation an exemption from the requirements of this section. A Federal savings association or service corporation requesting an exemption must submit a request in writing to the OCC. In reviewing such requests, the OCC will consider whether the exemption is consistent with the purposes of the Bank Secrecy Act (if applicable) and safe and sound banking, and may consider other appropriate factors. Any exemption will apply only as expressly stated in the exemption. (A Federal savings association or service corporation requesting an exemption that also requires relief from the requirements of applicable regulations issued by the Department of the Treasury at 31 CFR chapter X must submit a request in writing to both the OCC and FinCEN for approval.)

(2) The OCC will respond in writing to the Federal savings association or service corporation that submits a request pursuant to paragraph (f)(1) of this section after considering whether the exemption is consistent with the factors in paragraph (f)(1) of this section. Any exemption granted by the OCC under paragraph (f)(1) of this section will continue for the time specified by the OCC.

(3) The OCC may extend the period of time or may revoke an exemption granted under paragraph (f)(1) of this section. Exemptions or extensions may be revoked in the sole discretion of the OCC. Before revoking an exemption, the OCC will provide written notice to the Federal savings association or service corporation of the OCC's intention to revoke an exemption. Such notice will include the basis for the revocation and will provide an opportunity for the Federal savings association or service corporation to submit a response to the OCC. The OCC will consider any response before deciding whether or not to revoke an exemption and provide written notice to the Federal savings association or service corporation of the OCC's final decision to revoke an exemption.

(4) With respect to requests for exemptions that will also require relief from the requirements of applicable regulations issued by the Department of the Treasury at 31 CFR chapter X, upon receiving approval from both the OCC and FinCEN, the requestor will be relieved of its obligations under this section to the extent stated in such approvals.

Michael J. Hsu,

Acting Comptroller of the Currency.

[FR Doc. 2022–05521 Filed 3–17–22; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Parts 550 and 553

[Docket ID: BOEM–2022–0004]

RIN 1010–AE10

2022 Civil Penalties Inflation Adjustments for Oil, Gas, and Sulfur Operations in the Outer Continental Shelf

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Final rule.

SUMMARY: This final rule implements the 2022 inflation adjustments to the maximum daily civil monetary penalties contained in the Bureau of Ocean Energy Management (BOEM) regulations for violations of the Outer Continental Shelf Lands Act (OCSLA) and the Oil Pollution Act of 1990 (OPA), pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (FCPIAA Improvements Act) and relevant Office of Management and Budget (OMB) guidance. The 2022 adjustment multiplier of 1.06222 accounts for 1 year of inflation from October 2020 through October 2021.

DATES: This rule is effective on March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Peter Meffert, Chief, Regulations, Bureau of Ocean Energy Management, at (703) 787–1610 or by email at *peter.meffert@boem.gov.*

SUPPLEMENTARY INFORMATION:

I. Legal Authority

OCSLA authorizes the Secretary of the Interior (the Secretary) to impose a daily civil monetary penalty for a violation of OCSLA or its implementing regulations, leases, permits, or orders and directs the Secretary to adjust the maximum penalty at least every 3 years to reflect any inflation increase in the Consumer Price Index. 43 U.S.C. 1350(b)(1). Similarly, OPA authorizes civil monetary penalties for failure to comply with OPA's financial responsibility provisions or its implementing regulations. 33 U.S.C. 2716a(a). OPA does not include a maximum daily civil penalty inflation adjustment provision. Id.

The FCPIAA Improvements Act [1] requires that Federal agencies publish inflation adjustments to their civil monetary penalties in the **Federal Register** not later than January 15 annually.[2] Public Law 114–74, sec. 701(b)(1). The purposes behind these inflation adjustments are to maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, sec. 2 (codified at 28 U.S.C. 2461 note).

II. Background

BOEM implemented the 2021 inflation adjustment for its civil monetary penalties through a final rule, ''2021 Civil Penalties Inflation Adjustments for Oil, Gas, and Sulfur Operations in the Outer Continental Shelf,'' published in the **Federal Register** on April 15, 2021, which accounted for inflation for the 12-month period between October 2019 and October 2020. 86 FR 19782 (April 15, 2021).

The OMB Memorandum M–22–07 (''Implementation of Penalty Inflation Adjustments for 2022, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015''; available at *https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-07.pdf*) explains agency responsibilities under the FCPIAA Improvements Act that include identifying applicable penalties and performing the annual adjustment; publishing revisions to regulations to implement the adjustment in the **Federal Register**; applying adjusted penalty levels; and performing agency oversight of inflation adjustments.

Pursuant to the FCPIAA Improvements Act, this final rule implements BOEM's 2022 inflation adjustments to OCSLA and OPA maximum daily civil monetary penalties. A proposed rule is unnecessary, as the FCPIAA Improvements Act expressly exempts annual civil penalty inflation adjustments from the Administrative Procedure Act's (APA) notice of proposed rulemaking, public comment, and standard effective date provisions. FCPIAA Improvements Act, Public Law 114–74, sec. 701(b)(1)(D); APA, 5 U.S.C. 553.[3]

III. Calculation of 2022 Adjustments

In accordance with the FCPIAA Improvements Act, BOEM determined that OCSLA and OPA maximum daily civil monetary penalties require annual inflation adjustments and is issuing this final rule adjusting those penalty amounts for inflation through October 2021. The annual inflation adjustment is based on the percent change between the Consumer Price Index for All Urban Consumers (CPI–U) for the October preceding the date of the adjustment and the prior year's October CPI–U. Consistent with OMB M–22–07, the 2022 inflation adjustment multiplier can be calculated by dividing the October 2021 CPI–U by the October 2020 CPI–U. In this case, October 2021 CPI–U (276.589)/October 2020 CPI–U (260.388) = 1.06222.

For 2022, BOEM multiplied the current OCSLA maximum daily civil monetary penalty of $46,000 by the multiplier 1.06222 to equal $48,862.12. The FCPIAA Improvements Act requires that the resulting amount then be rounded to the nearest dollar. Accordingly, the 2022 adjusted OCSLA maximum daily civil monetary penalty is $48,862.

For 2022, BOEM multiplied the current OPA maximum daily civil monetary penalty amount of $48,762 by the multiplier 1.06222 to equal $51,795.97. The FCPIAA Improvements

[1] The FCPIAA Improvements Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990. Public Law 101–410 (codified at 28 U.S.C. 2461 note).

[2] Under the FCPIAA Improvements Act, Federal agencies are required to adjust their civil monetary penalties for inflation with an initial ''catch-up'' adjustment through an interim final rulemaking in 2016 and are required to make subsequent inflation adjustments not later than January 15 annually, beginning in 2017. Public Law 114–74, sec. 701(b)(1).

[3] Specifically, Congress directed that agencies adjust civil monetary penalties ''notwithstanding section 553 of title 5, United States Code [Administrative Procedure Act (APA)],'' which generally requires prior notice of proposed rulemaking, opportunity for public comment on proposed rulemaking, and publication of a final rule at least 30 days before its effective date. FCPIAA Improvements Act, sec. 701(b)(1)(D); APA, 5 U.S.C. 553. OMB confirmed this interpretation of the FCPIAA Improvements Act. OMB M–22–07 at 3–4 (''This means that the public procedure the APA generally requires—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.'').

Act requires that the resulting amount then be rounded to the nearest dollar. Accordingly, the 2022 adjusted OPA maximum daily civil monetary penalty is $51,796.

The adjusted penalty amounts take effect immediately upon publication of this rule. Under the FCPIAA Improvements Act, the adjusted amounts apply to civil penalties assessed after the date the increase takes effect, even if the associated violation predates the increase.

This table summarizes BOEM's 2022 maximum daily civil monetary penalties for each OCSLA and OPA violation:

CFR citation	Description of the penalty	Current maximum penalty	Multiplier	Adjusted maximum penalty
30 CFR 550.1403 (OCSLA)	Failure to comply per day per violation	$46,000	1.06222	$48,862
30 CFR 553.51(a) (OPA)	Failure to comply per day per violation	48,762	1.06222	51,796

IV. Procedural Requirement

A. Statutes

1. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*) is not required because, as a regulation of an administrative and fiscal nature, this rule is covered by a categorical exclusion. See 43 CFR 46.210(i). BOEM also has determined that the rule does not implicate any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA. Therefore, a detailed statement under NEPA is not required.

2. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA, 5 U.S.C. 601 *et seq.*) requires an agency to prepare a regulatory flexibility analysis for all rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. See 5 U.S.C. 603(a) and 604(a). The FCPIAA Improvements Act expressly exempts these annual inflation adjustments from the requirement to publish a proposed rule for notice and comment. FCPIAA Improvements Act, Public Law 114–74, sec. 701(b)(1)(D); OMB M–22–07 at 3–4. Thus, the RFA does not apply to this rulemaking.

3. Paperwork Reduction Act

This rule does not contain information collection requirements, and, therefore, a submission to OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or on the private sector, of more than $164 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments, or on the private sector. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

5. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

(a) Will not have an annual effect on the economy of $100 million or more;

(b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and

(c) will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

6. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*) and OMB guidance,[4] this rule is not a major rule, as defined by that act.[5]

B. Executive Orders (E.O.)

1. Governmental Actions and Interference With Constitutionally Protected Property Rights (E.O. 12630)

This rule does not effect a taking of private property or otherwise have takings implications under E.O. 12630. Therefore, a takings implication assessment is not required.

2. Regulatory Planning and Review (E.O. 12866); Improving Regulation and Regulatory Review (E.O. 13563)

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that annual civil penalty inflation adjustment rules are not significant if they exclusively implement the annual inflation adjustment consistent with OMB guidance and have an annual impact of less than $100 million.[6] This rule meets those conditions and, thus, is not a significant rule.

E.O. 13563 reaffirms the principles of E.O. 12866, while calling for improvements in the Nation's regulatory system to reduce uncertainty and to promote predictability and for the use of the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 further emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. However, BOEM is not using science in this rulemaking, as Congress directed agencies to adjust the maximum daily civil monetary penalty amounts using a particular equation, and BOEM does not have discretion to use any other factor in the adjustment. BOEM has developed this rule in a manner consistent with the requirements in E.O. 13563, to the extent relevant and feasible given the limited discretion provided agencies under the FCPIAA Improvements Act.

3. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

[4] *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB M–19–14, Guidance on Compliance with the Congressional Review Act (2019), available at *https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf;* OMB Memorandum M–22–07 at 3.

[5] 5 U.S.C. 804(2).

[6] *See* OMB Memorandum M–22–07 at 3.

(b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

4. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. This rule merely adjusts the level of civil monetary penalties that BOEM may impose on its lessees and has no effects on any action of State or local governments. Therefore, a federalism summary impact statement is not required.

5. Consultation and Coordination With Indian Tribal Governments (E.O. 13175)

The Department of the Interior and BOEM strive to strengthen their government-to-government relationships with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. BOEM has evaluated this rule under the Department of the Interior's consultation policy, under Departmental Manual part 512 chapters 4 and 5, and under the criteria in E.O. 13175 and determined that this rule has no substantial direct effects on federally recognized Indian Tribes or Alaska Native Claims Settlement Act (ANCSA) Corporations and that consultation under the Department of the Interior's and BOEM's Tribal and ANCSA consultation policies is not required.

6. Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. Therefore, a statement of energy effects is not required.

This action by the Principal Deputy Assistant Secretary is taken herein pursuant to an existing delegation of authority.

List of Subjects

30 CFR Part 550

Administrative practice and procedure, Continental shelf, Environmental impact statements, Environmental protection, Federal lands, Government contracts, Investigations, Mineral resources, Oil and gas exploration, Outer continental shelf, Penalties, Pipelines, Reporting and recordkeeping requirements, Rights-of-way, Sulfur.

30 CFR Part 553

Administrative practice and procedure, Continental shelf, Financial responsibility, Liability, Limit of liability, Oil and gas exploration, Oil pollution, Outer continental shelf, Penalties, Pipelines, Reporting and recordkeeping requirements, Rights-of-way, Surety bonds, Treasury securities.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

For the reasons stated in the preamble, BOEM amends 30 CFR parts 550 and 553 as follows:

PART 550—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 1. The authority citation for part 550 continues to read as follows:

Authority: 30 U.S.C. 1751; 31 U.S.C. 9701; 43 U.S.C. 1334.

■ 2. Revise § 550.1403 to read as follows:

§ 550.1403 What is the maximum civil penalty?

The maximum civil penalty is $48,862 per day per violation.

PART 553—OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES

■ 3. The authority citation for part 553 is revised to read as follows:

Authority: 33 U.S.C. 2704, 2716, as amended.

■ 4. Revise § 553.51(a) to read as follows:

§ 553.51 What are the penalties for not complying with this part?

(a) If you fail to comply with the financial responsibility requirements of OPA at 33 U.S.C. 2716 or with the requirements of this part, then you may be liable for a civil penalty of up to $51,796 per COF per day of violation (that is, each day a COF is operated without acceptable evidence of OSFR).

* * * * *

[FR Doc. 2022–05633 Filed 3–17–22; 8:45 am]

BILLING CODE 4310–MR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0375; FRL–9472–01–OCSPP]

Bicyclopyrone; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of bicyclopyrone in or on banana; broccoli; hop, dried cones; horseradish; onion, bulb; onion, green; papaya; strawberry; sweet potato, tuber; timothy, forage; timothy, hay and watermelon. Syngenta Crop Protection, LLC., requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective March 18, 2022. Objections and requests for hearings must be received on or before May 17, 2022 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–2020–0375, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is open to visitors by appointment only. For the latest status information on EPA/DC services and 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 Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

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–2020–0375 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 May 17, 2022. 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–2020–0375, by one of the following methods:

- *Federal eRulemaking Portal: https://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 *https://www.epa.gov/dockets/contacts.html.*

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of February 25, 2021 (86 FR 11488) (FRL–10020–47), 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 0F8853) by Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the herbicide bicyclopyrone, 4-hydroxy-3-{2-[(2-methoxyethoxy)methyl}-6-(trifluoromethyl)-3-pyridylcarbonyl}bicyclo[3.2.1]oct-3-en-2-one, in or on banana at 0.01 parts per million (ppm); broccoli at 0.01 ppm; garlic, bulb at 0.02 ppm, hops, dried cones at 0.04 ppm; horseradish at 0.015 ppm; onion, bulb at 0.02 ppm; onion, green at 0.05 ppm; papaya at 0.01 ppm; plantains at 0.01 ppm; strawberry at 0.01 ppm; sweet potato, roots at 0.02 ppm; timothy, forage at 0.9 ppm; timothy, hay at 1.5 ppm; and watermelon at 0.01 ppm.

That document referenced a summary of the petition prepared by Syngenta Crop Protection, LLC., the registrant, which is available in the docket, *https://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA is establishing several tolerances at different levels than requested by the petitioner, is not establishing several petitioned for tolerances, and adjusted several commodity definitions. 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 bicyclopyrone including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with bicyclopyrone follows.

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections of the rule that repeat what has been previously published in tolerance rulemakings for the same pesticide chemical. Where scientific information concerning a particular chemical remains unchanged, the content of those sections would not vary between tolerance rulemaking and republishing the same sections is unnecessary and duplicative. 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 bicyclopyrone, in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to bicyclopyrone 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.

A. Toxicological Profile

For a discussion of the Toxicological Profile of bicyclopyrone, see Unit III.A. of the December 23, 2021, rulemaking (86–FR–72846) (FRL–9199–01–OCSPP).

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. The PODs and levels of concern have not changed from the previous rulemaking and EPA incorporates the background information in the December 23, 2021, rulemaking. A summary of the

toxicological endpoints for bicyclopyrone used for human risk assessment can be found in the document titled ''Bicyclopyrone: Human Health Risk Assessment for the Establishment of Permanent Tolerances for Residues in/on Bananas, Broccoli, Dry Bulb Onions, Green Onion, Hops, Horseradish, Papaya, Strawberry, Sweet Potatoes, Timothy Forage, Timothy Hay, and Watermelon'' (hereinafter ''Bicyclopyrone Human Health Risk Assessment'') in docket ID number EPA–HQ–OPP–2020–0375 in *regulations.gov*.

C. Exposure Assessment

Much of the exposure assessment remains the same although updates have occurred to accommodate exposures from the petitioned-for tolerance. These updates are discussed in this section; for a description of the rest of the EPA approach to and assumptions for the exposure assessment, please reference Unit III.C. of the December 23, 2021, rulemaking.

EPA's dietary exposure assessments have been updated to include the additional exposure from the new uses of bicyclopyrone on banana; broccoli; hop, dried cones; horseradish; onion, bulb; onion, green; papaya; strawberry; sweet potato, tuber; timothy, forage; timothy, hay; and watermelon (see Unit IV. C for an explanation of the differences between this list and the petitioned for tolerances). The assessment used the same assumptions as the December 23, 2021, final rule concerning average field trial residues for registered crops, tolerance levels for the proposed crops and recently added crops, average empirical processing factors for registered crops, anticipated residues for livestock commodities, and percent crop treated (PCT) for registered crops commodities.

D. Anticipated Residue and Percent Crop Treated (PCT) Information

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

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

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

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

The chronic dietary assessment incorporated the following average PCT estimates: Barley, 1%; field corn, 10%; sweet corn, 5%; pop corn, 10% (used the higher of the corn PCT); and wheat, 5% (used spring wheat PCT which was higher than winter wheat PCTs). An estimate of 100% crop treated was used for all other commodities. The PCT for livestock commodities is based on the PCT value for the livestock feed item used in the dietary burden with the highest percent crop treated (field corn, 10%).

In most cases, EPA uses available data from the United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the 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 bicyclopyrone may be applied in a particular area.

Dietary exposure from drinking water. EPA has revised the bicyclopyrone Drinking Water Assessment (DWA) since the December 23, 2021, rule. The 2016 DWA for bicyclopyrone (USEPA, 2016, DP Barcode 428614) recommended moving forward with estimated drinking water concentrations (EDWCs) for a groundwater scenario that occurred in a wheat and barley growing area and move away from the existing EDWCs based on a simulation resulting in the highest groundwater EDWC. The Human Health Risk Assessment (USEPA, 2022, DP Barcode 459563) used the highest groundwater EDWCs from the previous 2016 DWA. The maximum acute and chronic/cancer surface water and groundwater EDWCs associated with bicyclopyrone use were 7.61 parts per billion (ppb) for the maximum acute and 6.66 ppb, for the maximum chronic/cancer.

Non-occupational exposure. There are no new residential (non-occupational) exposures associated with the new proposed uses and bicyclopyrone is not registered for any use patterns that would result in residential exposure.

Cumulative exposure. For a discussion of the cumulative exposure assessment of bicyclopyrone, see Unit

III.C.4 of the December 23, 2021, rulemaking.

Safety factor for infants and children. EPA continues to conclude that there are reliable data to support the reduction of the Food Quality Protection Act (FQPA) safety factor. See Unit III.D of the December 23, 2021 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). 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 points of departure to ensure that an adequate margin of exposure exists.

An acute dietary exposure assessment was not conducted as toxicological effects attributable to a single dose were not identified. Chronic dietary risks are below the Agency's level of concern of 100% of the cPAD: The population subgroup with the highest exposure estimate was all infants at 16% of the cPAD. Bicyclopyrone is classified as ''Suggestive Evidence of Carcinogenic Potential''. However, because the Agency has determined that the chronic reference dose will be protective of any potential cancer risk and there are no chronic risks that exceeds the Agency's level of concern, EPA concludes that there is not a concern for cancer risk from exposure to bicyclopyrone. There are no registered or new uses of bicyclopyrone that would result in residential exposure, therefore the aggregate risk estimates are equivalent to the chronic dietary (food and water) risk estimates and are not of concern.

Based on these risk assessments and the information described above, 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 bicyclopyrone residues. More detailed information about the Agency's analysis can be found in the Bicyclopyrone Human Health Risk Assessment in docket ID number EPA–HQ–OPP–2020–0373 in regulations.gov at *https://www.regulations.gov.*

IV. Other Considerations

A. Analytical Enforcement Methodology

For a discussion of the available analytical enforcement method, see Unit IV.A of the December 23, 2021, 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).

The Codex has not established a MRL for residues of bicyclopyrone in/on bananas, broccoli, dry bulb onions, timothy forage or hay, green onion, hops, horseradish, papaya, strawberry, sweet potato, or watermelon.

C. Revisions to Petitioned-For Tolerances

FFDCA section 408(d)(4)(A)(i) permits the Agency to finalize a tolerance that varies from that sought by the petition. The petitioner initially requested to include tolerances for both banana and plantain; however, a separate tolerance is not required for plantain per 40 CFR 180.1(g). Therefore, the Agency is only finalizing a tolerance for banana. The petitioner also requested to include tolerances for both garlic and onion, bulb; however, a separate tolerance is not required for garlic per 40 CFR 180.1(g). Therefore, the Agency is only finalizing a tolerance for onion, bulb.

The proposed commodity definitions for hops, dried cones; sweet potato, roots; have been modified to hop, dried cones; sweet potato, tuber, respectively, in order be consistent with Agency nomenclature.

The petitioner initially requested a tolerance of 0.9 ppm for timothy, forage and 1.5 ppm for timothy, hay. The petitioner appears to have calculated the requested tolerance value using input residue values from the forage and hay decline trials with a longer preharvest intervals (PHI), which would underestimate the resulting residues. The Agency used the residue values from the decline trial that had the shortest PHI. The Agency deems it appropriate to use the more conservative (*i.e.,* results with the highest residue value) approach and as a result produced a recommended tolerance of 1.5 ppm for timothy, forage and 2 ppm for timothy, hay when entered into the OECD calculator.

The proposed commodity for horseradish tolerance has also been modified to be set at the respective limit of quantitation (LOQs), as there were no residues detected.

V. Conclusion

Therefore, tolerances are established for residues of bicyclopyrone, 4-hydroxy-3-[[2-[(2-methoxyethoxy)methyl]-6-(trifluoromethyl)-3-pyridinyl]carbonyl]bicyclo[3.2.1]oct-3-en-2-one, including its metabolites and degradates in or on banana at 0.01 ppm; broccoli at 0.01 ppm; hop, dried cones at 0.04 ppm; horseradish at 0.02 ppm; onion, bulb at 0.02 ppm; onion, green at 0.05 ppm; papaya at 0.01 ppm; strawberry at 0.01 ppm; sweet potato, tuber at 0.02 ppm; timothy, forage at 1.5 ppm; timothy, hay at 2 ppm; and watermelon at 0.01 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). 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

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: March 9, 2022.

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 § 180.682 amend Table 1 to Paragraph (a) (1) by adding in alphabetical order the entries ''Banana''; ''Broccoli''; ''Hop, dried cones''; ''Horseradish''; ''Onion, bulb''; ''Onion, green''; ''Papaya''; ''Strawberry''; ''Sweet potato, tuber''; ''Timothy, forage''; Timothy, hay''; and ''Watermelon'' to read as follows:

§ 180.682 Bicyclopyrone; tolerances for residues.

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
Banana	0.01
* * * * *	
Broccoli	0.01
* * * * *	
Hop, dried cones	0.04
* * * * *	
Horseradish	0.02
* * * * *	
Onion, bulb	0.02
Onion, green	0.05
Papaya	0.01
* * * * *	
Strawberry	0.01
* * * * *	
Sweet potato, tuber	0.02
Timothy, forage	1.5
Timothy, hay	2
* * * * *	
Watermelon	0.01
* * * * *	

* * * * *

[FR Doc. 2022–05737 Filed 3–17–22; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MB Docket No. 21–263; FCC 22–13; FR ID 76380]

Broadcast Radio Technical Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communication Commission (Commission or FCC) amends the rules applicable to broadcast radio stations to better reflect current requirements and eliminate redundant, outdated, or conflicting technical provisions.

DATES: Effective April 18, 2022.

FOR FURTHER INFORMATION CONTACT: James Bradshaw, Deputy Division Chief, Media Bureau, Audio Division (202) 418–2739, *James.Bradshaw@fcc.gov;* Christine Goepp, Attorney Advisor, Media Bureau, Audio Division, (202) 418–7834, *Christine.Goepp@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O), MB Docket No. 21–263, FCC 22–13, adopted on February 16, 2022, and released on February 17, 2022. The full text of the R&O will be available electronically via the FCC's Electronic Document Management System (EDOCS) website at *www.fcc.gov/edocs* or via the FCC's Electronic Comment Filing System (ECFS) website at *www.fcc.gov/ecfs.* The Commission published the notice of proposed rulemaking (NPRM) at 86 FR 43145 on August 6, 2021.

Synopsis

1. The Federal Communication Commission amends the following rules applicable to broadcast radio stations to better reflect current requirements and eliminate redundant, outdated, or conflicting technical provisions.

2. *Maximum rated transmitter power for AM stations.* The Commission amends 47 CFR 73.1665(b) to remove the maximum rated transmitter power limit for AM stations and deletes the corresponding ''Table 1 to paragraph (b).'' This equipment limitation on potential transmitter power is outdated and unnecessary given the Commission's current reliance on actual operating antenna input power as the most accurate and effective means of ensuring that AM stations adhere to their authorized power limits. The Commission anticipates that elimination of this technical restriction on AM transmitters will allow AM stations of any class to use transmitters of any rated power, thus benefiting the AM service by broadening the market of transmitters available to stations, enhancing the secondary market for AM transmitters, and reducing the number of transmitters that need to be disposed of. Accordingly, it amends 47 CFR 73.1665(b) by removing the maximum rated transmitter power for AM stations, deletes the ''Table 1 to paragraph (b),'' and replaces ''power rating limit'' in the first sentence with ''manufacturer-rated power limit'' to indicate that this is a technical specification established by the transmitter manufacturer.

3. *Noncommercial Educational (NCE) community of license coverage.* The Commission eliminates the inconsistency between 47 CFR 73.316(c)(2)(ix)(B) and 73.1690(c)(8)(i) and the NCE FM community coverage standard set out in 47 CFR 73.515. Specifically, it amends

§§ 73.316(c)(2)(ix)(B) and 73.1690(c)(8)(i) to conform to the updated standard that NCE applicants must show that their predicted 60 dBu contour will cover at least 50% of the relevant community of license or reach 50% of the population within the community.

4. *FM transmitter interference to nearby antennas.* The Commission declines to eliminate the proximate interference rule, 47 CFR 73.316(d), on the basis of industry feedback. However, it correct a typographical error in this rule by replacing the word ''approximate'' with ''proximate.''

5. *NCE FM Class D second-adjacent channel interference ratio.* The Commission amends 47 CFR 73.509(b), which sets out signal strength contour overlap requirements for NCE FM Class D stations, to harmonize with the more permissive standard applied to all other NCE–FM stations. The Commission states that the less restrictive requirements have proven effective for other station classes and that there is no reason to continue treating Class D stations differently in this context. Although this distinction was originally designed to accommodate the establishment of the low power FM (LPFM) service, because the LPFM service is now mature, it is appropriate to extend the general contour overlap limits to Class D NCE stations. The Commission anticipates that the less preclusive requirement will create opportunities for NCE stations to increase power and coverage, as well as provide them with greater site selection flexibility. Accordingly, it amends 47 CFR 73.509(b) as set out in the final rules and makes non-substantive and formatting edits to the table contained in 47 CFR 73.509(a).

6. *Protection for grandfathered common carriers in Alaska in the 76–100 MHz band.* The Commission deletes 47 CFR 73.501(b), 74.1202(b)(3), the second sentence of 74.702(a)(1), and the second sentence of 74.786(b), all containing similar language requiring broadcast services to protect grandfathered common carrier services in Alaska operating in the 76–100 MHz frequency band. The Commission explains that this requirement is unnecessary and obsolete because the Commission's licensing databases indicate that there are no longer any common carrier services remaining in this frequency band in Alaska.

7. *AM fill-in area definition.* The Commission amends the definition of ''AM fill-in area'' set out in 47 CFR 74.1201(j) to conform to the requirement in 47 CFR 74.1201(g) that the ''coverage contour of an FM translator rebroadcasting an AM radio broadcast station as its primary station must be contained within the greater of either the 2 mV/m daytime contour of the AM station or a 25-mile (40 km) radius centered at the AM transmitter site.'' This change harmonizes the various rules governing fill-in translator transmitter siting and does not affect the signal coverage requirement set out in 47 CFR 74.1201(g).

8. *International coordinations.* The Commission updates 47 CFR 73.207(b) and 74.1235(d) to comport with the relevant international treaties. Specifically, it updates 47 CFR 73.207(b)(2) and the associated table to reflect the spacing requirements set out in the 1997 amendment to the 1991 U.S.-Canada FM Broadcasting Agreement and to reference the contour overlap provisions of section 5.2 of the Agreement. The Commission concludes that there is no need to grandfather stations that do not meet the new requirements because, at the time that the 1997 amendment took effect, the Commission coordinated with Canada Table B allotment modifications in accordance with the increase of Class A allotments to 6kW and has subsequently applied the distance separations set out in the amended 1991 U.S.-Canada FM Broadcasting Agreement when processing applications for more than two decades. The Commission clarifies that no facility modifications will be ordered because of the administrative updates to the distance separation requirements and that any Class A FM station may continue to operate under its licensed parameters. However, any application to modify the technical parameters in the station's license must include a showing that the proposed facilities satisfy the treaty requirements with respect to the Canadian border as set out in amended 47 CFR 73.207(b)(2).

9. The Commission also updates 47 CFR 73.207(b)(3) and the associated table to reflect the spacing requirements set out in the 1992 U.S.-Mexico FM Broadcasting Agreement. It clarifies that, for the purposes of the table associated with 47 CFR 73.207(b)(3), U.S. Class C0 assignments or allotments are considered Class C. In addition, the Commission states that the distances in both 47 CFR 73.207(b)(2) and (3) are to be calculated using the distance calculation methodology set out in the two respective Agreements. Finally, it makes non-substantive and formatting edits to all of the minimum distance separation tables contained in 47 CFR 73.207(b).

10. The Commission also updates 47 CFR 74.1235(d) to eliminate inconsistent provisions and reflect current treaty requirements applicable to FM translators. Specifically, it deletes all of the current introductory language of paragraph (d) prior to paragraphs (d)(1), (2), and (3). The first sentence of that introductory paragraph is inconsistent with the current treaty power limits established in the 1991 U.S.-Canada FM Broadcasting Agreement, as amended, which are already codified in paragraph (d)(3). The remainder of the introductory paragraph is inconsistent with the terms of the 1992 U.S.-Mexico FM Broadcasting Agreement, which specifies that FM translator stations are subject to a contour overlap based spacing methodology and are thus not subject to the distance separations of 47 CFR 73.207(b)(3). Finally, the reference in that paragraph to a 10-watt transmitter power output limitation is a superseded provision originally set out in the U.S.-Mexican FM Broadcast Agreement of 1972 and is no longer required under the current treaty. For these reasons, the Commission deletes all of the introductory language of § 74.1235(d) as obsolete.

Paperwork Reduction Act Analysis

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

Final Regulatory Flexibility Analysis

12. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the notice of proposed rulemaking (NPRM) to this proceeding. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

13. This document adopts several rule changes to better reflect current requirements and eliminate redundant, outdated, or conflicting provisions. Specifically, the Commission:

- Eliminates the maximum rated transmitter power limit rule for AM stations. The Commission finds that an equipment limitation on potential

transmitter power that is established by the transmitter manufacturer is outdated and unnecessary given the Commission's current reliance on actual operating antenna input power as the most accurate and effective means of ensuring that AM stations adhere to their authorized power limits.

- Updates several rule provisions containing an obsolete noncommercial educational (NCE) FM community of license coverage standard to harmonize with the later-adopted, more specific, NCE community of license coverage requirement.
- Updates the signal strength contour overlap requirements for NCE FM Class D stations to harmonize with the contour overlap requirements for all other classes of NCE FM stations. The Commission concludes that there is no reason to continue treating Class D stations differently in this context and that a less preclusive standard will create opportunities for NCE stations to increase power and coverage, as well as provide them with greater site selection flexibility.
- Eliminates the requirement for radio broadcast services to protect grandfathered common carrier services in Alaska operating in the 76–100 MHz frequency band. This requirement is no longer necessary as there are no more common carriers in this band in Alaska.
- Harmonizes the definition of an ''AM fill-in area'' set out in multiple rule sections. This correction applies the most up-to-date definition of ''AM fill-in area'' consistently across the relevant rules.
- Amends regulations applicable to broadcast stations within 320 kilometers of the Mexican and Canadian borders to implement the most current treaty provisions.

Amending these rules to accurately reflect current requirements will reduce potential confusion and eliminate unnecessary burdens on broadcasters.

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

14. There were no comments to the IRFA filed.

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

15. 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 the Rules Apply

16. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small government 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).

17. *Radio Stations.* Radio stations are an Economic Census category that ''comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.'' The SBA has established a small business size standard for this category as firms having $41.5 million or less in annual receipts. Economic Census data for 2012 shows that 2,849 radio station firms operated during that year. Of that number, 2,806 operated with annual receipts of less than $25 million per year, and 43 firms had annual receipts of $25 million or more. Because the Census has no additional classifications that could serve as a basis for determining the number of stations whose receipts exceeded $41.5 million in that year, we conclude that the majority of radio broadcast stations were small entities under the applicable SBA size standard.

18. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial AM stations to be 4,509 and the number of commercial FM stations to be 6,676 for a total of 11,185, along with 8,866 FM translator and booster stations. According to BIA/Kelsey Publications, Inc.'s Media Access Pro Database, as of March 2020, 4,389 a.m. stations and 6,767 FM stations had revenues of $41.5 million or less. In addition, the Commission has estimated the number of noncommercial educational FM radio stations to be 4,204. NCE stations are non-profit, and therefore considered to be small entities. Accordingly, we estimate that the majority of radio broadcast stations are small entities. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

19. Moreover, as noted above, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

E. Description of Projected Reporting, Record Keeping and Other Compliance Requirements

20. The rule changes adopted in the Report and Order do not include any notification or recordkeeping requirements.

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

21. 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.

22. The rules adopted or amended in the Report and Order do not impose any new substantive requirements on broadcast radio stations. Rather, they clarify existing technical requirements, create consistency across different rules, and ensure that current treaty terms are

accurately reflected in the rules. These measures will help small entities by reducing their need to rely on third parties, such as legal counsel, to understand the rules and comply with regulatory requirements. Significant alternatives would include leaving the rules as they are; however, in the Commission's judgment the increased transparency and certainty under the amended rules would outweigh any benefit of familiarity with the existing rules. The Commission did take this alternative approach when it decided to retain the proximate interference rule set out in § 73.316(d), responding to industry feedback that that rule serves a useful purpose.

G. Report to Congress

23. The Commission will send a copy of the Report and Order, including the FRFA, in a report to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the Commission will send a copy of the Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

24. Accordingly, *it is ordered* that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 301, 303, 307, 308, 309, 316, and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 303, 307, 308, 309, 316, and 319, the Report and Order *is adopted* and *will become effective* 30 days after publication in the **Federal Register**.

25. *It is further ordered* that parts 73 and 74 of the Commission's Rules ARE *amended* as set forth in the final rules and such rule amendments will become effective 30 days after publication in the **Federal Register**.

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

27. *It is further ordered* that the Commission *shall send* a copy of the 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).

28. *It is further ordered* that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 21–263 *shall be terminated* and its docket *closed.*

List of Subjects

47 CFR Part 73

Mexico, Radio.

47 CFR Part 74

Mexico, Radio.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR chapter I, parts 73 and 74, as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. Amend § 73.207 by:

■ a. Revising the first sentence of paragraph (b) introductory text;

■ b. In paragraph (b)(1), revising the introductory text and the heading for the table;

■ c. Revising paragraphs (b)(2), (b)(3) introductory text, and (b)(3)(iv) and (v);

■ d. Adding paragraph (b)(3)(vi); and

■ e. Redesignating Table C following paragraph (b)(3) as table 3 to paragraph (b) and revising the heading of the newly redesignated table.

The revisions and addition read as follows:

§ 73.207 Minimum distance separation between stations.

* * * * *

(b) The distances listed in Tables 1, 2, and 3 of this paragraph (b) apply to allotments and assignments on the same channel and each of five pairs of adjacent channels. * * *

(1) *Domestic distance separation.* Domestic allotments and assignments must be separated from each other by not less than the distances in Table 1 to this paragraph (b):

TABLE 1 TO PARAGRAPH (b)—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS

[Miles]

* * * * * * *

(2) *Canadian border distance separation.* Under the 1991 United States-Canada FM Broadcasting Agreement, as amended, any domestic U.S. allotment or assignment within 320 kilometers (199 miles) of the common border must either satisfy the contour overlap provisions set out in the Agreement or be separated from Canadian allotments and assignments by not less than the distance given in Table 2 to this paragraph (b), using the distance calculation methodology set out in the Agreement. When applying Table 2, U.S. Class C0 allotments and assignments are considered to be Class C; U.S. Class C2 allotments and assignments are considered to be Class B; and U.S. Class C3 allotments and assignments are considered to be Class B1.

TABLE 2 TO PARAGRAPH (b)—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS

[Canada]

Relation	Co-channel	200 kHz	400 kHz	600 kHz	10.6/10.8 MHz (I.F.)
A1 to A1	78	45	24	20	4
A1 to A	131	78	44	40	7
A1 to B1	164	98	57	53	9
A1 to B	190	117	71	67	12

TABLE 2 TO PARAGRAPH (b)—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS—Continued

[Canada]

Relation	Co-channel	200 kHz	400 kHz	600 kHz	10.6/10.8 MHz (I.F.)
A1 to C1	223	148	92	88	19
A1 to C	227	162	103	99	26
A to A	151	98	51	42	10
A to B1	184	119	64	55	12
A to B	210	137	78	69	15
A to C1	243	168	99	90	22
A to C	247	182	110	101	29
B1 to B1	197	131	70	57	24
B1 to B	223	149	84	71	24
B1 to C1	256	181	108	92	40
B1 to C	259	195	116	103	40
B to B	237	164	94	74	24
B to C1	271	195	115	95	40
B to C	274	209	125	106	40
C1 to C1	292	217	134	101	48
C1 to C	302	230	144	111	48
C to C	306	241	153	113	48

(3) *Mexican border distance separation.* Under the 1992 United States-Mexico FM Broadcasting Agreement, any domestic U.S. assignment or allotment within 320 kilometers (199 miles) of the common border must either satisfy the contour overlap provisions set out in section 7.3 of the Agreement or be separated from Mexican assignments or allotments by not less than the distances given in Table 3 to this paragraph (b), using the distance calculation methodology set out in the Agreement. The minimum required distance separation between I.F. allotments and assignments cannot be reduced. When applying Table 3—

* * * * *

(iv) U.S. Class C2 assignments or allotments are considered Class B;

(v) Class C1 assignments or allotments assume maximum facilities of 100 kW ERP at 300 meters HAAT. However, U.S. Class C1 stations may not, in any event, exceed the domestic U.S. limit of 100 kW ERP at 299 meters HAAT, or the equivalent; and

(vi) U.S. Class C0 assignments or allotments are considered Class C.

TABLE 3 TO PARAGRAPH (b)—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS

[Mexico]

* * * * * * *

■ 3. Amend § 73.316 by:

■ a. In paragraph (c)(2)(ix)(B):

■ i. In the first sentence, removing ''where'' and adding ''Where'' in its place; and

■ ii. Revising the second sentence; and

■ b. Revising paragraph (d).

The revisions read as follows:

§ 73.316 FM antenna systems.

* * * * *

(c) * * *

(2) * * *

(ix) * * *

(B) * * * The application for license must also demonstrate that coverage of the community of license by the 70 dBu contour is maintained for stations authorized pursuant to § 73.215 on Channels 221 through 300, as required by § 73.315(a), while noncommercial educational stations operating on Channels 201 through 220 must show that the proposed transmitter location will provide a minimum field strength of 1 mV/m (60 dBu) over at least 50 percent of its community of license or reach 50 percent of the population within the community.

(d) Applications proposing the use of FM transmitting antennas in the immediate vicinity (*i.e.,* 60 meters or less) of other FM or TV broadcast antennas must include a showing as to the expected effect, if any, of such proximate operation.

* * * * *

§ 73.501 [Amended]

■ 4. Amend § 73.501 by removing and reserving paragraph (b) and removing the parenthetical authority citation at the end of the section.

■ 5. Amend § 73.507 by:

■ a. Revising paragraph (c); and

■ b. Removing the parenthetical authority citation at the end of the section.

The revision reads as follows:

§ 73.507 Minimum distance separations between stations.

* * * * *

(c)(1) Stations separated in frequency by 10.6 or 10.8 MHz (53 or 54 channels) from allotments or assignments on non-reserved channels will not be authorized unless they conform to the separations given in Table 1 to paragraph (b) of § 73.207.

(2) Under the United States-Mexican FM Broadcasting Agreement, for stations and assignments differing in frequency by 10.6 to 10.8 MHz (53 or 54 channels), U.S. noncommercial educational FM allotments and assignments must meet the separations given in Table 3 to paragraph (b) of § 73.207 to Mexican allotments or assignments in the border area.

■ 6. Amend § 73.509 by:

■ a. In paragraph (a):

■ i. Revising the introductory text; and

■ ii. Adding a heading for the table; and

■ b. Revising paragraph (b).

The revisions read as follows:

§ 73.509 Prohibited overlap.

(a) An application for a new or modified NCE–FM station other than a

Class D (secondary) station will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station licensed by the Commission and operating in the reserved band (Channels 200–220, inclusive) as set forth in Table 1 to this paragraph (a):

TABLE 1 TO PARAGRAPH (a)

* * * * * * *

(b) An application by a Class D (secondary) station, other than an application to change class, will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station as set forth in Table 2 to this paragraph (b):

TABLE 2 TO PARAGRAPH (b)

Frequency separation	Contour of proposed station	Contour of any other station
Co-channel	0.1 mV/m (40 dBu)	1 mV/m (60 dBu)
200 kHz	0.5 mV/m (54 dBu)	1 mV/m (60 dBu)
400/600 kHz	100 mV/m (100 dBu)	1 mV/m (60 dBu)

* * * * *

■ 7. Amend § 73.1665 by revising paragraph (b) to read as follows:

§ 73.1665 Main transmitters.

* * * * *

(b) There is no maximum manufacturer-rated power limit for AM, FM, TV or Class A TV station transmitters.

* * * * *

■ 8. Amend § 73.1690 by revising the second sentence of paragraph (c)(8)(i) to read as follows:

§ 73.1690 Modification of transmission systems.

* * * * *

(c) * * *

(8) * * *

(i) * * * Noncommercial educational FM stations must continue to provide a 60 dBu contour over at least 50 percent of its community of license or reach 50 percent of the population within the community. * * *

* * * * *

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

■ 9. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 307, 309, 310, 336 and 554.

§ 74.702 [Amended]

■ 10. Amend § 74.702 by removing the second sentence of paragraph (a)(1).

§ 74.786 [Amended]

■ 11. Amend § 74.786 by removing the second sentence of paragraph (b).

■ 12. Amend § 74.1201 by revising paragraph (j) to read as follows:

§ 74.1201 Definitions.

* * * * *

(j) *AM Fill-in area.* The area within the greater of the 2 mV/m daytime contour of the AM radio broadcast station being rebroadcast or a 25-mile (40 km) radius centered at the AM transmitter site.

* * * * *

§ 74.1202 [Amended]

■ 13. Amend § 74.1202 by removing paragraph (b)(3).

■ 14. Amend § 74.1235 by:

■ a. Removing paragraph (d) introductory text; and

■ b. Revising paragraph (d)(1) and the first sentence of paragraph (d)(2).

The revisions read as follows:

§ 74.1235 Power limitations and antenna systems.

* * * * *

(d)(1) Translator or booster stations located within 125 kilometers of the Mexican border may not exceed an ERP of 50 watts (0.050 kW) in the direction of the Mexican border. Such stations also may not produce an interfering contour in excess of 32 km from the transmitter site in the direction of the Mexican border, nor may the 60 dBu service contour exceed 8.7 km from the transmitter site in the direction of the Mexican border.

(2) Translator or booster stations located between 125 kilometers and 320 kilometers from the Mexican border may operate with an ERP in excess of 50 watts. * * *

* * * * *

[FR Doc. 2022–05684 Filed 3–17–22; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 380

[Docket No. FMCSA–2007–27748]

RIN 2126–AB66

Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators; Correction

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Final rule; correcting amendment.

SUMMARY: FMCSA removes obsolete regulatory text from its June 30, 2021, entry-level driver training (ELDT) final rule. The section-by-section analysis in the March 7, 2016 notice of proposed rulemaking (NPRM) concerning the ELDT requirements proposed that, upon the effective date of the final rule, the subpart setting out the old driver training standards would be removed from the regulations and the subpart reserved for future use. However, the Agency omitted the amendatory instruction needed to remove and reserve the subpart from the December 8, 2016 final rule. FMCSA corrects the omission, which was repeated in subsequent ELDT rulemaking notices, the most recent being the June 2021 final rule.

DATES: This correction is effective March 18, 2022, and is applicable beginning February 7, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. Joshua Jones, Commercial Driver's License Division, FMCSA, 1200 New

Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–7332, *Joshua.Jones@dot.gov.*

SUPPLEMENTARY INFORMATION: As noted above, the Agency's December 8, 2016 (81 FR 88732), ELDT final rule omitted certain amendatory instructions. Subsequently, FMCSA published an interim final rule on February 4, 2020 (85 FR 6088) which also omitted the amendatory instruction. The interim final rule was finalized on June 30, 2021 (86 FR 34631), but without providing the necessary amendatory instruction originally discussed in the March 7, 2016 NPRM (81 FR 11944).

In this document, FMCSA provides the amendatory instruction to remove and reserve subpart E as originally explained in the preamble to the 2016 NPRM.

List of Subjects in 49 CFR Part 380

Administrative practice and procedure, Highway safety, Motor carriers, Reporting and recordkeeping requirements.

For reasons stated in the preamble, FMCSA amends 49 CFR part 380 by making the following correcting amendment:

PART 380—SPECIAL TRAINING REQUIREMENTS

■ 1. The authority citation for part 380 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31305, 31307, 31308, 31502; sec. 4007(a) and (b), Pub. L. 102–240, 105 Stat. 1914, 2151–2152; sec. 32304, Pub. L. 112–141, 126 Stat. 405, 791; and 49 CFR 1.87.

Subpart E—[Removed and Reserved]

■ 2. Subpart E, consisting of §§ 380.501 through 380.513, is removed and reserved.

Issued under authority delegated in 49 CFR 1.87.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2022–05709 Filed 3–17–22; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 220223–0054]

RTID 0648–XB752

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Pot Catcher/Processors in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher/processors using pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season apportionment of the 2022 Pacific cod total allowable catch (TAC) allocated to catcher/processors using pot gear in the BSAI.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), March 15, 2022, through 1200 hours, A.l.t., September 1, 2022.

FOR FURTHER INFORMATION CONTACT: Krista Milani, 907–581–2062.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season apportionment of the 2022 Pacific cod TAC allocated to catcher/processors using pot gear in the BSAI is 1,021 metric tons (mt) as established by the final 2021 and 2022 harvest specifications for groundfish in the BSAI (87 FR 11626, March 2, 2022).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the A season apportionment of the 2022 Pacific cod TAC allocated as a directed fishing allowance to catcher/processors using pot gear in the BSAI will soon be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by pot catcher/processors in the BSAI.

While this closure is effective the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, 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, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher/processors using pot gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 14, 2022.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: March 15, 2022.

Ngagne Jafnar Gueye,

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

[FR Doc. 2022–05766 Filed 3–15–22; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 220216–0049]

RTID 0648–XB794

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Less Than 50 Feet Length Overall Using Hook-and-Line Gear in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by for catcher vessels less than 50 feet (15.2 meters (m)) length overall using hook-and-line (HAL) gear in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2022 total allowable catch (TAC) apportioned to catcher vessels less than 50 feet length overall using HAL gear in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), March 15, 2022, through 1200 hours, A.l.t., June 10, 2022.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7241.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2022 Pacific cod TAC apportioned to catcher vessels less than 50 feet (15.2 m) length overall using HAL gear in the Central Regulatory Area of the GOA is 1,366 metric tons (mt) as established by the final 2022 and 2023 harvest specifications for groundfish in the GOA (87 FR 11599, March 2, 2022).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2022 Pacific cod TAC apportioned to catcher vessels less than 50 feet (15.2 m) length overall using HAL gear in the Central Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,316 mt and is setting aside the remaining 50 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for catcher vessels less than 50 feet (15.2 m) length overall using HAL gear in the Central Regulatory Area of the GOA.

While this closure is effective the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, 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, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher vessels less than 50 feet (15.2 m) length overall using HAL gear in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 14, 2022.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: March 15, 2022.

Ngagne Jafnar Gueye,

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

[FR Doc. 2022–05767 Filed 3–15–22; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 87, No. 53
Friday, March 18, 2022

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 HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2022–0131]

RIN 1625–AA00

Safety Zones; Recurring Marine Events and Fireworks Displays Within the Fifth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to amend its safety zones established for recurring marine events and fireworks displays that take place within the Fifth Coast Guard District area of responsibility. This Notice of Proposed Rule Making (NPRM) addresses a minor revision to the listing of events that informs the public of regularly scheduled fireworks displays that require additional safety measures provided by regulations. Through this proposed final rule, the current list of recurring marine events requiring safety zones would be updated with two additional events that take place in the Sector Virginia area of responsibility. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before April 18, 2022.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0131 using the Federal Decision Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, email LCDR Ashley Holm, Sector Virginia, Waterways Management Division, U.S. Coast Guard, Telephone: 757–668–5580, email: *virginiawaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
PATCOM Patrol Commander
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The Coast Guard regularly updates the regulations for recurring safety zones within the Fifth Coast Guard District at 33 CFR 165.506, and its respective tables. These recurring safety zones are for fireworks displays that take place either on or over the navigable waters of the Fifth Coast Guard District as defined at 33 CFR 3.25. These regulations were last amended October 15, 2021 (86 FR 57358). Since then, two recurring marine events within the Fifth Coast Guard District have changed in a way that require establishment of a safety zone for protection of life, property and the environment. Hazards associated with these events include potential falling debris and possible fire, explosion, projectile, and burn hazards. The purpose of this rulemaking is to ensure the safety of persons, vessels, and the navigable waters within close proximity to fireworks displays before, during, and after the scheduled events.

The Coast Guard is conducting this rulemaking under authority in 46 U.S.C. 70034 (previously, 33 U.S.C. 1231). The Secretary has delegated ports and waterways authority, with certain reservations not applicable here, to the Commandant via DHS Delegation No. 0170.1(II) (70). The Commandant has further delegated these authorities within the Coast Guard as described in 33 CFR 1.05–1 and 6.04–6.

III. Discussion of Proposed Rule

The Coast Guard is proposing to establish two new safety zones to cover waters in the vicinity of certain fireworks displays in order to ensure public safety on the waterway during these events.

The first safety zone would be enforced on the third or fourth Saturday in July of each year, beginning in July 2022, between 9:30 p.m. and 10 p.m. and cover all waters of John H. Kerr Reservoir within a 400 yard radius of approximate position latitude 36°37′51″ N, longitude 078°32′50″ W, located near the center span of the State Route 15 Highway Bridge.

The second safety zone would be enforced on the evening of the first or second Saturday or Sunday in June of each year, beginning in June 2022, between 9:30 p.m. and 10 p.m. and cover the waters all waters of the Elizabeth River within a 500-yard radius of approximate position of the fireworks barge at latitude 36°50′41″ N, longitude 076°17′47″ W, located near Town Point Park in Norfolk, VA.

Dates and times are subject to change in accordance with existing regulatory text found in 33 CFR 165.506(c).

The duration of the zones are intended to ensure the safety of vessels and these navigable waters before, during, and after each scheduled fireworks display. No vessel or person would be permitted to enter the safety zones without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the short amount of time that vessels will be restricted from certain parts of the waterway and the small size of these areas that are usually positioned away from high vessel traffic zones. Generally vessels would not be precluded from getting underway, or mooring at any piers or marinas

currently located in the vicinity of the regulated areas. Advance notifications will also be made to the local maritime community by issuance of Local Notice to Mariners, Broadcast Notice to Mariners via VHF–FM marine channel 16, and Marine Safety Information or Security Bulletins so mariners can adjust their plans accordingly. Notifications to the public for most events will typically be made by local newspapers, radio and TV stations. The Coast Guard anticipates that these safety zones will only be enforced for limited durations, less than 24 hours, occurring on specific dates throughout the year.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator. These safety zones will not have a significant economic impact on a substantial number of small entities for the following reasons: The Coast Guard will ensure that small entities are able to operate in the areas where events are occurring to the extent possible while ensuring the safety of the public. The enforcement period will be short in duration and permission to enter, remain in, or transit through these regulated areas during the enforcement may be given when deemed safe to do so by the event PATCOM on scene.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves implementation of regulations within 33 CFR part 165 that apply to recurring safety zones for fireworks displays that take place either on or over the navigable waters of the United States. Some events by their nature may introduce potential for adverse impact on the safety or other interest of waterway users or waterfront infrastructure within or close proximity to the event area. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2022–0131 in the search box and click ''Search.'' Next, look for this

document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 1.2.

■ 2. In § 165.506, amend table 3 in paragraph (h)(3) by adding entries 12 and 13 to read as follows:

§ 165.506 Safety Zones; Fireworks Displays in the Fifth Coast Guard District.

* * * * *

(3) Coast Guard Sector Virginia—COTP Zone

TABLE 3 TO PARAGRAPH (h)(3)

*	*	*	*
12	July—3rd or 4th Saturday	John H. Kerr Reservoir, Clarksville, VA; Safety Zone.	All waters of John H. Kerr Reservoir within a 400-yard radius of approximate position latitude 36°37′51″ N, longitude 078°32′50″ W, located near the center span of the State Route 15 Highway Bridge.
13	June—first or second Saturday or Sunday.	Elizabeth River, Town Point Reach, Norfolk, VA; Safety Zone.	All waters of the Elizabeth River, Town Point Reach within a 500-yard radius of approximate position of the fireworks barge latitude 36°50′41″ N, longitude 076°17′47″ W, in vicinity of Town Point Park in Norfolk, VA.

Dated: March 14, 2022.

L.M. Dickey,

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

[FR Doc. 2022–05693 Filed 3–17–22; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–OLEM–2016–0153, OLEM–2021–0455, OLEM–2022–0190, 0191, 0192, and 0193; FRL–9185–01–OLEM]

National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; withdrawal of proposed rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA'' or ''the Act''), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan (''NCP'') include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The National Priorities List (''NPL'') constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency (''EPA'' or ''the agency'') in determining which sites warrant further investigation. These further investigations will allow the EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule proposes to add five sites to the General Superfund section of the NPL. This document also withdraws a previous proposal for NPL addition.

DATES: Comments regarding any of these proposed listings must be submitted (postmarked) on or before May 17, 2022.

As of March 18, 2022, the proposed rule published April 7, 2016, at 81 FR 20277, is withdrawn.

ADDRESSES: Identify the appropriate docket number from the table below.

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/county, state	Docket ID No.
Georgetown North Groundwater	Georgetown, DE	EPA–HQ–OLEM–2022–0190
Highway 3 PCE	Le Mars, IA	EPA–HQ–OLEM–2021–0455
Hercules Inc	Hattiesburg, MS	EPA–HQ–OLEM–2022–0191
Lower Hackensack River	Bergen and Hudson Counties, NJ	EPA–HQ–OLEM–2022–0192
Brillo Landfill	Victory, NY	EPA–HQ–OLEM–2022–0193

You may send comments, identified by the appropriate docket number, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Agency Website: https://www.epa.gov/superfund/current-npl-updates-new-proposed-npl-sites-and-new-npl-sites;* scroll down to the site for which you would like to submit comments and click the ''Comment Now'' link.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Superfund Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions: All submissions received must include the appropriate Docket ID No. for site(s) for which you are submitting comments. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Review/Public Comment'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (202) 566–1048, email: *jeng.terry@epa.gov,* Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation, Mail code 5204T, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Public Review/Public Comment

A. May I review the documents relevant to this proposed rule?

Yes, documents that form the basis for the EPA's evaluation and scoring of the sites in this proposed rule are contained in public dockets located both at the EPA Headquarters in Washington, DC, and in the regional offices. These documents are also available by electronic access at *https://www.regulations.gov* (see instructions in the **ADDRESSES** section above).

B. How do I access the documents?

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

The following is the contact information for the EPA dockets: Mail comments to the EPA Headquarters as detailed at the beginning of this preamble.)

The contact information for the regional dockets is as follows:

- Holly Inglis, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; 617/918–1413.
- James Desir, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212/637–4342.
- Lorie Baker, Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, Library, 1650 Arch Street, Mailcode 3HS12, Philadelphia, PA 19103; 215/814–3355.
- Sandra Bramble, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street SW, Mailcode 9T25, Atlanta, GA 30303; 404/562–8926.
- Todd Quesada, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA Superfund Division Librarian/SFD Records Manager SRC–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; 312/886–4465.

• Michelle Delgado-Brown, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1201 Elm Street, Suite 500, Mailcode SED, Dallas, TX 75270; 214/665–3154.

• Kumud Pyakuryal, Region 7 (IA, KS, MO, NE), U.S. EPA, 11201 Renner Blvd., Mailcode SUPRSTAR, Lenexa, KS 66219; 913/551–7956.

• Victor Ketellapper, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mailcode 8EPR–B, Denver, CO 80202–1129; 303/312–6578.

• Eugenia Chow, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mailcode SFD 6–1, San Francisco, CA 94105; 415/972–3160.

• Ken Marcy, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 6th Avenue, Suite 155, Mailcode 12–D12–1, Seattle, WA 98101; 206/890–0591.

You may also request copies from the EPA Headquarters or the regional dockets. An informal request, rather than a formal written request under the Freedom of Information Act, should be the ordinary procedure for obtaining copies of any of these documents. Please note that due to the difficulty of reproducing them, oversized maps may be viewed only in-person; since the EPA dockets are not equipped to both copy and mail out such maps or scan them and send them out electronically.

You may use the docket at *https://www.regulations.gov* to access documents in the Headquarters docket. Please note that there are differences between the Headquarters docket and the regional dockets and those differences are outlined in this preamble below.

C. What documents are available for public review at the EPA Headquarters docket?

The Headquarters docket for this proposed rule contains the following information for the sites proposed in this rule: Hazard Ranking System (HRS) score sheets; documentation records describing the information used to compute the score; information for any sites affected by particular statutory requirements or the EPA listing policies; and a list of documents referenced in the documentation record.

D. What documents are available for public review at the EPA regional dockets?

The regional dockets for this proposed rule contain all of the information in the Headquarters docket plus the actual reference documents containing the data principally relied upon and cited by the EPA in calculating or evaluating the HRS score for the sites. These reference documents are available only in the regional dockets.

E. How do I submit my comments?

Follow the online instructions detailed above in the **ADDRESSES** section for submitting comments. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

F. What happens to my comments?

The EPA considers all comments received during the comment period. Significant comments are typically addressed in a support document that the EPA will publish concurrently with the **Federal Register** document if, and when, the site is listed on the NPL.

G. What should I consider when preparing my comments?

Comments that include complex or voluminous reports, or materials prepared for purposes other than HRS scoring, should point out the specific information that the EPA should consider and how it affects individual HRS factor values or other listing criteria (*Northside Sanitary Landfill* v. *Thomas,* 849 F.2d 1516 (D.C. Cir. 1988)). The EPA will not address voluminous comments that are not referenced to the HRS or other listing criteria. The EPA will not address comments unless they indicate which component of the HRS documentation record or what particular point in the EPA's stated eligibility criteria is at issue.

H. May I submit comments after the public comment period is over?

Generally, the EPA will not respond to late comments. The EPA can guarantee only that it will consider those comments postmarked by the close of the formal comment period. The EPA has a policy of generally not delaying a final listing decision solely to accommodate consideration of late comments.

I. May I view public comments submitted by others?

During the comment period, comments are placed in the Headquarters docket and are available to the public on an ''as received'' basis. A complete set of comments will be available for viewing in the regional dockets approximately one week after the formal comment period closes.

All public comments, whether submitted electronically or in paper form, will be made available for public viewing in the electronic public docket at *https://www.regulations.gov* as the EPA receives them and without change, unless the comment contains copyrighted material, CBI or other information whose disclosure is restricted by statute. Once in the public dockets system, select ''search,'' then key in the appropriate docket ID number.

J. May I submit comments regarding sites not currently proposed to the NPL?

In certain instances, interested parties have written to the EPA concerning sites that were not at that time proposed to the NPL. If those sites are later proposed to the NPL, parties should review their earlier concerns and, if still appropriate, resubmit those concerns for consideration during the formal comment period. Site-specific correspondence received prior to the period of formal proposal and comment will not generally be included in the docket.

II. Background

A. What are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 (''CERCLA'' or ''the Act''), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (''SARA''), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What is the NCP?

To implement CERCLA, the EPA promulgated the revised National Oil and Hazardous Substances Pollution

Contingency Plan (''NCP''), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. The EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes ''criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action.'' ''Removal'' actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of ''releases'' and the highest priority ''facilities'' and requires that the NPL be revised at least annually. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is only of limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by the EPA (the ''General Superfund section''), and one of sites that are owned or operated by other Federal agencies (the ''Federal Facilities section''). With respect to sites in the Federal Facilities section, these sites are generally being addressed by other Federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each Federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody or control, although the EPA is responsible for preparing a Hazard Ranking System (''HRS'') score and determining whether the facility is placed on the NPL.

D. How are sites listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (see 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which the EPA promulgated as appendix A of the NCP (40 CFR part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), the EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. On January 9, 2017 (82 FR 2760), a subsurface intrusion component was added to the HRS to enable the EPA to consider human exposure to hazardous substances or pollutants and contaminants that enter regularly occupied structures through subsurface intrusion when evaluating sites for the NPL. The current HRS evaluates four pathways: Ground water, surface water, soil exposure and subsurface intrusion, and air. As a matter of agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Pursuant to 42 U.S.C. 9605(a)(8)(B), each state may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each state as the greatest danger to public health, welfare or the environment among known facilities in the state. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- The EPA determines that the release poses a significant threat to public health.
- The EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

The EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What happens to sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the ''Superfund'') only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). (''Remedial actions'' are those ''consistent with permanent remedy, taken instead of or in addition to removal actions. * * *'' 42 U.S.C. 9601(24).) However, under 40 CFR 300.425(b)(2) placing a site on the NPL ''does not imply that monies will be expended.'' The EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL define the boundaries of sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA ''facility'' is broadly defined to include any area where a hazardous substance has ''come to be located'' (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the ''boundaries'' of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (*e.g.,* the ''Jones Co. Plant site'') in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (*e.g.,* it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (*e.g.,* where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the ''site''). The ''site'' is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination; and is not meant to constitute any determination of liability at a site. For example, the name ''Jones Co. Plant site,'' does not imply that the Jones Company is responsible for the contamination located on the plant site.

The EPA regulations provide that the remedial investigation (''RI'') ''is a process undertaken . . . to determine the nature and extent of the problem presented by the release'' as more information is developed on site contamination, and which is generally performed in an interactive fashion with the feasibility Study (''FS'') (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination ''has come to be located'' before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted previously, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of property, it can submit supporting information to the agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How are sites removed from the NPL?

The EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that the EPA shall consult with states on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment and taking of remedial measures is not appropriate.

H. May the EPA delete portions of sites from the NPL as they are cleaned up?

In November 1995, the EPA initiated a policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What is the Construction Completion List (CCL)?

The EPA also has developed an NPL construction completion list (''CCL'') to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved; (2) the EPA has determined that the response action should be limited to measures that do not involve construction (*e.g.,* institutional controls); or (3) the site qualifies for deletion from the NPL. For more information on the CCL, see the EPA's internet site at *https://www.epa.gov/superfund/construction-completions-national-priorities-list-npl-sites-number*.

J. What is the Sitewide Ready for Anticipated Use measure?

The Sitewide Ready for Anticipated Use measure (formerly called Sitewide Ready-for-Reuse) represents important Superfund accomplishments and the measure reflects the high priority the EPA places on considering anticipated future land use as part of the remedy selection process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, Office of Solid Waste and Emergency Response (OSWER) 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. The EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment for current and future land uses, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *https://www.epa.gov/superfund/about-superfund-cleanup-process#reuse*.

K. What is state/tribal correspondence concerning NPL listing?

In order to maintain close coordination with states and tribes in the NPL listing decision process, the EPA's policy is to determine the position of the states and tribes regarding sites that the EPA is considering for listing. This consultation process is outlined in two memoranda that can be found at the following website: *https://www.epa.gov/superfund/statetribal-correspondence-concerning-npl-site-listing.*

The EPA has improved the transparency of the process by which state and tribal input is solicited. The EPA is using the Web and where appropriate more structured state and tribal correspondence that (1) explains the concerns at the site and the EPA's rationale for proceeding; (2) requests an explanation of how the state intends to address the site if placement on the NPL is not favored; and (3) emphasizes the transparent nature of the process by informing states that information on their responses will be publicly available.

A model letter and correspondence between the EPA and states and tribes where applicable, is available on the EPA's website at *https://www.epa.gov/superfund/statetribal-correspondence-concerning-npl-site-listing.*

III. Contents of This Proposed Rule

A. Proposed Additions to the NPL

In this proposed rule, the EPA is proposing to add five sites to the NPL, all to the General Superfund section. All of the sites in this rule are being proposed for NPL addition based on an HRS score of 28.50 or above.

The sites are presented in the tables below.

GENERAL SUPERFUND SECTION

State	Site name	City/county
DE	Georgetown North Groundwater	Georgetown.
IA	Highway 3 PCE	Le Mars.
MS	Hercules Inc	Hattiesburg.
NJ	Lower Hackensack River	Bergen and Hudson Counties.
NY	Brillo Landfill	Victory.

B. Withdrawal of Previous Proposal for NPL Addition

The EPA is withdrawing its previous proposal to add the Riverside Groundwater Contamination site in Indianapolis, Indiana, to the NPL because the Indiana Department of Environmental Management (IDEM) will continue to take or ensure appropriate actions to address the site in compliance with a 2017 Memorandum of Agreement (MOA) with EPA that deferred addition of the site to the NPL while the state oversees response actions. The MOA outlines IDEM's commitment to investigate the nature and extent of contamination and clean up the site to the same standards as an EPA-lead cleanup. Under the MOA all site investigations and cleanups are being performed under state enforcement actions. The state will identify and address contamination on individual properties that are a potential source of chlorinated solvents through Voluntary Remediation Agreements, Brownfield Comfort Letters, and the State Cleanup Program. IDEM will continue to ensure any remaining contamination in groundwater does not pose a human health exposure risk. The rule proposing to add this site to the NPL can be found at 81 FR 20277 (April 7, 2016). Refer to the Docket ID number EPA–HQ–OLEM–2016–0153 for supporting documentation regarding this action.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule does not contain any information collection requirements that require approval of the OMB.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This rule listing sites on the NPL does not impose any obligations on any group, including small entities. This rule also does not establish standards or requirements that any small entity must meet and imposes no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Listing a site on the NPL does not itself impose any costs. Listing does not mean that the EPA necessarily will undertake remedial action. Nor does listing require any action by a private party, state, local, or tribal governments or determine liability for response costs. Costs that arise out of site responses result from future site-specific decisions regarding what actions to take, not directly from the act of placing a site on the NPL.

F. Executive Order 13132: Federalism

This rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. Listing a site on the NPL does not impose any costs on a tribe or require a tribe to take remedial action. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because this action itself is procedural in nature (adds sites to a list) and does not, in and of itself, provide protection from environmental health and safety risks. Separate future regulatory actions are required for mitigation of environmental health and safety risks.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment. As discussed in Section I.C. of the preamble to this action, the NPL is a list of national priorities. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or need contaminants. The NPL is of only limited significance as it does not assign liability to any party. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily be taken.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Barry N. Breen,

Acting Assistant Administrator, Office of Land and Emergency Management.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 300 as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.;* 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 2. Amend appendix B of part 300 in Table 1, by adding entries for ''DE, Georgetown North Groundwater'', ''IA, Highway 3 PCE'', ''MS, Hercules Inc'', ''NJ, Lower Hackensack River'', and ''NY, Brillo Landfill'' in alphabetical order by state to read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [a]
*	* * *	* * *	*
DE	Georgetown North Groundwater	Georgetown.	
*	* * *	* * *	*
IA	Highway 3 PCE	Le Mars.	
*	* * *	* * *	*
MS	Hercules Inc	Hattiesburg.	
*	* * *	* * *	*
NJ	Lower Hackensack River	Bergen and Hudson Counties.	
*	* * *	* * *	*
NY	Brillo Landfill	Victory.	
*	* * *	* * *	*

[a] A = Based on issuance of health advisory by Agency for Toxic Substances and Disease Registry (if scored, HRS score need not be greater than or equal to 28.50).

* * * * *

[FR Doc. 2022–05855 Filed 3–17–22; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

45 CFR Part 1330

RIN 0985–AA16

National Institute on Disability, Independent Living, and Rehabilitation Research

AGENCY: Administration for Community Living, Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Administration for Community Living (ACL) within the Department of Health and Human Services (HHS or the Department) is proposing to amend its regulations for the National Institute on Disability, Independent Living and Rehabilitation Research (NIDILRR). These minor amendments to NIDILRR's peer review criteria will allow NIDILRR to better evaluate the extent to which grant applicants conduct outreach to and hire people with disabilities and people from other groups that traditionally have been underserved and underrepresented, and emphasize the need for engineering research and development activities within NIDILRR's Rehabilitation Engineering Research Centers (RERC) program.

DATES: To be assured consideration, comments must be received at the

address provided below, no later than 11:59 p.m. April 18, 2022.

ADDRESSES: You may submit comments through the Federal eRulemaking Portal: *https://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

Warning: Do not include any personally identifiable information (such as 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 can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to comments received.

Inspection of Public Comments: All comments received before the close of the comment period will be available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make. HHS 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*. Follow the search instructions on that Website to view the public comments.

FOR FURTHER INFORMATION CONTACT: Phillip Beatty, Director, NIDILRR Office of Research Sciences, Administration for Community Living, Department of Health and Human Services, 330 C Street SW, Washington, DC 20201. Email: *phillip.beatty@acl.hhs.gov,* Telephone: (202) 795–7305.

SUPPLEMENTARY INFORMATION:

I. Background

The HHS regulation for National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) programs was developed and finalized in 2016 following the transfer of NIDILRR to ACL and HHS from the Department of Education, as required by the Workforce Innovation and Opportunity Act (WIOA) of 2014. NIDILRR's mission is to generate new knowledge and to promote its effective use to improve the abilities of individuals with disabilities to perform activities of their choice in the community and to expand society's capacity to provide full opportunities and accommodations for individuals with disabilities. As the primary research enterprise within ACL, NIDILRR's mission is highly complementary to the overarching mission of ACL to maximize the independence, well-being, and health of older adults, people with disabilities across the lifespan, and their families and caregivers. NIDILRR programs address a wide range of disabilities and impairments across all age groups and promote health and function, community living and participation, and employment. To accomplish these goals, NIDILRR invests in research, knowledge translation, and capacity-building activities through its discretionary grant-funding authorities.

The proposed rule would provide minor but important updates to provisions within §§ 1330.23 and 1330.24 of the NIDILRR rule (45 CFR part 1330).

The first update to 45 CFR part 1330 is directly responsive to Executive Order 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.* The purpose of the update is to better evaluate, through the peer review of grant applications, the extent to which grant applicants conduct outreach to and hire people who are members of specific groups that have traditionally been underserved and underrepresented in research. Applicant refers to organizations such as universities or other organizations that apply for NIDILRR grants. NIDILRR's criterion that focuses on applicants' proposed ''Project Staff'' (45 CFR 1330.24(n)) currently combines a significant number of underrepresented groups into one list (''. . . based on race, color, national origin, gender, age, or disability), and asks reviewers to broadly evaluate the extent to which the grant applicant encourages applications for employment from people who are members of those groups in the list. This format does not allow reviewers to distinctly evaluate applicants' outreach and hiring practices for people with disabilities, or for other populations highlighted in the existing list.

To better promote applicants' hiring of people with disabilities, and people from other underserved communities, 45 CFR 1330.24(n) will be revised to separate these populations into two distinct peer review subcriteria. This disaggregation of people with disabilities and people from underserved communities into separate subcriteria will allow peer reviewers to more directly evaluate and score the extent to which grant applicants encourage the hiring of people in each of these distinct groups. ACL will make a conforming amendment to 45 CFR 1330.23(b) reflecting this revision to the selection criteria. While individuals live at the intersection of multiple populations or groups, ACL's planned disaggregated review of hiring practices will compel applicants to describe their outreach and hiring practices for people with disabilities and other specific groups, separately and distinctly. ACL intends for grant applicants to respond to these disaggregated subcriteria with quantitative and/or qualitative information in the narrative of their proposal, and for peer reviewers to accordingly use this information to evaluate and score each individual application.

The second update to 45 CFR part 1330 is to better emphasize the need for engineering research and development (R&D) activities in NIDILRR's Rehabilitation Engineering Research Centers (RERC) program funding opportunities. The update will add a subcriterion under both the ''Design of Research Activities'' (45 CFR 1330.24(c)) and ''Design of Development Activities'' (45 CFR 1330.24(d)) that allow reviewers to evaluate the extent to which applicants are proposing engineering knowledge and methods as part of their RERC applications. The absence of such engineering-focused criteria have led to some RERC grants that are not optimally using the engineering R&D methods envisioned in the program's title and statute.

II. Required Regulatory Analyses

A. Executive Orders 12866 and 13563

E.O. 12866, ''Regulatory Planning and Review,'' and E.O. 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits.

OMB determined that this rulemaking is not an economically significant regulatory action under these E.O.s. The preamble to this proposed rule describes that it is primarily procedural changes that would require Department expenditures to implement.

B. Regulatory Flexibility Act

The Department has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq*. The RFA requires an agency to describe the impact of a proposed rulemaking on small entities by providing an initial regulatory flexibility analysis, unless the agency determines that the proposed rule will not have a significant economic impact on a substantial number of small entities, provides a factual basis for this

determination, and proposes to certify the statement. 5 U.S.C. 603(a) and 605(b). The Department considers a proposed or final rule to have a significant economic impact on a substantial number of small entities if it has at least a three percent impact on revenue of at least five percent of small entities. The Department has determined, and the Secretary certifies, that this proposed rule would not have a significant economic impact on the operations of a substantial number of small entities.

C. Executive Order 13132 (Federalism)

E.O. 13132, ''Federalism,'' establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has Federalism implications. The Department has determined that this proposed rule would not impose such costs or have any Federalism implications.

D. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

HHS has analyzed this proposed rule in accordance with the principles set forth in E.O. 13175. HHS has tentatively determined that the proposed rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. In accordance with the Department's Tribal consultation policy, the Department solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

E. National Environmental Policy Act

HHS had determined that this proposed rule would not have a significant impact on the environment.

F. Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, 44 U.S.C. 3501–3521; 5 CFR part 1320, appendix A.1, the Department has reviewed this proposed rule and has determined that it proposes no new collections of information.

List of Subjects in 45 CFR Part 1330

Disability, Grant programs, Research.

Accordingly, ACL proposes to revise 45 CFR 1330.23 and 1330.24, to read as follows:

PART 1330—NATIONAL INSTITUTE FOR DISABILITY, INDEPENDENT LIVING, AND REHABILITATION RESEARCH

■ 1. The authority citation for part 1330 continues to read as follows:

Authority: 29 U.S.C. 709, 3343.

■ 2. Amend § 1330.23 by revising paragraph (b) to read as follows:

§ 1330.23 Evaluation process.

* * * * *

(b) In considering selection criteria in § 1330.24, the Director selects one or more of the factors listed in the criteria, but always considers the factors in § 1330.24(n) regarding people with disabilities, and members of groups that have traditionally been underrepresented based on race, ethnicity, national origin, sex (including sexual orientation and gender identity), or age.

* * * * *

■ 2. Amend § 1330.24 by adding paragraphs (c)(5) and (d)(4) and revising paragraph (n) to read as follows:

§ 1330.24 Selection criteria.

* * * * *

(c) * * *

(5) The extent to which research activities use engineering knowledge and techniques to collect, analyze, or synthesize research data.

* * * * *

(d) * * *

(4) The extent to which development activities apply engineering knowledge and techniques to achieve development objectives.

* * * * *

(n) *Project staff.* In determining the quality of the applicant's project staff, the Director considers one or more of the following factors:

(1) The extent to which the applicant encourages applications for employment from and hires people with disabilities.

(2) The extent to which the applicant encourages applications from, and hires people who are members of groups that have traditionally been underrepresented in research professions based on race, ethnicity, national origin, sex (including sexual orientation and gender identity), or age.

(3) The extent to which the key personnel and other key staff have appropriate training and experience in disciplines required to conduct all proposed activities.

(4) The extent to which the commitment of staff time is adequate to accomplish all the proposed activities of the project.

(5) The extent to which the key personnel are knowledgeable about the methodology and literature of pertinent subject areas.

(6) The extent to which the project staff includes outstanding scientists in the field.

(7) The extent to which key personnel have up-to-date knowledge from research or effective practice in the subject area covered in the priority.

* * * * *

Dated: March 2, 2022.

Alison Barkoff,

Principal Deputy Administrator, Administration for Community Living

Approved:

Xavier Becerra,

Secretary.

[FR Doc. 2022–05665 Filed 3–17–22; 8:45 am]

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Notices

Federal Register
Vol. 87, No. 53
Friday, March 18, 2022

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

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 required 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 April 18, 2022 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.

Farm Service Agency

Title: 2017 Wildfires and Hurricanes Indemnity Program (2017 WHIP) and (Florida Citrus Block Grant) and Quality Loss Adjustment (QLA) Program.

OMB Control Number: 0560–0291.

Summary of Collection: The Bipartisan Budget Act of 2018 (BBA, Pub. L. 115–123) authorized $2.36 billion in assistance for losses to crops, trees, bushes, and vine losses due to 2017 wildfires and hurricanes. The Farm Service Agency (FSA) is implementing the provisions of the BBA by providing up to $2 billion in assistance to eligible producers through the 2017 WHIP, and approximately $340 million through a block grant with the State of Florida to address losses to citrus trees, and production.

FSA is also providing the QLA assistance to the producers as specified in the Disaster Relief Act. The Additional Supplemental Appropriations for Disaster Relief Act, 2019 (Disaster Relief Act; Pub. L. 116–20) also provides disaster assistance for necessary expenses related to losses of crops (including milk, on-farm stored commodities, crops prevented from planting in 2019, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.

Need and Use of the Information: In order for FSA to determine whether a producer is eligible for 2017 WHIP and to calculate a payment, a producer is required to submit FSA–890 2017, WHIP application; FSA–891, Crop Insurance and/or NAP Coverage Agreement; FSA–892, Request for an Exception to the WHIP Payment Limitation (if applicable); FSA–893, 2018 Citrus Actual Production History and Approved Yield Record (Florida Only); CCC–902, Farm Operating Plan for Payment Eligibility; FSA–578, Report of Acreage; and AD–1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification. The information collected from the forms will be used by FSA and the State of Florida to determine eligibility and distribute payments to eligible producers under WHIP.

In order to determine whether a producer is eligible for the QLA Program and to calculate a payment, a producer is required to submit form FSA–898, QLA Program application; form FSA–899, Historical Nutritional Value Weighted Average Worksheet (Continuation); form FSA–895, Crop Insurance and/or NAP Coverage Agreement; form FSA–578, Report of Acreage; required documentation of the producer's loss, form CCC–902I, Farm Operating Plan for Individuals; form CCC–901, Member's Information; form CCC–941, Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure Tax Information; form CCC–942, Certification of Income from Farming, Ranching and Forestry Operations, if applicable, and form AD–1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification. Failure to submit the application and the additional forms would result in payments not being provided to eligible producers.

Description of Respondents: Individuals and households.

Number of Respondents: 236,100.

Frequency of Responses: Recordkeeping; Annually.

Total Burden Hours: 184,551.

Dated: March 15, 2022.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2022–05722 Filed 3–17–22; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

[Docket ID FSA–2021–0012]

Notice of Funds Availability; Spot Market Hog Pandemic Program (SMHPP)

AGENCY: Farm Service Agency, USDA.

ACTION: Notification of funding availability.

SUMMARY: The Farm Service Agency (FSA) published a notice on December 14, 2021, announcing the availability of $50 million for the Spot Market Hog Pandemic Program (SMHPP). This document clarifies hog eligibility, documentation requirements, and payment factoring. SMHPP assists

producers who sold hogs through a spot market sale from April 16, 2020, through September 1, 2020, the period during which these producers faced the greatest reduction in market prices due to the COVID–19 pandemic. SMHPP excludes non-adult pigs or other swine that were not intended for slaughter. SMHPP also excludes hogs sold under contracts that had a premium or other formula outside a spot market sale. The eligibility requirements, payment calculation, and application procedure for SMHPP are included in this notice.

DATES:

Funding availability: Implementation will begin March 18, 2022.

FOR FURTHER INFORMATION CONTACT:

Kimberly Graham; telephone: (202) 720–6825; email: *Kimberly.Graham@usda.gov*. Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice) or 844–433–2774 (toll-free nationwide).

SUPPLEMENTARY INFORMATION:

Revision and Clarification

FSA published the initial notice on December 14, 2021 (86 FR 71003–71007), which announced the availability of $50 million for SMHPP. In response to stakeholder concerns and additional USDA analysis, USDA is issuing this document to clarify hog eligibility, documentation requirements, and payment factoring. Other provisions of the initial notice remain unchanged. This document provides these clarifications by incorporating the changes into the text from the prior notice, starting with the Background section below. This section explains the clarifications and revisions.

Based upon review and stakeholder feedback, USDA is revising SMHPP eligibility to better target the effectiveness of SMHPP. As a result, this document revises eligible spot market sales to include additional negotiated sales, and third-party intermediary sales as defined in this NOFA. When the COVID–19 pandemic disrupted normal marketing channels, producers sold their hogs either directly or through third-party intermediaries to local processors, butchers, individuals, brokers, sale barns, or livestock aggregators. The use of third-party intermediaries was the only available marketing alternative for many producers when access to packers was not feasible due to the pandemic and they used these sales avenues rather than depopulation; therefore, these sales alternatives are included in SMHPP. The only sales directly to packers that are eligible remain those through a negotiated sale. Hogs sold through a contract that includes a premium of the spot-market price or other formula such as the wholesale cut-out price remain ineligible. This document also clarifies that eligible hogs:

- Do not include immature swine (that is, pigs), and
- Must be suitable and intended for slaughter as determined by USDA.

FSA became aware that some producers were confused about the eligibility of sales and what information they needed to submit when compared to what they had submitted for previous pandemic assistance. Therefore, FSA is requiring that all producers provide verifiable or reliable documentation of their eligibility of sales to ensure SMHPP payment eligibility and to prevent erroneous payments.

To ensure SMHPP funding availability is disbursed equitably to all eligible producers, FSA will issue payments after the application period ends. If calculated payments exceed the amount of available funding, payments will be factored.

As a result of these revisions, the SMHPP application period has been extended to April 29, 2022.

Background

The Coronavirus Aid, Relief, Economic Security (CARES) Act (Pub. L. 116–136) provides funding to prevent, prepare for, and respond to the COVID–19 pandemic by providing support for agricultural producers who were impacted. The Secretary announced the USDA Pandemic Assistance for Producers initiative on March 24, 2021. As a part of that initiative, FSA implemented SMHPP, as directed by the Secretary, to make payments to producers that sold hogs through a spot market sale from April 16, 2020, through September 1, 2020, the period in which these producers faced the greatest reduction in market prices due to the COVID–19 pandemic.

FSA and USDA's Agricultural Marketing Service (AMS) identified negotiated hogs as a sector of the agricultural industry significantly impacted by the pandemic that had not been adequately addressed by previous pandemic relief programs and experienced the greatest market price impacts out of all hog purchase types. Using a price analysis of the average daily national negotiated sales during the pandemic compared to the daily 5-year average for years 2015 through 2019. FSA and AMS determined April 16, 2020, through September 1, 2020, to be the period with the greatest market impacts on hogs sold through a negotiated sale due to the pandemic. The reduced market prices were a result of fewer negotiated hogs being procured, packer production decreases due to employee illness, and supply chain issues. This period also generally aligns with the Coronavirus Food Assistance Program (CFAP) 2 eligibility period for swine, which ran from April 16, 2020, through August 31, 2020.

When the COVID–19 pandemic disrupted normal marketing channels, including access to packers, producers sold their hogs through cash sales to local processors or butchers, direct sales to individuals, and third-party intermediaries which, may include, but are not limited to, sale barns or brokers. The use of third-party intermediaries was the only available marketing alternative for many producers and they used these sales avenues rather than depopulation; therefore, these sales alternatives are included in SMHPP.

Direct payments are limited to hog producers located in the United States. This assistance will be available to hog producers through SMHPP as provided in this notice.

FSA is administering SMHPP under the general supervision and direction of the FSA Administrator and AMS. AMS is providing technical assistance to FSA, which includes, but is not limited to, sharing expertise on the hog industry regarding the impact of the COVID–19 pandemic on the industry.

Definitions

The definitions in 7 CFR parts 718 and 1400 apply to SMHPP, except as otherwise provided in this document. The following definitions also apply.

Contract grower means a person or legal entity who grows or produces eligible livestock under contract for or on behalf of another person or entity. The contract grower's income is dependent upon the successful production of livestock or offspring from livestock. The contract grower does not have ownership in the livestock and is not entitled to a share from sales proceeds of the livestock.

Hogs means adult swine of an appropriate size and condition for slaughter as evidenced by sale and acceptance for slaughter, if determined to be reasonable for the size for slaughter for the area from April 16, 2020, through September 1, 2020, by the applicable FSA county committee.

Negotiated sale means a sale by a producer of hogs to a packer under which the base price for the hogs is determined by seller-buyer interaction and agreement on a delivery day. The hogs are scheduled for delivery to the packer not more than 14 days after the

date on which the hogs are committed to the packer. A negotiated formula sale is also considered a negotiated sale.

Negotiated formula sale means a hog or pork market formula sale under which:

(1) The formula is determined by negotiation on a lot-by-lot basis; and

(2) The hogs are scheduled for delivery to the packer not later than 14 days after the date on which the formula is negotiated and the hogs are committed to the packer.

Ownership interest means to have either a legal ownership interest or a beneficial ownership interest in a legal entity. For the purposes of administering SMHPP, a person or legal entity that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is considered to have a beneficial ownership interest in such legal entity.

Packer means a packer as defined in section 201 of the Packers and Stockyards Act, 1921 (7 U.S.C. 191). Therefore, packer means any person engaged in the business:

(a) Of buying livestock in commerce for purposes of slaughter;

(b) Of manufacturing or preparing meats or meat food products for sale or shipment in commerce; or

(c) Of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

Pig an immature, non-adult swine weighing less than 120 pounds.

Producer means a person or legal entity who has ownership of the hogs and whose production and facilities are located in the United States.

Reliable record means any non-verifiable record available that can reasonably be used to substantiate the eligible hog sales and how prices were determined for the sale, as determined acceptable by the FSA county committee.

Sold means the producer and the buyer agreed on the negotiated price through a spot market sale, and the producer delivered the hogs within the time of that agreement. For SMHPP, a hog is considered sold on the date of the agreement, rather than when the hog or payment is delivered.

Spot market sale means hogs marketed for slaughter to an individual or through a negotiated sale or through an intermediary who interacts with the buyer on behalf of the seller, which may include, but is not limited to, sale barns, brokers, or other intermediaries as determined by DAFP.

Swine means domesticated omnivorous pig, hog, or boar.

United States means all 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any other territory or possession of the United States.

Verifiable record means a document provided by the producer that can be verified by the FSA county committee through an independent source and can be used to substantiate the eligible hog sales and how prices were determined for the sale.

Eligible Hog Sales

Eligible hogs are hogs sold through a spot market sale by producers from April 16, 2020, through September 1, 2020. FSA is providing assistance for these sales because USDA has determined producers that sold hogs through a spot market sale were affected by the greatest reduction in market prices for swine producers due to the COVID–19 pandemic during this period.

The hogs must have been physically located in the United States at the time of sale and advertised or offered as ready for slaughter.

Ineligible Hog Sales

Ineligible hog sales include:

(1) Any other types of sales identified by the AMS Livestock Mandatory Reporting (LMR), including: Formulas linked to futures or formulas based on the cutout based on the wholesale meat prices, such as other market formula and swine or pork market formula,

- Packer-owned swine.

(2) Contracts that include a premium above the spot market price; and

(3) Sales of either pigs or hogs that are marketed for purposes other than slaughter, such as for breeding stock or to grow out.

Eligible Producers

An eligible producer is a person or legal entity who has ownership of the eligible hogs and whose production and facilities are in the United States.

To be eligible for SMHPP, a producer must be any of the following:

(1) Citizen of the United States;

(2) Resident alien, which for purposes of this subpart means ''lawful alien'' as defined in 7 CFR part 1400;

(3) Partnership of citizens or resident aliens of the United States;

(4) Corporation, limited liability company, or other organizational structure organized under State law solely owned by U.S. citizens or resident aliens; or

(5) Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

Eligible producers must have sold the hogs through a spot market sale during the time frame of April 16, 2020, through September 1, 2020.

Ineligible Producers

Ineligible producers include:

(1) Contract growers;

(2) Federal, State, and local governments, including public schools; and

(3) Packers.

Application Process

FSA will accept applications from December 15, 2021, through April 29, 2022. To apply for SMHPP, eligible producers must submit a complete form FSA–940, Spot Market Hog Pandemic Program (SMHPP) Application. Applications may be submitted to any FSA county office in person or by mail, email, facsimile, or other methods announced by FSA.

Producers must also submit all the following items, if not previously filed with FSA:

- Form AD–2047, Customer Data Worksheet for new customers or existing customers needing to update their customer profile;
- Form CCC–902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;
- Form CCC–901, Member Information for Legal Entities (if applicable);
- Form CCC–941, Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information, for the 2020 program year for the person or legal entity, including the legal entity's members, partners, shareholders, heirs, or beneficiaries as provided in 7 CFR part 1400;
- Form FSA–1123, Certification of 2020 Adjusted Gross Income, if applicable; and
- A highly erodible land conservation (sometimes referred to as HELC) and wetland conservation certification as provided in 7 CFR part 12 (form AD–1026 Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification for the SMHPP producer and applicable affiliates.

Producers must submit all required eligibility documentation specified

above, as applicable, no later than 60 days from the date a producer signs and submits the form FSA–940. If the producer does not timely submit the required eligibility forms, or a member who is required to submit the form AD–1026 does not do so, FSA will not issue a payment. When the other required eligibility forms are not timely submitted for a member of a legal entity, FSA will reduce the payment based on the member's ownership interest in the legal entity.

All producers must provide documentation to support the accuracy of information provided on the application, including to substantiate the number of hogs reported on the application that were sold through a spot market sale and how the price was determined for the sale. The supporting documentation must be verifiable or reliable records that substantiate the reported number of hogs sold through a spot market sale and how the price was determined for the sale. Producers who apply for SMHPP after the publication of this document are required to submit supporting documentation to FSA within 15 days from submitting the FSA–940 to FSA or the application will be disapproved. For producers who applied for SMHPP prior to the publication of this document, FSA will notify producers and request supporting documentation to verify the sales of hogs sold through a spot market sale. The documentation must be submitted to FSA within 30 days from the request or the application will be disapproved by FSA.

Payment

SMHPP payments compensate eligible hog producers for hogs sold through a spot market sale from April 16, 2020, through September 1, 2020. To simplify administration of SMHPP, FSA and AMS have determined a single payment rate of $54 per head.

USDA calculated the average daily difference in the negotiated sales price during the applicable time frame, compared to the daily 5-year average for negotiated sales prices during April 16 through September 1 for years 2015 through 2019. The average daily difference was equal to $77 per hog based on the average carcass weight that was submitted to AMS through livestock mandatory reporting.

The SMHPP payment rate of $54 per head is equal to the $77 per head minus the CFAP 2 rate of $23 per head. CFAP 2 paid for the highest hog inventory from April 16, 2020, through August 31, 2020. CFAP 2 was available to all swine producers who qualified under the terms and conditions of such program and the application period for CFAP 2 was extended, ending October 12, 2021, to allow additional time for all eligible producers to apply. SMHPP is therefore not intended to cover pandemic impacts that were or could have been compensated under CFAP 2; accordingly, the CFAP 2 hog payment rate of $23 per head has been deducted from the calculated payment rate for SMHPP.

SMHPP payments will be calculated by multiplying the number of head of eligible hogs, not to exceed 10,000 head, by the payment rate per head of $54. FSA will issue payments to eligible producers after the application period ends. If calculated payments exceed the amount of available funding, payments will be factored. SMHPP is not subject to payment limitations.

Provisions Requiring Refund to FSA

In the event that any application for a SMHPP payment resulted from erroneous information reported by the producer, the payment will be recalculated, and the producer must refund any excess payment to FSA, including interest to be calculated from the date of the disbursement to the SMHPP producer. If, for whatever reason, FSA determines that the producer misrepresented the total hogs sold through a spot market sale, the application will be disapproved, and the producer must refund the full SMHPP payment to FSA with interest from the date of disbursement. Any required refunds must be resolved in accordance with 7 CFR part 3.

Miscellaneous Provisions

A person or legal entity, other than a joint venture or general partnership, is ineligible for SMHPP payments if the person's or legal entity's average adjusted gross income (AGI), using the average of the adjusted gross incomes for the 2016, 2017, and 2018 tax years, exceeds $900,000 as described in 7 CFR part 1400, subpart F, unless the exception described below applies. With respect to joint ventures and general partnerships, this average AGI provision will be applied to members of the joint venture and general partnership. Average AGI provisions are applicable to members, partners, stockholders, heirs, and beneficiaries with an ownership interest in a legal entity, including a general partnership or joint venture who are at or above the fourth level of ownership in the business structure. The eligible hog producer's payment will be reduced by the portion of a payment attributed to a member who exceeds the average $900,000 AGI limitation or is otherwise ineligible for payment.

A person or legal entity whose average AGI exceeds $900,000 may otherwise be eligible for SMHPP payments if the 2020 AGI alone is less than $900,000. In order to qualify for this exception to the average AGI limitation, persons or legal entities must submit form FSA–1123 to certify that their 2020 AGI is not more than $900,000 and also provide a certification from a licensed CPA or attorney attesting to the accuracy of the person's or legal entity's certification.

A payment made to a legal entity will be attributed to those members who have a direct or indirect ownership interest in the legal entity unless the payment of the legal entity has been reduced by the proportionate ownership interest of the member due to that member's ineligibility.

Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

- *First level of ownership:* Any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first-level or payment legal entity;
- *Second level of ownership:* Any payment made to a first-level legal entity that is owned in whole or in part by another legal entity (referred to as a second-level legal entity) will be attributed to the second-level legal entity in proportion to the ownership of the second-level legal entity in the first-level legal entity; if the second-level legal entity is owned in whole or in part by a person, the amount of the payment made to the first-level legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-level legal entity by the person;
- *Third and fourth levels of ownership:* Except as provided in the second-level of ownership bullet above, any payments made to a legal entity at the third and fourth levels of ownership will be attributed in the same manner as specified in the second-level of ownership bullet above; and
- *Fourth level of ownership:* If the fourth level of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-level or payment legal entity in the amount that represents the indirect ownership in the first-level or payment legal entity by the fourth level legal entity.

Payments made directly or indirectly to a person who is a minor child will

not be combined with the earnings of the minor's parent or legal guardian.

A producer that is a legal entity must provide the names, addresses, ownership share, and valid taxpayer identification numbers of the members holding an ownership interest in the legal entity. Payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest, at or above the fourth level of ownership in the business structure, is not provided to USDA.

If an individual or legal entity is not eligible to receive SMHPP payments due to the individual or legal entity failing to satisfy some other payment eligibility provision such as AGI or conservation compliance provisions, the payment made either directly or indirectly to the individual or legal entity will be reduced to zero. The amount of the reduction for the direct payment to the producer will be commensurate with the direct or indirect ownership interest of the ineligible individual or ineligible legal entity.

General requirements that apply to other FSA-administered commodity programs also apply to SMHPP, including compliance with the provisions of 7 CFR part 12, ''Highly Erodible Land and Wetland Conservation,'' and the provisions of 7 CFR 718.6, which address ineligibility for benefits for offenses involving controlled substances. Appeal regulations specified in 7 CFR parts 11 and 780 and equitable relief and finality provisions specified in 7 CFR part 718, subpart D, apply to determinations under SMHPP. The determination of matters of general applicability that are not in response to, or result from, an individual set of facts in an individual participant's application for payment are not matters that can be appealed. Such matters of general applicability include, but are not limited to, the determination of the applicable time period for eligible spot market sales and the payment rate for SMHPP.

Participants are required to retain documentation in support of their application for 3 years after the date of approval. Participants receiving SMHPP payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and to allow representatives to make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

A producer may file an application with an FSA county office after the SMHPP application deadline, and in such case the application will be considered a request to waive the deadline. The Deputy Administrator for Farm Programs, FSA (Deputy Administrator), has the discretion and authority to consider the case and waive or modify application deadlines and other requirements or program provisions not specified in law, in cases where the Deputy Administrator determines it is equitable to do so and where the Deputy Administrator finds that the lateness or failure to meet such other requirements or program provisions do not adversely affect the operation of SMHPP. Although producers have a right to a decision on whether they filed applications by the deadline or not, producers have no right to a decision in response to a request to waive or modify deadlines or program provisions. The Deputy Administrator's refusal to exercise discretion to consider the request will not be considered an adverse decision and is, by itself, not appealable.

Any payment under SMHPP will be made without regard to questions of title under State law and without regard to any claim or lien. The regulations governing offsets in 7 CFR part 3 apply to SMHPP payments.

In either applying for or participating in SMHPP, or both, the producer is subject to laws against perjury and any penalties and prosecution resulting therefrom, with such laws including, but not limited to, 18 U.S.C. 1621. If the producer knowingly makes any untrue verbal or written declaration, certification, statement, or verification that the producer when applying for or participating in SMHPP, or both, then the producer is guilty of perjury (except as otherwise provided by law) and may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or outside the United States.

For the purposes of the effect of a lien on eligibility for Federal programs (28 U.S.C. 3201(e)), USDA waives the restriction on receipt of funds under SMHPP but only as to beneficiaries who, as a condition of the waiver, agree to apply the SMHPP payments to reduce the amount of the judgment lien.

In addition to any other Federal laws that apply to SMHPP, the following laws apply: 15 U.S.C. 714; and 18 U.S.C. 286, 287, 371, and 1001.

Paperwork Reduction Act Requirements

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), FSA received the OMB approval (control number 0560–0305) to cover the SMHPP information collection request under the emergency request. FSA will include the increased burden hours of 4,152 to cover the additional documentation required to support the completed form FSA–940 SMHPP application in the 3-year approval.

Environmental Review

The environmental impacts have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulation for compliance with NEPA (7 CFR part 799).

As previously stated, SMHPP is providing payments to producers that sold hogs through a spot market sale from April 16, 2020, through September 1, 2020, the period in which these producers faced the greatest reduction in market prices due to the COVID–19 pandemic. The limited discretionary aspects of SMHPP do not have the potential to impact the human environment as they are administrative. Accordingly, these discretionary aspects are covered by the FSA Categorical Exclusions specified in 7 CFR 799.31(b)(6)(iv) that applies to individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) that applies to safety net programs.

No Extraordinary Circumstances (§ 799.33) exist. As such, the implementation of SMHPP and the participation in SMHPP do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this action and this document serves as documentation of the programmatic environmental compliance decision for this federal action.

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Catalog of Federal Domestic Assistance, to which this document applies is 10.144—Spot Market Hog Pandemic Program.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (for example, Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720–2600 or 844–433–2774 (toll-free nationwide). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov.*

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Zach Ducheneaux,

Administrator, Farm Service Agency.

[FR Doc. 2022–05672 Filed 3–17–22; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Proposed Administrative Settlement Agreement and Order on Consent for Removal Action, Nacimiento Mine Site, Santa Fe National Forest, New Mexico

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of settlement; request for comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), notice is hereby given of a proposed Administrative Settlement Agreement and Order on Consent (ASAOC), between the United States Department of Agriculture Forest Service (Forest Service) and Williams Express LLC (Williams), regarding the Nacimiento Mine Site located on the Santa Fe National Forest near Cuba, New Mexico. The property that is the subject of this proposed ASAOC are areas where hazardous substances and/or pollutants or contaminants are located on the surface features of the federally-owned portion of the Site designated as Operable Unit 1 (OU1).

DATES: Comments must be received in writing by April 18, 2022.

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at the offices of the United States Department of Agriculture, Forest Service, Southwestern Regional Office, 333 Broadway SE, Albuquerque, NM 87102, or from Kirk M. Minckler with USDA's Office of the General Counsel, email: *kirk.minckler@usda.gov,* phone: (303) 275–5549. Comments should reference the Nacimiento Mine, Santa Fe National Forest, Sandoval County, New Mexico, and should be addressed to Kirk M. Minckler, USDA Office of the General Counsel, 1617 Cole Boulevard, Suite 385E, Lakewood, Colorado 80401–3305.

The United States' response to any comments received will be available for public inspection at the USDA, Office of General Counsel, Mountain Region, 1617 Cole Boulevard, Suite 385E, Lakewood, Colorado 80401, and at the Forest Service's Southwestern Regional Office, 333 Broadway SE, Albuquerque, NM 87102.

FOR FURTHER INFORMATION CONTACT:

Technical information: Steven J. McDonald, USDA Forest Service Southwestern Region, 333 Broadway SE, Albuquerque, NM 87102; phone: 505–842–3838, email: *steven.mcdonald@usda.gov*.

Legal information: Kirk M. Minckler, USDA Office of the General Counsel, 1617 Cole Boulevard, Suite 385E, Lakewood, Colorado 80401–3305; phone (303) 275–5549, Fax: (303) 275–5557; email: *kirk.minckler@usda.gov*.

Individuals who use telecommunications devices for the deaf or hard of hearing (TDD) may call the Federal Relay Service (FRS) at 800–877–8339 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The proposed ASAOC between the Forest Service and Williams, in accordance with Section 122(i) of CERCLA, as amended, 42 U.S.C. 9622(i) under Sections 104, 107 and 122, requires Williams to perform a Removal Action necessary to implement the selected cleanup alternative involving mining waste piles and other surface features located on the federally owned portion of OU1 at the Site. The performance of this work must be approved and monitored by the Forest Service. Also, under the proposed ASAOC, Williams will reimburse the Forest Service's inspections, monitoring, and maintenance costs related to the Removal Action as Future Response Costs.

For thirty (30) days following the date of publication of this notice, the United States will receive written comments relating to the ASAOC. The United States will consider all comments received and may modify or withdraw its consent to the ASAOC if comments received disclose facts or considerations that indicate that the settlement is inappropriate, improper, or inadequate.

Dated: March 15, 2022.

Kerwin S. Dewberry,

Acting Deputy Regional Forester, Southwestern Region.

[FR Doc. 2022–05787 Filed 3–17–22; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Certification of Identity (Form BC–300)

AGENCY: Census Bureau, Department of Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed revision of the Certification of Identity (Form BC–300) as a Common Form, prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before May 17, 2022.

ADDRESSES: Interested persons are invited to submit written comments by email to <*census.efoia@census.gov*>. Please reference ''Certification of Identity (Form BC–300)'' in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2022–0005, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Vernon E. Curry, Chief, Freedom of Information Act/Privacy Act Officer, U.S. Census Bureau, at 301–763–7325, *vernon.e.curry@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau's Freedom of Information Act (FOIA) Office receives an estimated 250 Privacy Act requests annually. In order to protect the public's privacy and adhere to Privacy regulations, the Census Bureau's FOIA Office developed the Certification of Identity (Form BC–300) to assist with accurately identifying and providing personnel records to requesters. The Form BC–300 asks requesters to provide general information such as name, address, date of birth (D.O.B), description of the request, etc. The form provides added protection in managing sensitive records regulated under the Privacy Act. This form will be hosted by the Census Bureau as a Common Form.

II. Method of Collection

The Privacy Act of 1974 (the Privacy Act), as amended, 5 U.S.C. 552a, establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies. Regulations at 15 CFR part 4, subpart B prescribe how an individual must make a request for access to his or her own personal records to the Census Bureau under the Privacy Act. Generally, one may submit a request for access to his or her own personal records by appearing in person, electronically through the FOIA public website, or by writing to the Census FOIA Office. The regulations require that the requestor describe the records in enough detail to enable Census Bureau personnel to locate the applicable system of records containing the information with a reasonable amount of effort. 15 CFR 4.4(c). A request made under the Privacy Act should include the information listed at 15 CFR 4.24(b), including whenever possible, a description of the records sought, the time periods they were compiled, and the name or identifying number of each system of records where they are kept. Furthermore, requestor must provide documentation or proof of identity. 15 CFR 4.24(d). These documents include information such as the requestor's full name, current address, D.O.B, and place of birth, and where required, a notarized or sworn statement of identity. All Privacy Act requests not made in person must contain a verification of identity that either is notarized or signed under penalty of perjury. 15 CFR 4.24(d). The Census Bureau is prohibited by federal law from disclosing any information contained in the records, except upon written request from the person to whom the information pertains or to a legal representative.

The Form BC–300 is used to collect general information in order to sufficiently identify a respondent to ensure accurate records are provided to the right person as stated in 15 CFR 4.24(d). The Form BC–300 asks for name, address, D.O.B., description of request, and signature, in accordance with 15 CFR 4.24(d). The form explains the purpose and includes the Privacy Act Statement, the disclosure statement, the authorities under which the Census Bureau is authorized to collect the information, and an explanation of burden to the requester. The Form BC–300 is a ''public use'' form meaning that this form is used for all public and internal agency requests for personal records.

The Form BC–300 is accessible electronically and is printable. The Census Bureau plans to develop the form as a fillable form that can be submitted online to help minimize the requester's processing time for filling out and submitting the form. The Census Bureau will receive all Form BC–300s either electronically submitted through the Census FOIA website, *FOIAonline.gov,* by fax, or via postal mail. In all circumstances, proper identification of the requestor must be obtained to ensure distribution of accurate records to the correct individuals. Providing this information is voluntary; however, if not provided, the Census Bureau will be unable to provide the requested personal records.

III. Data

OMB Control Number: 0607–1018.

Form Number(s): Form BC–300.

Type of Review: Regular submission, Request for a Revision of a Currently Approved Collection, as a Common Form.

Affected Public: Individuals requesting the release of his or her own records.

Estimated Number of Respondents: 250 (annual respondents).

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 25.

Estimated Total Annual Cost to Public: $0 (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: In accordance with 15 CFR part 4, subpart B, the U.S. Census Bureau requires the submission of sufficient information to identify individuals that submit requests by mail or otherwise not in person under the Privacy Act of 1974, 5 U.S.C. Section 552a.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department,

including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2022–05795 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, U.S. Department of Commerce.

ACTION: Notice and opportunity for public comment.

SUMMARY: The Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of the firms contributed importantly to the total or partial separation of the firms' workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

SUPPLEMENTARY INFORMATION:

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[2/26/2022 through 3/13/2022]

Firm name	Firm address	Date accepted for investigation	Product(s)
Prospect Life Sciences, Inc	11025 Dover Street, Westminster, CO 80021.	3/1/2022	The company manufactures medical devices.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice. These petitions are received pursuant to section 251 of the Trade Act of 1974, as amended.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.8 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Bryan Borlik,

Director.

[FR Doc. 2022–05701 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–78–2021]

Foreign-Trade Zone (FTZ) 18—San Jose, California, Authorization of Production Activity Innovusion, Inc. (Light Detection and Ranging Systems), Sunnyvale, California

On November 12, 2021, Innovusion, Inc., submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 18 in Sunnyvale, California.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (86 FR 67022, November 24, 2021). On March 14, 2022, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: March 14, 2022.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2022–05727 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–74–2021]

Foreign-Trade Zone (FTZ) 122—Corpus Christi, Texas; Authorization of Production Activity; Gulf Coast Growth Ventures LLC, (Ethylene, Polyethylene, Monoethylene Glycol and Related Co-Products); San Patricio County, Texas

On November 12, 2021, the Port of Corpus Christi Authority, grantee of FTZ 122, submitted a notification of proposed production activity to the FTZ Board on behalf of Gulf Coast Growth Ventures LLC, within Subzone 122W, in San Patricio County, Texas.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (86 FR 64899, November 19, 2021). On March 14,

2022, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: March 14, 2022.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2022–05690 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–914]

Light-Walled Rectangular Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2019–2020; Correction

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On March 11, 2022, the Department of Commerce (Commerce) published a notice in the **Federal Register**, in which it issued the final results of the 2019–2020 antidumping duty administrative review of light-walled rectangular pipe and tube from the People's Republic of China (China). The notice inadvertently contained an incorrect rate for the China-wide entity.

DATES: Applicable March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Thomas Hanna, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0835.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of March 11, 2022, in FR Doc. 2022–05210, page 13969 in the third column, Commerce included an incorrect China-wide rate of 264.64 percent. The correct China-wide rate is 255.07 percent.

Background

On March 11, 2022, Commerce inadvertently published an incorrect rate in the final results of the 2019–2020 antidumping duty administrative review of light-walled rectangular pipe and tube from China.[1] In the final results, Commerce incorrectly listed the China-wide rate as 264.64 percent, while the correct China-wide rate is 255.07 percent. This notice serves as a notification of, and correction to, this inadvertent error. With the issuance of this notice of correction, we confirm that the China-wide rate is 255.07.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i) of the Tariff Act of 1930, as amended.

Dated: March 14, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–05723 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2019–2020,* 87 FR 13968 (March 11, 2022).

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Ruling Applications Filed in Antidumping and Countervailing Duty Proceedings

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) received scope ruling applications, requesting that scope inquiries be conducted to determine whether identified products are covered by the scope of antidumping duty (AD) and/or countervailing duty (CVD) orders and that Commerce issue scope rulings pursuant to those inquiries. In accordance with Commerce's regulations, we are notifying the public of the filing of the scope ruling applications listed below in the month of February 2022.

DATES: Applicable March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

Notice of Scope Ruling Applications

In accordance with 19 CFR 351.225(d)(3), we are notifying the public of the following scope ruling applications related to AD and CVD orders and findings filed in or around the month of February 2022. This notification includes, for each scope application: (1) Identification of the AD and/or CVD orders at issue (19 CFR 351.225(c)(1)); (2) concise public descriptions of the products at issue, including the physical characteristics (including chemical, dimensional and technical characteristics) of the products (19 CFR 351.225(c)(2)(ii)); (3) the countries where the products are produced and the countries from where the products are exported (19 CFR 351.225(c)(2)(i)(B)); (4) the full names of the applicants; and (5) the dates that the scope applications were filed with Commerce and the name of the ACCESS scope segment where the scope applications can be found.[1] This notice does not include applications which have been rejected and not properly resubmitted. The scope ruling applications listed below are available on Commerce's online e-filing and document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS), at *https://access.trade.gov.*

Scope Ruling Applications

Raw Flexible Magnets from the People's Republic of China (China) (A–570–922; C–570–923); Refrigerator door gasket with magnetic band; produced in Mexico with magnetic band sourced from either Germany or China; [2] submitted by REHAU Industries, LLC (REHAU); February 4, 2022; ACCESS scope segments ''Door Gasket.''

[1] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300, 52316 (September 20, 2021) (*Final Rule*) (''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.'')

[2] REHAU's product is a refrigerator door gasket with magnetic band. It is an extruded PVC gasket incorporating a flexible magnetic band inside the gasket. The PVC gasket contains a pocket which encases the magnetic band. The magnetic band is not permanently affixed to the PVC gasket by an adhesive, a heat process, or pressure. The gasket is designed to be used on a specific model of refrigerator. The gasket is affixed to the door of refrigerator to prevent the loss of cold air from the refrigerator. The PVC gasket performs this primary function and the magnetic band provides an additional sealing force when the refrigerator door is closed.

The subject product is manufactured in Mexico with magnetic band that is sourced from either Germany or China. In Mexico, the PVC gasket is extruded in the shape and size of the refrigerator for which it is designed. The incorporation of the magnetic band takes place in Mexico. The refrigerator door gasket with magnetic band is properly classified in the HTSUS subheading 8418.99.80, which provides for, ''Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof: Parts: Other: Other.''

Certain Chassis and Subassemblies Thereof from China (A–570–135; C–570–136); Wheel caps; [3] produced in and exported from China; submitted by Trans Texas Tire, LLC (Texas Tire); February 16, 2022; ACCESS scope segments ''Trans Texas Tire—Wheel Caps.''

Notification to Interested Parties

This list of scope ruling applications is not an identification of scope inquiries that have been initiated. In accordance with 19 CFR 351.225(d)(1), if Commerce has not rejected a scope ruling application nor initiated the scope inquiry within 30 days after the filing of the application, the application will be deemed accepted and a scope inquiry will be deemed initiated the following day—day 31.[4] Commerce's practice generally dictates that where a deadline falls on a weekend, Federal holiday, or other non-business day, the appropriate deadline is the next business day.[5] Accordingly, if the 30th day after the filing of the application falls on a non-business day, the next business day will be considered the ''updated'' 30th day, and if the application is not rejected or a scope inquiry initiated by or on that particular business day, the application will be deemed accepted and a scope inquiry will be deemed initiated on the next business day which follows the ''updated'' 30th day.[6]

In accordance with 19 CFR 351.225(m)(2), if there are companion AD and CVD orders covering the same merchandise from the same country of origin, the scope inquiry will be conducted on the record of the AD proceeding. Further, please note that pursuant to 19 CFR 351.225(m)(1), Commerce may either apply a scope ruling 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, or on a company-specific basis.

For further information on procedures for filing information with Commerce through ACCESS and participating in scope inquiries, please refer to the Filing Instructions section of the Scope Ruling Application Guide, at *https://access.trade.gov/help/Scope_Ruling_Guidance.pdf.* Interested parties, apart from the scope ruling applicant, who wish to participate in a scope inquiry and be added to the public service list for that segment of the proceeding must file an entry of appearance in accordance with 19 CFR 351.103(d)(1) and 19 CFR 351.225(n)(4). Interested parties are advised to refer to the case segment in ACCESS as well as 19 CFR 351.225(f) for further information on the scope inquiry procedures, including the timelines for the submission of comments.

Please note that this notice of scope ruling applications filed in AD and CVD proceedings may be published before any potential initiation, or after the initiation, of a given scope inquiry based on a scope ruling application identified in this notice. Therefore, please refer to the case segment on ACCESS to determine whether a scope ruling application has been accepted or rejected and whether a scope inquiry has been initiated.

Interested parties who wish to be served scope ruling applications for a particular AD or CVD order may file a request to be included on the annual inquiry service list during the anniversary month of the publication of the AD or CVD order in accordance with 19 CFR 351.225(n) and Commerce's procedures.[7]

Interested parties are invited to comment on the completeness of this monthly list of scope ruling applications received by Commerce. Any comments should be submitted to James Maeder, Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, via email to *CommerceCLU@trade.gov.*

This notice of scope ruling applications filed in AD and CVD proceedings is published in accordance with 19 CFR 351.225(d)(3).

Dated: March 14, 2022.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2022–05725 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–DS–P

[3] Texas Tire's wheel caps are country of origin China as they are wholly produced in China. They are then exported from China directly to the United States. At entry, the wheel caps are classified under the HTSUS subheading 8716.90.5060.

Subsequent to their importation, they will be installed onto wheels for use on marine trailers, utility trailers, and recreational vehicles. The wheel caps themselves are stainless steel decorative discs that cover the central portion of the wheel. They may keep dirt away from the spindle nut and wheel bearings or to hide the lug nuts, and/or the bearing. They are not a functional part of a vehicle chassis. There are two varieties of substantially similar wheel cap at issue. The first is a single piece cap composed of stainless steel. The second is a two-piece cap which includes the stainless-steel main cap component and a small plastic cap that clips onto the front end of the steel cap. The plastic cap can be removed so that a technician may better access and lubricate the axle. Both varieties are utilized only for marine trailers, utility trailers, and recreational vehicles.

[4] In accordance with 19 CFR 351.225(d)(2), within 30 days after the filing of a scope ruling application, if Commerce determines that it intends to address the scope issue raised in the application in another segment of the proceeding (such as a circumvention inquiry under 19 CFR 351.226 or a covered merchandise inquiry under 19 CFR 351.227), it will notify the applicant that it will not initiate a scope inquiry, but will instead determine if the product is covered by the scope at issue in that alternative segment.

[5] *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[6] This structure maintains the intent of the applicable regulation, 19 CFR 351.225(d)(1), to allow day 30 and day 31 to be separate business days.

[7] *Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions,* 86 FR 53205 (September 27, 2021).

DEPARTMENT OF COMMERCE

International Trade Administration

Announcement of Approved International Trade Administration Trade Missions

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Department of Commerce, International Trade Administration (ITA), is announcing two upcoming trade missions that will be recruited, organized, and implemented by ITA. These missions are:

- U.S. ICT and Energy Efficiency Trade Mission to the Western Balkans—October 23–28, 2022
- Healthcare Sector Business Development Mission to Thailand, Vietnam, and Malaysia—September 19–24, 2022

A summary of each mission is found below. Application information and more detailed mission information, including the commercial setting and sector information, can be found at the trade mission website: *https://www.trade.gov/trade-missions.*

For each mission, recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*https://www.trade.gov/trade-missions-schedule*) and other internet websites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

FOR FURTHER INFORMATION CONTACT: Jeffrey Odum, Events Management Task Force, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–6397 or email *Jeffrey.Odum@trade.gov.*

The Following Conditions for Participation Will Be Used for Each Mission

Applicants must submit a completed and signed mission application and supplemental application materials, including adequate information on their products and/or services, primary market objectives, and goals for participation to allow the Department of Commerce to evaluate their application. If the Department of Commerce receives an incomplete application, the Department may either: Reject the application, request additional information/clarification, or take the lack of information into account when evaluating the application. If the requisite minimum number of participants is not selected for the mission by the recruitment deadline, the mission may be cancelled.

Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, are marketed under the name of a U.S. firm and have at least 51% U.S. content by value. In the case of an organization, the applicant must certify that, for each entity to be represented by the organization, the products and/or services the represented firm or service provider seeks to export are either produced in the United States or, if not, marketed under the name of a U.S. firm and have at least 51% U.S. content.

An organization applicant must certify to the above for all of the companies it seeks to represent on the mission.

In addition, each applicant must:

- Certify that the export of products and services that it wishes to market through the mission is in compliance with U.S. export controls and regulations;
- Certify that it has identified any matter pending before any bureau or office in the Department of Commerce;
- Certify that it has identified any pending litigation (including any administrative proceedings) to which it is a party that involves the Department of Commerce; and
- Sign and submit an agreement that it and its affiliates (1) have not and will not engage in the bribery of foreign officials in connection with a company's/participant's involvement in this mission, and (2) maintain and enforce a policy that prohibits the bribery of foreign officials.

In the case of a trade association/organization, the applicant must certify that each firm or service provider to be represented by the association/organization can make the above certifications.

The Following Selection Criteria Will Be Used for Each Mission

Targeted mission participants are U.S. firms, services providers and organizations (universities, research institutions, or financial services trade associations) providing or promoting U.S. products and services that have an interest in entering or expanding their business in the mission's destination country. The following criteria will be evaluated in selecting participants:

- Suitability of the applicant's (or in the case of an organization, represented firm's or service provider's) products or services to these markets;
- The applicant's (or in the case of an organization, represented firm's or service provider's) potential for business in the markets, including likelihood of exports resulting from the mission; and
- Consistency of the applicant's (or in the case of an organization, represented firm's or service provider's) goals and objectives with the stated scope of the mission.

Balance of applicant's size and location may also be considered during the review process.

Referrals from a political party or partisan political group or any information, including on the application, containing references to political contributions or other partisan political activities will be excluded from the application and will not be considered during the selection process. The sender will be notified of these exclusions.

Trade Mission Participation Fees

If and when an applicant is selected to participate on a particular mission, a payment to the Department of Commerce in the amount of the designated participation fee below is required. Upon notification of acceptance to participate, those selected have 5 business days to submit payment or the acceptance may be revoked.

Participants selected for a trade mission will be expected to pay for the cost of personal expenses, including, but not limited to, international travel, lodging, meals, transportation, communication, and incidentals, unless otherwise noted. Participants will, however, be able to take advantage of U.S. Government rates for hotel rooms. In the event that a mission is cancelled, no personal expenses paid in anticipation of a mission will be reimbursed. However, participation fees for a cancelled mission will be reimbursed to the extent they have not already been expended in anticipation of the mission.

If a visa is required to travel on a particular mission, applying for and obtaining such a visa will be the responsibility of the mission participant. Government fees and processing expenses to obtain such a visa are not included in the participation fee. However, the Department of Commerce will provide instructions to each participant on the procedures required to obtain business visas.

Trade Mission members participate in trade missions and undertake mission-related travel at their own risk. The nature of the security situation in a given foreign market at a given time cannot be guaranteed. The U.S. Government does not make any representations or guarantees as to the safety or security of participants. The U.S. Department of State issues U.S. Government international travel alerts and warnings for U.S. citizens available at *https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/.* Any question regarding insurance coverage must be resolved by the participant and its insurer of choice.

Definition of Small- and Medium-Sized Enterprise

For purposes of assessing participation fees, an applicant is a small or medium-sized enterprise (SME) if it qualifies under the Small Business Administration's (SBA) size standards (*https://www.sba.gov/document/support-table-size-standards*), which vary by North American Industry Classification System (NAICS) Code. The SBA Size Standards Tool [*https://www.sba.gov/size-standards/*] can help you determine the qualifications that apply to your company.

Important Note About the Covid–19 Pandemic

Travel and in-person activities are contingent upon the safety and health conditions in the United States and the mission countries. Should safety or health conditions not be appropriate for travel and/or in-person activities, the Department will consider postponing the event or offering a virtual program in lieu of an in-person agenda. In the event of a postponement, the Department will notify the public and applicants previously selected to

participate in this mission will need to confirm their availability but need not reapply. Should the decision be made to organize a virtual program, the Department will adjust fees, accordingly, prepare an agenda for virtual activities, and notify the previous selected applicants with the option to opt-in to the new virtual program.

Mission List: (additional information about each mission can be found at *https://www.trade.gov/trade-missions*).

U.S ICT and Energy Efficiency Trade Mission to the Western Balkans

Dates: October 23–28, 2022

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing a U.S. ICT and Energy Efficiency Trade Mission to the Western Balkans, with specific stops in Serbia and Montenegro on October 23–28, 2022.

The ICT and Energy Efficiency Trade Mission to the Western Balkans is intended to include representatives from a variety of U.S. ICT, energy efficiency, and renewable energy technology manufactures, service providers, associations, and trade organizations. The mission will introduce the participants to foreign government experts and decision makers, service providers, end-users, and prospective partners whose needs and capabilities are best suited to each U.S. participant's strengths. Participating in an official U.S. trade delegation, rather than traveling to Serbia and Montenegro individually will not only help enhance the participants' ability to secure key business and government meetings in the Western Balkans, but also more effectively promote U.S. goods and services to a wider targeted audience. Mission participants will learn about regional priorities, policy and regulatory changes, and projects throughout the region. The purpose of the mission is to leverage the regional political and economic climate to help U.S. companies enter the markets or further expand their market share.

The meetings will match the participants with potential business partners, distributors, and importers in in the two markets and wider region. Moreover, key local industry leaders will brief mission participants on local market conditions, needs and opportunities in the various regions, and domestic regulatory and policy issues that impact the two sectors.

Proposed Timetable

**Note:* The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Date	Schedule
Sunday, October 23, 2022	—Trade Mission Participants arrive in Belgrade, Serbia and check-in their hotel. —Those that arrive on time can attend an optional cultural/sightseeing event and a welcome dinner.
Monday, October 24, 2022	—Morning Embassy Briefing on Doing Business in Serbia. —Meeting with Ministry of Trade, Tourism, and Telecommunications. —Networking lunch with AmCham. —Afternoon B2B Meetings. —Reception hosted by Ambassador Godfrey.
Tuesday, October 25, 2022	—Meeting with Ministry of Mining and Energy. —Networking lunch and B2G Meeting. —Plenary Event at Serbian Chamber of Commerce. —Open Balkans Regional Business Networking Reception.
Wednesday, October 26, 2022	—Transfer to airport for travel to Podgorica, Montenegro. —Networking Lunch. — Afternoon Embassy briefing on doing business in Montenegro. —Dinner.
Thursday, October 27, 2022	—Meetings with Montenegrin Government. —Networking lunch with AmCham. —B2G Roundtable. —B2B Meetings. —Reception hosted by Chief of Mission.
Friday, October 28, 2022	—Morning B2B Meetings. —Morning B2G Meetings. —Networking Lunch. —Checkout of hotel and transfer to Airport. —Departure to United States. —Mission Complete.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 20 and maximum of 30 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Trade Mission will be $1800 for small or medium-sized enterprises (SME) [1]; and $3750 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $250. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar

(*http://export.gov/trademissions*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than August 19th, 2022. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after August 19th, 2022 will be considered only if space and scheduling constraints permit.

Contacts

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Healthcare Sector Business Development Mission to Thailand, Vietnam, and Malaysia

Dates: September 19–24, 2022

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an executive-led healthcare sector business development mission to the Southeast Asian countries of Thailand, Vietnam, and Malaysia from September 19 to 24, 2022.

The Healthcare Sector Business Development Mission will assist U.S. health sector exporters and ITA strategic partners in exploring market opportunities into Southeast Asia, building on the Virtual Medical Technology Trade Forum to Vietnam, Malaysia, and Thailand on May 24–27, 2021. The new Mission will include matchmaking appointments, market briefings, policy-focused roundtables, and site visits to increase U.S. industry competitiveness and build relationships. Mission participants will gain firsthand knowledge of the selected Southeast Asian markets through business overviews and introductions to hospitals and clinical laboratories, government healthcare agencies, distributors, and others who could benefit from U.S. products and services.

The Trade Mission to Southeast Asia will seek to include U.S. medical products in high potential areas, such as technologies and equipment for treating non-communicable diseases.

Proposed Timetable

* *Note:* The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Thailand Day 1 ..... Sunday, September 18.	*Trade Mission Participants Arrive in Bangkok.*
Thailand Day 1 ..... Monday, September 19	*Optional: Morning Rest.* • Welcome remarks by U.S. Ambassador. • U.S. Mission Thailand market briefing. • Welcome remarks on Thailand's healthcare and medical tourism by Ministry of Public Health. • Panel discussion on Thailand's non-communicable disease treatments and technologies. • Panel discussion on plastic surgery and medical aesthetics. • One-on-one meetings with potential distributors. • Networking reception at the Ambassador's Residence or hotel and meeting with invitees from Thailand's healthcare industry.
Thailand Day 2	• Continued one-one-one meetings. • Meetings with medical device associations/hospitals.
Tuesday, September 20	*Travel to Hanoi, Vietnam* • U.S. Embassy Briefing and Welcome at the Ambassador's Residence. • Meeting the Ministry of Health (MOH) Vietnam: ○–Welcome remarks by Delegation and MOH. ○–MOH Briefing on Vietnamese Healthcare system with applicable regulations. ○–Open Discussion on Vietnam's Development Strategies for Healthcare.
Vietnam Day 1 ..... Wednesday, September 21	• Visit to one Public or Private hospital's. • One-on-one meetings with potential partners/distributors (in person if potential partners are based in Hanoi and virtual meetings with potential partners based in Ho Chi Minh City). • Networking reception at a hotel and meeting with invitees from Vietnam's healthcare industry and U.S. Embassy Officers.

Vietnam Day 2	• Morning: possible second day of one-on-one meetings at hotel and/or visit to local medical device association.
Thursday, September 22	*Travel to Kuala Lumpur, Malaysia*
Malaysia Day 1	• Meeting with the Ministry of Health (MOH) Malaysia: —Welcome remarks on the Malaysian healthcare system and non-communicable diseases by MOH.
Friday, September 23	• Delegate to present U.S. solutions. • Meeting with Malaysia Medical Device Association (MMDA)/Association of Malaysian Medical Industries (AMMI). • U.S. Embassy Malaysia briefing—Political, Economic, Commercial climate/context. • Additional meeting(s) and/or one-on-one meetings with Malaysian healthcare industry and stakeholders, as well as potential partners/distributors. • Networking reception at Chief of Mission Residence/hotel and meet with invitees from Malaysian government and healthcare industry and U.S. Embassy officers.
Malaysia Day 2	• Depart Malaysia.
Saturday, September 24.	

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 12 and maximum of 15 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Healthcare Business Development Mission will be $5,300 for small or medium-sized enterprises (SME) [1]; and $6,200 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $500.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://export.gov/trademissions*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than June 30, 2022. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a comparative basis. Applications received after June 30, 2022 will be considered only if space and scheduling constraints permit.

Contacts

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Malaysia

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Dated: March 14, 2022.

Gemal Brangman,

Director, ITA Events Management Task Force.

[FR Doc. 2022–05707 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–881]

Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that certain cold-rolled steel flat products (cold-rolled steel) from the Republic of Korea were not sold in the United States at less than normal value during the period of review (POR), September 1, 2019, through August 31, 2020.

DATES: Applicable March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Preston Cox, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924 or (202) 482–5041, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 6, 2021, Commerce published the *Preliminary Results* of this administrative review in the **Federal Register**.[1] We invited interested parties to comment on the *Preliminary Results*.[2] This administrative review covers two mandatory respondents: Hyundai Steel Company (Hyundai) and POSCO/POSCO International

[1] *See Certain Cold Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2019–2020,* 86 FR 55584 (October 6, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Preliminary Results,* 86 FR at 55585.

Corporation (PIC) (collectively, POSCO/PIC).[3] This administrative review also covers 38 producers and/or exporters of subject merchandise. The list of producers/exporters not selected for individual examination is attached as Appendix II to this notice.

On November 5, 2021, Hyundai submitted a case brief.[4] No other party submitted case or rebuttal briefs. On February 1, 2022, we extended the deadline for these final results to no later than March 18, 2022.[5] For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[6]

Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [7]

The product covered by the *Order* is cold-rolled steel from the Republic of Korea. For a complete description of the scope of this administrative review, *see* the Issues and Decision Memorandum.[8]

Analysis of Comments Received

All issues raised in the case brief filed by Hyundai, an interested party in this review, are discussed in the Issues and Decision Memorandum. A list of the issues which Hyundai raised, and to which we responded in the Issues and Decision Memorandum, is attached as Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and our analysis of the comments received, we made certain changes to the margin calculation for Hyundai. For a complete discussion of these changes, *see* the Issues and Decision Memorandum.

Rate for Non-Selected Respondents

The Act and Commerce's regulations do not address the establishment of a weighted-average dumping margin to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a less-than-fair-value (LTFV) investigation, for guidance when calculating the weighted-average dumping margin for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any margins that are zero, *de minimis* (*i.e.,* less than 0.5 percent), or determined entirely on the basis of facts available.

Consistent with our practice and section 735(c)(5)(A) of the Act, for the companies that were not selected for individual review, we assigned a rate based on the rates of the respondents that were selected for individual examination. Consistent with the U.S. Court of Appeals for the Federal Circuit's decision in *Albemarle,* we are assigning to the 38 companies not selected for individual examination the zero percent rates calculated for the mandatory respondents, Hyundai and POSCO/PIC.[9] These are the only rates determined in this review for individual respondents and, thus, we determine that they apply to the 38 firms not selected for individual examination under section 735(c)(5)(B) of the Act.

Final Results of the Administrative Review

For these final results, we determine that the following weighted-average dumping margins exist for the period September 1, 2019, through August 31, 2020:

Producer/exporter	Weighted-average dumping margin (percent)
Hyundai Steel Company	0.00
POSCO/POSCO International Corporation	0.00
Non-Selected Companies [10]	0.00

Disclosure

Commerce intends to disclose the calculations performed for these final results to parties within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Pursuant to 19 CFR 351.212(b)(1), Commerce calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of those sales. Where the respondent's weighted-average dumping margin is either zero or *de minimis,* we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties. Because the weighted-average dumping margins for Hyundai, POSCO/PIC, and the 38 firms not selected for individual examination have been determined to be zero percent, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties. In accordance with Commerce's practice, for entries of subject merchandise during the POR produced by Hyundai or POSCO/PIC for which it did not know its merchandise was destined for the United States, we intend to instruct CBP to liquidate such entries at the all-others rate if there is no company-specific rate for the intermediate company(ies) involved in the transaction.[11]

[3] Commerce continues to treat POSCO and POSCO International Corporation as a collapsed single entity for the final results of this review. *See Preliminary Results* PDM at 1; *see also Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2018–2019,* 86 FR 40808 (July 29, 2021), and accompanying Issues and Decision Memorandum at 6 n.16.

[4] *See* Hyundai's Letter, ''Certain Cold Rolled Steel Flat Products from the Republic of Korea: Hyundai Steel's Case Brief,'' dated November 5, 2021.

[5] *See* Memorandum, ''Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Extension of Deadline for Final Results of 2019–2020 Antidumping Duty Administrative Review,'' dated February 1, 2022.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Certain Cold-Rolled Steel Flat Products from the Republic of Korea; 2019–2020,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[7] *See Certain Cold Rolled Steel Flat Products from Brazil, India, the Republic of Korea, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Brazil and the United Kingdom and Antidumping Duty Orders,* 81 FR 64432 (September 20, 2016) (*Order*).

[8] *See* Issues and Decision Memorandum at 2–5.

[9] *See Albemarle Corp.* v. *United States,* 821 F.3d 1345 (Fed. Cir. 2016) (*Albemarle*).

[10] *See* Appendix II for a full list of the non-selected companies.

[11] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Consistent with its recent notice,[12] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication). The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise under review and for future cash deposits of estimated antidumping duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of the notice of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation but the producer has been covered in a prior completed segment of this proceeding, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 20.33 percent, the all-others rate established in the LTFV investigation.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: March 11, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the *Preliminary Results*
V. Rate for Non-Examined Companies
VI. Discussion of the Issue
Comment: Correction of Clerical Errors
VII. Recommendation

Appendix II—List of Companies Not Individually Examined

1. AJU Steel Co., Ltd.
2. Ameri-Source Korea
3. Dai Yang Metal Co., Ltd.
4. DCM Corporation
5. DK GNS Co., Ltd.
6. Dongbu Incheon Steel Co., Ltd
7. Dongbu Steel Co., Ltd.
8. Dongkuk Industries Co., Ltd.
9. Dongkuk Steel Mill Co., Ltd.
10. GS Global Corporation
11. Hanawell Co., Ltd.
12. Hankum Co., Ltd.
13. Hwashin Co. Ltd.
14. Hyosung TNC Corporation
15. Hyundai Corporation
16. JMP Co., Ltd.
17. KG Dongbu Steel Co., Ltd.
18. Korinox Co., Ltd.
19. Mikwang Precision Manufacture Co., Ltd.
20. Okaya Korea Co., Ltd.
21. POSCO Coated and Colored Steel Co., Ltd.
22. Samhwan Steel Co., Ltd.
23. Samsung C & T Corporation
24. Samsung Electronics Co., Ltd.
25. Samsung STS Co., Ltd.
26. SeAH Changwon Integrated Special Steel Corporation
27. SeAH Coated Metal Corporation
28. SeAH Steel Corporation
29. Shin Steel Co., Ltd.
30. Shin Young Co., Ltd.
31. Signode Korea Inc.
32. SK Networks Co., Ltd.
33. Soon Hong Trading Co., Ltd.
34. Sungjin Co., Ltd.
35. Taesan Corporation
36. TCC Steel Corporation
37. TI Automotive Ltd.
38. Wolverine Korea Co., Ltd.

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BILLING CODE 3510–DS–P

[12] *See Notice of Discontinuation of Policy to Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Administrative Proceedings,* 86 FR 3995 (January 15, 2021).

[13] *See Order.*

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–907]

Sodium Nitrite From India: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Eva Kim, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–8283.

SUPPLEMENTARY INFORMATION:

Background

On February 8, 2022, the Department of Commerce (Commerce) published the initiation of countervailing duty (CVD) investigations of imports of sodium nitrite from India and Russia.[1] Currently, the preliminary determinations are due no later than April 8, 2022.

Postponement of Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a countervailing duty investigation within 65 days after the date on which Commerce initiated the investigation. However, section

[1] *See Sodium Nitrite from India and the Russian Federation: Initiation of Countervailing Duty Investigations,* 87 FR 7108 (February 8, 2022).

703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) The petitioner [2] makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On March 14, 2022, the petitioner submitted a timely request that Commerce postpone the preliminary CVD determination of sodium nitrite from India.[3] The petitioner requested postponement due to the complexity of this investigation and posited that more time is needed for Commerce to conduct a complete and thorough analysis.[4] The petitioner noted that it ''identified twenty-one different subsidy programs that potentially benefit the mandatory respondent, Deepak Nitrite Limited,'' and that Commerce's preliminary determination is currently due on April 8, 2022,[5] ''which is just two weeks after the current deadline for complete initial responses to Sections II and III of Commerce's questionnaires.'' [6] In accordance with 19 CFR 351.205(e), the petitioner has stated its reasons for requesting a postponement of the preliminary determination, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determination to no later than 130 days after the date on which this investigation was initiated, *i.e.,* June 13, 2022.[7] Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: March 14, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

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[2] The petitioner is Chemtrade Chemicals US, LLC.

[3] *See* Petitioner's Letter, ''Sodium Nitrite from India: Request for Extension of the Preliminary Determination of the Countervailing Duty Investigation,'' dated March 14, 2022.

[4] *Id.*

[5] *See* 19 CFR 351.205(b)(1) (explaining that the preliminary countervailing duty determination is due 65 days after the date of initiation). This investigation was initiated on February 2, 2022.

[6] *Id.*

[7] Postponing the preliminary determination to 130 days after initiation would place the deadline on Sunday, June 12, 2022. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

International Trade Administration

Announcement of Winter 2022 Approved International Trade Administration Trade Missions

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Department of Commerce, International Trade Administration (ITA), is announcing six upcoming trade missions that will be recruited, organized, and implemented by ITA. These missions are:

- U.S. Industry Program (USIP) at the International Atomic Energy Agency (IAEA) General Conferencein Vienna, Austria—9/25–9/28/2022
- Executive-Led Advanced Manufacturing Business Development Mission to Indonesia and Singapore, with an optional stop in Japan—10/17–10/21/2022
- Women in Tech Trade Mission to France, Netherlands, and Portugal—10/30–11/5/2022
- Executive-Led Middle East Aerospace and Defense Trade Mission—11/6–11/11/2022
- Clinical Waste Management Mission to Indonesia and Malaysia—3/6–3/10/2023
- Middle East Executive-led Clean Tech Trade Mission—3/12–3/17/2023

A summary of each mission is found below. Application information and more detailed mission information, including the commercial setting and sector information, can be found at the trade mission website: *https://www.trade.gov/trade-missions*.

For each mission, recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*https://www.trade.gov/trade-missions-schedule*) and other internet websites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

FOR FURTHER INFORMATION CONTACT: Jeffrey Odum, Events Management Task Force, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone (202) 482–6397 or email *Jeffrey.Odum@trade.gov*.

The following conditions for participation will be used for each mission: Applicants must submit a completed and signed mission application and supplemental application materials, including adequate information on their products and/or services, primary market objectives, and goals for participation to allow the Department of Commerce to evaluate their application. If the Department of Commerce receives an incomplete application, the Department may either: Reject the application, request additional information/clarification, or take the lack of information into account when evaluating the application. If the requisite minimum number of participants is not selected for the mission by the recruitment deadline, the mission may be cancelled.

Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, are marketed under the name of a U.S. firm and have at least 51% U.S. content by value. In the case of an organization, the applicant must certify that, for each entity to be represented by the organization, the products and/or services the represented firm or service provider seeks to export are either produced in the United States or, if not, marketed under the name of a U.S. firm and have at least 51% U.S. content.

An organization applicant must certify to the above for all of the companies it seeks to represent on the mission.

In addition, each applicant must:

- Certify that the export of products and services that it wishes to market through the mission is in compliance with U.S. export controls and regulations;
- Certify that it has identified any matter pending before any bureau or office in the Department of Commerce;
- Certify that it has identified any pending litigation (including any

administrative proceedings) to which it is a party that involves the Department of Commerce; and

• Sign and submit an agreement that it and its affiliates (1) have not and will not engage in the bribery of foreign officials in connection with a company's/participant's involvement in this mission, and (2) maintain and enforce a policy that prohibits the bribery of foreign officials.

In the case of a trade association/organization, the applicant must certify that each firm or service provider to be represented by the association/organization can make the above certifications.

The following selection criteria will be used for each mission: Targeted mission participants are U.S. firms, services providers and organizations (universities, research institutions, or financial services trade associations) providing or promoting U.S. products and services that have an interest in entering or expanding their business in the mission's destination country. The following criteria will be evaluated in selecting participants:

• Suitability of the applicant's (or in the case of an organization, represented firm's or service provider's) products or services to these markets;

• The applicant's (or in the case of an organization, represented firm's or service provider's) potential for business in the markets, including likelihood of exports resulting from the mission; and

• Consistency of the applicant's (or in the case of an organization, represented firm's or service provider's) goals and objectives with the stated scope of the mission.

Balance of applicant's size and location may also be considered during the review process. Referrals from a political party or partisan political group or any information, including on the application, containing references to political contributions or other partisan political activities will be excluded from the application and will not be considered during the selection process. The sender will be notified of these exclusions.

Trade mission participation fees: If and when an applicant is selected to participate on a particular mission, a payment to the Department of Commerce in the amount of the designated participation fee below is required. Upon notification of acceptance to participate, those selected have 5 business days to submit payment or the acceptance may be revoked.

Participants selected for a trade mission will be expected to pay for the cost of personal expenses, including, but not limited to, international travel, lodging, meals, transportation, communication, and incidentals, unless otherwise noted. Participants will, however, be able to take advantage of U.S. Government rates for hotel rooms. In the event that a mission is cancelled, no personal expenses paid in anticipation of a mission will be reimbursed. However, participation fees for a cancelled mission will be reimbursed to the extent they have not already been expended in anticipation of the mission.

If a visa is required to travel on a particular mission, applying for and obtaining such a visa will be the responsibility of the mission participant. Government fees and processing expenses to obtain such a visa are not included in the participation fee. However, the Department of Commerce will provide instructions to each participant on the procedures required to obtain business visas. Trade Mission members participate in trade missions and undertake mission-related travel at their own risk. The nature of the security situation in a given foreign market at a given time cannot be guaranteed. The U.S. Government does not make any representations or guarantees as to the safety or security of participants. The U.S. Department of State issues U.S. Government international travel alerts and warnings for U.S. citizens available at *https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/.* Any question regarding insurance coverage must be resolved by the participant and its insurer of choice.

Definition of small- and medium-sized enterprise: For purposes of assessing participation fees, an applicant is a small or medium-sized enterprise (SME) if it qualifies under the Small Business Administration's (SBA) size standards (*https://www.sba.gov/document/support--table-size-standards*), which vary by North American Industry Classification System (NAICS) Code. The SBA Size Standards Tool [*https://www.sba.gov/size-standards/*] can help you determine the qualifications that apply to your company.

Important note about the covid–19 pandemic: Travel and in-person activities are contingent upon the safety and health conditions in the United States and the mission countries. Should safety or health conditions not be appropriate for travel and/or in-person activities, the Department will consider postponing the event or offering a virtual program in lieu of an in-person agenda. In the event of a postponement, the Department will notify the public and applicants previously selected to participate in this mission will need to confirm their availability but need not reapply. Should the decision be made to organize a virtual program, the Department will adjust fees, accordingly, prepare an agenda for virtual activities, and notify the previous selected applicants with the option to opt-in to the new virtual program.

Mission list: (additional information about each mission can be found at *https://www.trade.gov/trade-missions*).

U.S. Industry Program at the International Atomic Energy Agency (IAEA) General Conference in Vienna, Austria Dates: September 25–28, 2022

Summary

The U.S. Department of Commerce's (DOC) International Trade Administration (ITA), with participation from the U.S. Departments of Energy and State, is organizing its annual U.S. Industry Program at the International Atomic Energy Agency (IAEA) General Conference, to be held September 25–28, 2022, in Vienna, Austria. The IAEA General Conference is the premier global meeting of civil nuclear policymakers and typically attracts senior officials and industry representatives from all 172 Member States. The U.S. Industry Program is part of the DOC's Civil Nuclear Trade Initiative, a U.S. Government (USG) effort to help U.S. civil nuclear companies identify and capitalize on commercial civil nuclear opportunities around the world. The purpose of the program is to demonstrate high level USG support for the U.S. nuclear industry to promote its services and technologies to an international audience, including senior energy policymakers from current and emerging markets as well as IAEA staff.

Representatives of U.S. companies from across the U.S. civil nuclear supply chain are eligible to participate. In addition, organizations providing related services to the industry, such as universities, research institutions, and U.S. civil nuclear trade associations, are eligible for participation. The mission will help U.S. participants gain market insights, make industry contacts, solidify business strategies, and identify or advance specific projects with the goal of increasing U.S. civil nuclear exports to a wide variety of countries interested in nuclear energy. A senior DOC official will lead the U.S. industry delegation.

The schedule includes: Meetings with foreign delegations and discussions with senior USG officials on important

civil nuclear topics including regulatory, technology and standards, liability, public acceptance, export controls, financing, infrastructure development, and R&D cooperation. Past U.S. Industry Programs have included participation by the U.S. Secretary of Energy, the Chairman of the U.S. Nuclear Regulatory Commission (NRC) and senior USG officials from the Departments of Commerce, Energy, State, the Export-Import Bank of the United States and the National Security Council.

There are significant opportunities for U.S. businesses in the global civil nuclear energy market. With 52 reactors currently under construction in 15 countries and 160 nuclear plant projects planned in 27 countries over the next 8–10 years, this translates to a market demand for equipment and services totaling $500–740 billion over the next ten years.

Proposed Timetable

****Note that specific events and meeting times have yet to be confirmed****

Sunday, September 25

3:00 p.m.–5:00 p.m. 1–1 Showtime Meetings with visiting ITA Staff
6:00 p.m.–8:00 p.m. U.S. Industry Welcome Reception

Monday, September 26

7:00 a.m. Industry Program Breakfast Begins
8:00–9:45 a.m. U.S. Policymakers Roundtable
9:45–10:00 a.m. Break
10:00–11:00 a.m. USG Dialogue with Industry
11:00 a.m.–6:00 p.m. IAEA Side Events
11:00 a.m.–12:30 p.m. Break
12:30–6:00 p.m. Country Briefings for Industry Delegation (presented by foreign delegates)
7:30–9:30 p.m. U.S. Mission to the IAEA Reception

Tuesday, September 27

9:00 a.m.–6:00 p.m. Country Briefings for Industry (presented by foreign delegates)
10:00 a.m.–6:00 p.m. IAEA Side Event Meetings

Wednesday, September 28

9:00 a.m.–6:00 p.m. Country Briefings for Industry (presented by foreign delegates)
10:00 a.m.–6:00 p.m. IAEA Side Event Meetings

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 15 and maximum of 50 companies and/or trade associations and/or U.S. academic and research institutions will be selected to participate in the mission from the applicant pool. The first ten applicants will be permitted to send two representatives per organization (if desired). After the first ten applicants, additional representatives will be permitted only if space is available. Participating companies may send more than two participants if space permits. The Department of Commerce will evaluate applications and inform applicants of selection decisions [three weeks after publication in the **Federal Register**] and on a rolling basis thereafter until the maximum number of participants has been selected.

Fees and Expenses

After a company or organization has been selected to participate on the mission, a payment to the DOC in the form of a participation fee is required. The fee covers ITA support to register U.S. industry participants for the IAEA General Conference. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Participants will be able to take advantage of discounted rates for hotel rooms.

The fee to participate in the event is $5,246 for a large company and $4,915 for a small or medium-sized company (SME)2, a trade association, or a U.S. university or research institution. The fee for each additional representative (large company, trade association, university/research institution, or SME) is $2,000.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*https://www.trade.gov/trade-missions-schedule*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than July 22, 2022. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after July 22, 2022, will be considered only if space and scheduling constraints permit. If the trade mission cannot be held due to the COVID–19 global pandemic, the event will be postponed to the September 2022 IAEA General Conference. ITA will notify participants by July 30, 2021 regarding a decision to postpone the event.

Contacts

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Executive-Led Advanced Manufacturing Business Development Mission to Indonesia and Singapore, With an Optional Stop in Japan, Dates: October 17–21, 2022

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an Executive-Led Advanced Manufacturing Business Development Mission to Indonesia and Singapore, with an optional stop in Japan, from October 17–21, 2022.

The mission will visit Jakarta, Indonesia; Batam, Indonesia; and Singapore, along with an optional stop in Tokyo, Japan. The purpose of the mission is to increase U.S. exports to Indonesia and Singapore (with optional export opportunities to Japan) by connecting U.S. firms and the National Electrical Manufacturers Association (NEMA) to pre-screened business prospects. The mission will focus on advanced manufacturing systems—commonly referred to as ''Industry 4.0'' or ''Smart Manufacturing.'' These products and systems increase productivity and quality, reduce energy use, and enable manufacturers to better monitor and interact with their supply chains, all of which are essential to improving manufacturing resiliency. The delegation will be comprised of representatives with decision-making authority from U.S. companies producing advanced manufacturing systems and representatives from NEMA. The mission will align with NEMA's Market Development Cooperator Program (MDCP), which looks to expand U.S. exports of

advanced manufacturing systems through greater participation in relevant technical standards development and greater collaboration with business leaders.

Delegates will benefit from the guidance and insights of ITA's commercial teams working in these markets. The mission will introduce U.S. firms and NEMA to advanced manufacturing stakeholders in the region and assist U.S. companies in finding foreign business partners in order to export their products and services to Indonesia and Singapore (with optional opportunities in Japan).

Proposed Timetable

*Note: The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Sunday, October 16, 2022 ...	▪ Arrive in Jakarta.
Monday, October 17, 2022 ..	▪ Full day in-person event in Jakarta. ▪ The morning will consist of presentations by the participating companies in a seminar-style format. ▪ The afternoon will include a networking lunch and/or one-on-one sessions with the U.S. companies and with relevant Indonesian stakeholders. ▪ Finally, an evening reception at the Ambassador's Residence (dependent on Covid mitigation requirements). We will invite other stakeholders that did not participate in the earlier session. These typically include those stakeholders that are influential but might not be directly related to the manufacturing sector.
Tuesday, October 18, 2022	▪ Travel to Batam. ▪ Site visit to manufacturing facilities in Batam Industrial Estate. Note: Participants may opt-out of the visit to Batam and travel directly to Singapore to participate in Industrial Transformation Asia-Pacific (ITAP).
Wednesday, October 19, 2022.	▪ Ferry from Batam to Singapore. ▪ Participate in Industrial Transformation Asia-Pacific (ITAP), Singapore.
Thursday, October 20, 2022	▪ Participate in Industrial Transformation Asia-Pacific (ITAP), Singapore. Note: Participants may travel to Tokyo, Japan for optional spin-off event.
Friday, October 21, 2022	▪ Return to U.S. from Singapore. Optional add-on: Full day event/matchmaking in Tokyo Japan.
Saturday, October 22, 2022	▪ Return to U.S. from Tokyo, Japan.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 10 and maximum of 15 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees And Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Executive Led Mission will be $3,500 for small or medium-sized enterprises (SME);[7] and $4,000 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $1,000. The participation fee for the optional spin-off to Tokyo Japan will be $950 for small firms, $2,300 for medium-sized firms; and $3,400 for large firms or trade associations. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*https://www.trade.gov/trade-missions-schedule*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than August 31, 2022. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after June 30, 2022, will be considered only if space and scheduling constraints permit. If the trade mission cannot be held due to the COVID–19 global pandemic, the event will be postponed to the September 2022 IAEA General Conference. ITA will notify participants by July 30, 2022, regarding a decision to postpone the event.

Contacts

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Women-in-Technology Focused Trade Mission (WTTM) to France, Netherlands, and Portugal, Dates: October 30–November 5, 2022

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an executive-led Women in Technology (Tech) Trade Mission (WTTM) to France, Netherlands, and Portugal from Sunday, October 30, 2022, to Saturday, November 5, 2022.

The recruitment for the WTTM will be a targeted focus on women-owned business and female executives of U.S. companies. However, recruitment and consideration will be given to all export-ready companies that meet the established criteria for participation in the mission. Trade mission activities will be designed to target the export assistance needs of American companies.

The focus of the WTTM is on the information and communication technology (ICT) sector and subsectors of cybersecurity, smart city infrastructure and technology solutions, artificial intelligence markets and cloud computing.

The delegation will be comprised of representatives with decision-making authority from U.S. companies, U.S. trade associations and national chambers of commerce representing businesses in the cited sectors, with an emphasis on recruiting and vetting women owned business and/or female executives of U.S. companies.

The mission will make three stops: Amsterdam, Netherlands; Lisbon, Portugal; and Paris, France. The purpose of the planned executive-led mission is to provide opportunities for U.S. companies, to access European regional markets and increase U.S. exports to the European Union (EU) by connecting U.S. firms and trade associations to pre-screened business prospects.

Proposed Timetable

* Note: The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

* Note: The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Sunday, October 30, 2022 ...	• Trade Mission Participants Arrive in Amsterdam, Netherlands and Check in their Hotel and for those that arrive on time attend a Hosted Welcome Reception.
Monday, October 31	• Morning Mission Briefing on Doing Business in Netherlands, B2B meetings, Networking Lunch with Government or Industry Speaker and Evening Networking Reception hosted by Consul General.
Tuesday, November 1	• Checkout of Hotel, Travel to Lisbon, Portugal. Arrive in Portugal. Check into Hotel. Briefing on Doing Business in Portugal and on the Web Summit. Lunch and B2B networking at the Web Summit. Evening networking event in conjunction with the Web Summit.
Wednesday, November 2	• Web Summit—Meetings and Networking Events.
Thursday, November 3	• Checkout of Hotel, Travel to Paris, France. Arrive in Paris. Check into Hotel. Briefing on Doing Business in France. B2B/B2G Meetings. Networking Event.
Friday, November 4	• B2B Meetings, Networking Lunch. B2G Meetings.
Saturday, November 5	• Checkout Hotel, Transfer to Airport, Mission Participants Leave France and Travel Home or to Spin-off. Mission is completed.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 15 and maximum of 20 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Women in Tech Trade Mission will be $4715 for small or medium-sized enterprises (SME);[1] and $7320 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $1000, with a limit of 2 additional representatives for each participating firm. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*https://www.trade.gov/trade-missions*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than September 1, 2022. The U.S. Department of Commerce will review applications and

inform applicants of selection decisions on a staggered basis. The Department of Commerce will evaluate applications and inform applicants of selection decisions three times during the recruitment period. All applications received subsequent to an evaluation date will be considered at the next evaluation. Deadlines for each round of evaluation are as follows:

- *First Evaluation:* July 1, 2022
- *Second Evaluation:* July 22, 2022
- *Finall Evaluation:* September 1, 2022

Applications received after September 1, 2022, will be considered only if space and scheduling constraints permit.

Contacts

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Middle East Aerospace and Defense Executive Led Trade Mission to Israel, Saudi Arabia, and Bahrain, Dates: November 6–11, 2022

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an Aerospace and Defense Trade Mission to the Middle East on November 6–11, 2022. This will be an Executive-led Mission at the Under Secretary or Deputy Under Secretary level. The purpose of the mission is to introduce U.S. companies to the aerospace and defense ecosystem in key Middle Eastern countries and assist delegate companies with finding business partners and exporting their products and services to the region. The mission will target approximately ten to fifteen U.S. companies and trade association representatives with members that provide products and services related to a broad range of best prospect aerospace and defense subsectors in these markets.

Mission delegates will have access to business development opportunities across Israel, Bahrain, and Saudi Arabia. Participating firms will gain market insight, make industry contacts, solidify business strategies, and advance specific projects, with the goal of increasing U.S. exports of products and services in the aerospace and defense sectors. The subsectors will depend on the nature of the market, potential demand, prospective government procurements, and other factors closer to the start of recruitment. A full list of potential subsectors can be found in the Executive Summary.

The mission will include customized one-on-one business appointments with pre-screened potential buyers, agents, distributors, and joint venture partners. It will also include meetings with central, state, and local government officials and industry leaders, as well as networking events. The mission will include stops in Israel, Saudi Arabia, and Bahrain and is purposefully scheduled to maximize synergies with the Bahrain Airshow, November 9–11, 2022, as well as the U.S.-Israel Defense Technology Expo being organized in early November in conjunction with ISDEF, Israel's largest international defense expo.

USG Objectives

- Maintain the United States' position as the partner of choice for defense and aerospace technologies.
- Signal the USG's commitment to key allies in the Middle East by connecting them with U.S. cutting-edge technologies.
- Provide alternative options to less reliable solutions being offered by Chinese and Russian competitors who are actively trying to displace U.S. suppliers and partners.

U.S. Exporter Objectives

- Capitalize on the billions of dollars being provided in Foreign Military Sales (FMS) and Foreign Military Financing (FMF) grants given to Israel ($3.3 billion FMF/$23.2 billion FMS active cases), Saudi Arabia ($126.6 billion FMS in active cases) and Bahrain ($6.08 billion FMS active cases) for the purchase of U.S. defense equipment, services and training.
- Establish new partnerships in some of the world's fastest growing tech hubs where some of the leading innovations in defense technologies are happening (artificial intelligence, cybersecurity and big data analytics).
- Build, execute and expand company exporting strategies in primary entry points into the Middle East that can eventually be replicated in neighboring markets.

Proposed Timetable

*Note: The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Sunday, November 6, 2022	• Trade Mission Participants Arrive in Israel. • No-host dinner.
Monday, November 7, 2022	• Israel Market Orientation Briefing. • Ministry and other Israeli Government Briefings and Meetings. • B2B Meetings. • Networking Reception.
Tuesday, November 8, 2022	• Additional B2B Meetings/Site Visits in Israel. • Fly to Saudi Arabia (layover in Turkey or UAE). • Networking Reception.
Wednesday, November 9, 2022	• KSA Market Orientation Briefing. • Ministry and other Saudi Government Briefings and Meetings. • B2B Meetings. • Fly to Bahrain (evening flight). • Welcome Dinner and Bahrain Market Orientation Briefing.

Thursday, November 10, 2022	• Ministry and other Bahraini Government Briefings and Meetings. • B2B Meetings. • Attend Bahrain Air Show. • Networking Reception.
Friday, November 11, 2022	• Additional B2B Meetings/Attend Air Show. • Trade Mission Participants Depart Manama Enroute to U.S.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. The mission will target a delegation of 15 firms, with a minimum of 10 to make the mission viable.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Middle East Aerospace and Defense Mission will be $6,800 for small or medium-sized enterprises (SME); [1] and $7,800 or large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $1,000. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://export.gov/trademissions*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than September 30, 2022. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after September 30, 2022, will be considered only if space and scheduling constraints permit.

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Clinical Waste Management Mission to Indonesia and Malaysia Dates: March 6–10, 2023

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an Executive-Led Clinical Waste Management Mission to Indonesia and Malaysia on March 6–10, 2023.

The Clinical Waste Management Mission will assistU.S. environmental technology and waste management sectorexportersandITA strategic partnersinexploring market opportunities into Southeast Asia. The new Mission will include matchmaking appointments, market briefings, policy-focused roundtables, and site visits to increase U.S. industry competitiveness and build relationships. Mission participants will gain firsthand knowledge of theselectedSoutheast Asianmarketsthrough business overviews and introductions to hospitals and clinical laboratories, government healthcareagencies, distributors,and others who could benefit from U.S.products and services.

Delegates will benefit from the guidance and insights of ITA's commercial teams working in the market. The mission will introduce U.S. firms to environmental and waste management stakeholders in Indonesia and Malaysia and assist U.S. companies in finding foreign business partners in order to export their products and services to Indonesia and Malaysia or to expand further their business in Indonesia and Malaysia.

The Clinical Waste Management Mission to Indonesia and Malaysia will includeU.S. environmental technologies in the following high potential areas:

- Decontamination Equipment
- Hazardous Waste Management Equipment
- Medical Waste Control

Proposed Timetable

* Note: The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Indonesia Day 1	• Trade Mission Participants Arrive.
Indonesia Day 2	• Full day in-person event in Jakarta. • The morning will consist of country briefing for delegation, meeting with Indonesian government agencies/ministries. • The afternoon will include a networking lunch and/or one-on-one sessions with the U.S. companies and with relevant Indonesian stakeholders or potential local partners. • Evening reception at the Ambassador's or Deputy Chief of Mission (DCM) Residence or at the hotel.
Indonesia Day 3	• Depart Indonesia. • Travel to Kuala Lumpur, Malaysia.
Malaysia Day 1	• Country briefing for delegation. • meeting with Malaysian government agencies/ministries.
Malaysia Day 2	• Full-day in-person event in Kuala Lumpur. • One-on-one sessions with relevant Malaysian stakeholders and potential local partners. • Evening reception at the Ambassador's or Deputy Chief of Mission (DCM) Residence or at the hotel.
Malaysia Day 3	• Depart Malaysia.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 10 and maximum of 14 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Executive Led Mission will be $5,100 for small or medium-sized enterprises (SME); [1] and $6,900 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $500. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://export.gov/trademissions*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than December 31, 2022. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after December 31, 2022, will be considered only if space and scheduling constraints permit.

Contacts

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Indonesia

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Francis Peters, Senior Commercial Officer, Kuala Lumpur, Malaysia, Ph: +60–3–2168–4869, *Francis.Peters@trade.gov*.

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Siau Wei Pung, Senior Commercial Specialist (Environmental Technology), Ph: +60–3–2168–5050 Ext: 5139, *SiauWei.Pung@trade.gov*.

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Middle East Clean Tech Executive Led Trade Mission to Saudi Arabia, the UAE and Israel, Dates: March 12–March 17, 2023

Summary

The United States Department of Commerce, International Trade Administration (ITA), is organizing an Executive-Led Clean Tech Business Development Mission to Saudi Arabia, the UAE, and Israel, with an optional stop in Qatar, in March 2023.

This mission will introduce U.S. companies and trade associations to the United States' largest trading partners and four of the largest economies in the Middle East, all of whose governments are investing heavily in Clean Tech to contribute to the global fight against climate change and to diversify and develop their economies. This mission will also offer an opportunity for participants to meet with key Saudi, Emirati, Israeli, and Qatari project decision makers while in the presence of a senior Commerce Executive—and such senior leader messaging is vital in a region where governments play such an important role in the economy. The mission will visit Riyadh, Saudi Arabia; Abu Dhabi & Dubai, UAE; and Tel Aviv and Jerusalem, Israel; with an optional stop also in Doha, Qatar. This will be the U.S. government's first-ever trade mission to travel between the Gulf and Israel. Participating firms will gain market insights, make industry contacts, solidify business strategies, and advance their own specific projects, all with the goal of increasing U.S. Clean Tech goods and service exports to the region.

This mission will include customized one-on-one business appointments with pre-screened potential buyers, agents, distributors, and joint venture partners. It will also allow for meetings with industry leaders as well as government officials, along with other networking events. Please note, the Department of Commerce Executive will only accompany the delegation to Saudi Arabia, the UAE, and Israel during the week of Sunday, March 12 to Friday, March 17, 2023.

Delegates will benefit from the guidance and insights of ITA's commercial teams working in these markets, opportunities to network with U.S. companies already doing business in the region, and customized, one-on-one business appointments with pre-screened prospective buyers, agents, distributors, and joint venture partners as well as with local government officials and industry leaders.

Proposed Timetable

* Note: The final schedule and potential site visits will depend on the availability of host government and business officials, specific goals of mission participants, and ground transportation.

Wednesday, March 8	OPTIONAL STOP—Doha, Qatar. • Mission Participants Arrive. • Welcome Briefing at Hotel.

Thursday, March 9	OPTIONAL STOP—Doha, Qatar. • Ministry and other Qatar Government Briefings and Meetings. • Networking Lunch (No-Host). • One-on-One business matchmaking appointments.
Friday, March 10	Travel to Riyadh, Saudi Arabia or down day.
Saturday, March 11	Travel to Riyadh, Saudi Arabia or down day. * All TM participants expected to arrive by Saturday, March 11.
Sunday, March 12	Full Day in Riyadh, Saudi Arabia. • Welcome and Saudi Arabia Country Briefing. • Ministry and other Saudi Government Briefings and meetings. • Networking Lunch Hosted by Chief of Mission. • One-on-One business matchmaking appointments. • Networking Reception at Hotel.
Monday, March 13	Morning in KSA, Travel to Dubai in Afternoon. • Morning B2B Meetings in Saudi Arabia. • Travel to Dubai, UAE. • Ministry and other Kuwait Government Briefings and Meetings. • One-on-One business matchmaking appointments. • Networking Reception at Consul General residence (TBC).
Tuesday, March 14	Full Day in UAE (Morning Dubai, Afternoon Abu Dhabi). • One-on-One business matchmaking appointments in Dubai. • Transfer to Abu Dhabi. • Ministry Meeting in Abu Dhabi. • Afternoon business matchmaking appointments. • Evening Networking Reception at Chief of Mission Residence.
Wednesday, March 15	Morning Abu Dhabi, Travel to Israel. • Morning flight from Abu Dhabi to Tel Aviv, Israel. • Welcome Lunch & Briefing at Hotel. • One-on-One business matchmaking appointments. • Evening Networking Event at Chief of Mission Residence.
Thursday, March 16	Full Day in Tel Aviv, Israel (Mission Ends at close of business). • Ministry and other Israeli Government Briefings and meetings. • Morning one-on-one business matchmaking appointments. • Lunch with Government Officials. • Afternoon one-on-one business matchmaking appointments. • Optional site visits.

Participation Requirements

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the DOC. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 15 and maximum of 20 firms and/or trade associations will be selected to participate in the mission from the applicant pool.

Fees and Expenses

After a firm or trade association has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee for the Digital Transformation Business Development Mission will be $6,800 for small or medium-sized enterprises (SME);[1] and $7,400 for large firms or trade associations. The fee for each additional firm representative (large firm or SME/trade organization) is $1,000. The participation fee for the optional spin-off to the UAE will be $2,300 for small or medium-sized enterprises (SME);[2] and $3600 for large firms or trade associations. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Interpreter and driver services can be arranged for additional cost. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms.

Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*https://www.trade.gov/trade-missions*) and other internet websites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than January 13, 2023. The U.S. Department of Commerce will review applications and inform applicants of selection decisions on a rolling basis. Applications received after January 13, 2023, will be considered only if space and scheduling constraints permit.

Contacts

Mike Calvert, Deputy Senior Commercial Officer, U.S. Embassy Israel, U.S. Commercial Service, International Trade Administration | U.S. Department of Commerce, Mobile: +972 3–519–8509, *Mike.Calvert@trade.gov*.

Jim Cramer, Deputy Director, Office of the Middle East, U.S. Department of Commerce, Washington DC, Tel: 202–790–7342, *James.Cramer@trade.gov*.

Drew Pederson, Desk Officer for UAE, Qatar, Kuwait and Oman, International Trade Administration, U.S. Department of Commerce, Tel: 202–569–7479.

Dated: March 14, 2022.

Gemal Brangman,

Director, ITA Events Management Task Force.

[FR Doc. 2022–05708 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB844]

Pacific Island Fisheries; Experimental Fishing Permit

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

ACTION: Notice; issuance of permit.

SUMMARY: NMFS is issuing an experimental fishing permit (EFP) to the Hawaii Longline Association (HLA) to evaluate the risk of seabird interactions in the Hawaii shallow-set longline fishery when setting fishing gear one hour before and one hour after local sunset and using tori lines instead of required blue-dyed bait and strategic offal discharge as seabird mitigation measures. The intent of the EFP is to conduct a preliminary evaluation of potential alternative effective methods of discouraging seabird interactions while providing operational flexibility during setting in the shallow-set longline fishery.

DATES: The EFP is authorized from March 24, 2022, through September 24, 2023.

ADDRESSES: Copies of the EFP, HLA's application, and supporting documents are available at *https://www.regulations.gov/docket/NOAA-NMFS-2021-0128*.

FOR FURTHER INFORMATION CONTACT: Heather Cronin, Sustainable Fisheries, NMFS Pacific Islands Regional Office, tel (808) 725–5179.

SUPPLEMENTARY INFORMATION: NMFS is issuing an EFP to the HLA under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific, and regulations at 50 CFR 665.17. Under the EFP, HLA will conduct a pilot test of tori lines (bird scaring streamers) as replacement seabird mitigation measures to discourage seabird interactions during setting in the Hawaii shallow-set longline fishery. The purpose of the experiment is to test new ways to mitigate seabird interactions that also increase operational flexibility during setting. HLA will use one vessel to test tori lines as an alternate seabird mitigation measure to currently required blue-dyed bait, strategic offal discharge, and night setting measures (50 CFR 665.815(a)(2) & (4)).

On December 15, 2021, NMFS published a notice of HLA's EFP application and request for public comments (86 FR 71234). NMFS received comments from 2 individuals and considered those comments before making a final decision to issue the EFP. One commenter expressed support for any strategy or technology that reduces interactions with seabirds. The other expressed opposition to the EFP stating, ''it will wipe out stocks and jeopardize the [sic] continued existence of these stocks . . . .'' NMFS expects that fishing under the EFP will have similar environmental impacts on seabirds as well as target fish species, non-target fish species, and non-seabird protected species as conventional shallow-set longline fishing. The project is limited in scale (only 3 vessels, setting a combined total of 80 sets with no more than one vessel operating at any given time), proposes a minor change in fishing operations that does not have the potential to change the overall effects of the fishery, and will be effective for no longer than 18 months. All other requirements would continue, including seabird mitigation measures such as strategic offal discharge during hauling and safe handling practices.

In addition, gear configurations and operations under the EFP would be compliant with international seabird mitigation requirements under the Western and Central Pacific Fisheries Commission and the Inter-American Tropical Tuna Commission. More information about the EFP may be found in the December 15, 2021 notice, and in HLA's EFP application (see **ADDRESSES**).

The EFP is effective March 24, 2022, through September 24, 2023, unless revoked, suspended, or modified earlier.

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

Dated: March 15, 2022.

Ngagne Jafnar Gueye,

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

[FR Doc. 2022–05768 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB873]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice of availability and request for comments; announcement of public meeting.

SUMMARY: The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) have received separate incidental take permit (ITP) applications from the Oregon Department of Forestry (ODF), associated with the Western Oregon State Forests habitat conservation plan (HCP). The HCP has been submitted pursuant to the Endangered Species Act of 1973, as amended (ESA). In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), NMFS announces the availability of a draft environmental impact statement (Draft EIS). NMFS is the lead Federal agency under NEPA, and FWS is a cooperating agency. The Draft EIS analyzes the potential effects of issuance of the ITPs and approval of the HCP. If granted, the ITPs would authorize incidental take of the covered species resulting from the covered activities (see **SUPPLEMENTARY INFORMATION**), as well as take resulting from activities carried out as part of the HCP's conservation strategy.

DATES: Written comments must be received by May 17, 2022. Any comments received after the closing date may not be considered in the final decision on these actions. NMFS will host a virtual public meeting on April 6, 2022, from 1 to 3 p.m. Pacific Time. Oral comments will be accepted at the public meeting with advance registration.

ADDRESSES: You may submit comments in two ways:

Written Comments: Written comments on the Draft EIS and HCP submitted with the ITP applications will be accepted via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2021–0019 in the Search Box. Follow instructions for submitting comments on Docket NOAA–NMFS–2021–0019. Please specify in your comments whether the comments provided pertain to the Draft EIS or the HCP. When commenting, please refer to the specific section and/or page number in the subject of your comment.

Instructions: Written comments to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on *https://www.regulations.gov.* All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous

comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Oral Comments during the Public Meeting: NMFS will host a virtual public meeting on April 6, 2022, from 1 to 3 p.m. Pacific Time. NMFS will begin the public meeting by presenting information about the project and the process, and will accept oral comments during the remainder of the meeting. Oral comments received during the public meeting will be recorded, and the transcript uploaded to *https://www.regulations.gov.* The link to the virtual meeting and instructions for registering to provide oral comments are posted at *https://www.fisheries.noaa.gov/action/western-oregon-state-forests-habitat-conservation-plan.* Persons needing reasonable accommodations to participate in the public meetings should contact Michelle McMullin by telephone at (541) 957–3378 or by email at *michelle.mcmullin@noaa.gov* as soon as possible. To allow sufficient time for processing requests, please submit reasonable accommodation requests no later than one week before the public meeting. Information regarding this proposed action is available in alternative formats upon request.

Obtaining Documents for Review: The Draft EIS and HCP are available for review online at *https://www.fisheries.noaa.gov/action/western-oregon-state-forests-habitat-conservation-plan* and are also available on *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michelle McMullin, NMFS, 541–957–3378, *Michelle.Mcmullin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

ESA-Listed Species Covered in This Notice

Species covered by NMFS:

- Coho salmon (*Oncorhynchus kisutch*): Threatened Oregon Coast Evolutionarily Significant Unit (ESU), Threatened Southern Oregon/Northern California Coast ESU, Threatened Lower Columbia River ESU
- Chinook salmon (*Oncorhynchus tshawytscha*): Threatened Upper Willamette River ESU, Threatened Lower Columbia River ESU
- Chum salmon (*Oncorhynchus keta*): Threatened Columbia River ESU
- Steelhead (*Oncorhynchus mykiss*): Threatened Upper Willamette River Distinct Population Segment (DPS)
- Eulachon (*Thaleichthys pacificus*): Threatened Southern DPS.

Species covered by FWS:

- Northern spotted owl (*Strix occidentalis*): Threatened
- Marbled murrelet (*Brachyramphus marmoratus*): Threatened
- Coastal marten (*Martes caurina*): Threatened Coastal DPS.

Non-ESA-Listed Species Included in the HCP

- Oregon Coast spring Chinook (*Oncorhynchus tshawytscha*)
- Southern Oregon/Northern California Coast spring Chinook (*Oncorhynchus tshawytscha*)
- Oregon slender salamander (*Batrachoseps wrighti*)
- Columbia torrent salamander (*Rhyacotriton kezeri*)
- Cascade torrent salamander (*Rhyacotriton cascadae*)
- Red tree vole (*Arborimus longicaudus*).

Background

Section 9 of the ESA and Federal regulations prohibit the taking of a species listed as endangered or threatened. The ESA defines ''take'' to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS and FWS may issue permits, under limited circumstances, to take listed species incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA and implementing regulations (50 CFR 222.307 for NMFS and 50 CFR 17.22(b) and 17.32(b) for FWS) provide for authorizing incidental take of listed species.

NMFS and FWS received separate ITP applications from ODF on February 9, 2022, pursuant to the ESA, as amended (ESA; 16 U.S.C. 1531 *et seq.*). ODF prepared the HCP in support of both ITP applications and is seeking authorization from NMFS and FWS (together, the Services) for incidental take of the species described above.

The ITPs, if issued, would authorize take of the covered species that may occur incidental to ODF's forest and recreation management activities (the covered activities). These activities include timber harvest; reforestation and young stand management; road system management activities; construction and maintenance of quarries, borrow sites, and stockpile sites; fire management; recreation infrastructure construction and maintenance; and implementation of the HCP's conservation strategy. A non-listed species that may become listed during the term of the proposed permit can be included in an HCP and ITP; take coverage would become effective if and when the species is listed.

The HCP specifies the impacts that will likely result from the taking of covered species and describes the steps that ODF will take to minimize and mitigate such impacts. The HCP also describes the covered species' life history and ecology, as well as biological goals and objectives of the HCP, adaptive management, monitoring, and funding assurances.

The proposed issuance of the ITP is considered a Federal action under NEPA, and NMFS determined that preparation of an EIS to analyze the potential impacts on the human (biological, physical, social, and economic) environment caused by the implementation of the HCP was appropriate. The Draft EIS was prepared by NMFS in accordance with the requirements of NEPA (42 U.S.C. 4321 *et seq.*), with input from FWS as a cooperating agency. NMFS analyzed five alternatives in detail in the Draft EIS, including the issuance of the ITPs and implementation of the HCP, a no action alternative, and three action alternatives. All alternatives include the forest and recreation management activities listed above. The HCP includes a conservation strategy that ODF would implement to achieve the biological goals and objectives for the covered species and to avoid, minimize, and mitigate impacts of take on listed species. Under the no action alternative, current management practices would continue to guide the management of ODF lands, and ODF would continue to conduct these activities in the absence of the HCP. The action alternatives include Alternative 3, which modifies the proposed action's conservation strategy to increase conservation, Alternative 4, which has a shorter permit term than the proposed action, and Alternative 5, which modifies the proposed action's conservation strategy to increase timber harvest.

The Services are seeking public input on the NEPA analysis in the Draft EIS, including the associated impacts of any reasonable alternatives, as well as comments on the HCP submitted with the ITP applications. We specifically request information on the following:

1. Biological information, analysis, and relevant data concerning the covered species, other wildlife, and ecosystems.

2. Potential effects that the proposed permit actions could have on the covered species, and other endangered or threatened species, and their habitats, including the interaction of the effects of the project with climate change and other stressors.

3. Adequacy of the proposed actions to minimize and mitigate the impact of the taking on covered species.

4. Potential effects that the proposed permit actions could have on other aspects of the human environment, including effects on plants and animals; water resources; and aesthetic, historic, cultural, economic, social, environmental justice, climate change, or health.

5. The alternatives, information, and analyses submitted during the public scoping period.

6. The alternatives analysis, including the range of alternatives analyzed and the alternatives considered but not analyzed in detail.

7. Relevant reasonably foreseeable environmental trends and planned actions and their possible impacts on the affected environment, including the covered species, as well as any closely related connected actions.

8. Other information relevant to the HCP and its impacts on the human environment.

The Services will each make their permit decisions based on the statutory and regulatory criteria of the ESA. Their decisions will also be informed by the data, analyses, and findings in the EIS and public comments received on the Draft EIS and HCP. The Services will each document their determinations independently in an ESA section 10 findings document, ESA Section 7 biological opinion, and NEPA Record of Decision developed at the conclusion of the ESA and NEPA compliance processes. If the Services find that all requirements for issuance of the ITPs are met, they will issue the requested permits, subject to terms and conditions deemed necessary or appropriate to carry out the purposes of ESA section 10.

Additional Information: NMFS, as the lead Federal agency, has chosen to use the NEPA substitution process to fulfill obligations under the National Historic Preservation Act of 1966, as amended (NHPA). While obligations under NHPA and NEPA are independent, the regulations implementing NHPA allow for the use of NEPA review to substitute for various aspects of the NHPA section 106 (16 U.S.C. 470f) review to improve efficiency, promote transparency and accountability, and support a broadened discussion of potential effects that a project may have on the human environment (36 CFR 800.3 through 800.6). During preparation of the EIS, NMFS will ensure that the NEPA substitution process will meet any NHPA obligations.

Authority: Section 10(c) of the ESA and its implementing regulations (50 CFR 222.307, 50 CFR 17.22, and 50 CFR 17.32) and NEPA and its implementing regulations (40 CFR 1503.1 and 40 CFR 1506.6).

Dated: March 14, 2022.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–05714 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB767]

Notice of Availability of the Deepwater Horizon Oil Spill Louisiana Trustee Implementation Group Draft Restoration Plan/Environmental Assessment #8: Wetlands, Coastal, and Nearshore Habitats

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

ACTION: Notice of availability; request for comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act (NEPA), and a Consent Decree with BP Exploration & Production Inc. (BP), the *Deepwater Horizon* (DWH) Federal natural resource trustee agencies for the Louisiana Trustee Implementation Group (Louisiana TIG) have prepared a Draft Restoration Plan/Environmental Assessment #8: Wetlands, Coastal, and Nearshore Habitats (RP/EA #8). The Draft RP/EA #8 describes and proposes restoration project alternatives considered by the Louisiana TIG to partially restore natural resources and ecological services injured or lost as a result of the DWH oil spill. The Louisiana TIG evaluated these alternatives under criteria set forth in the OPA natural resource damage assessment (NRDA) regulations, and evaluated the environmental consequences of the restoration alternatives in accordance with NEPA. The purpose of this notice is to inform the public of the availability of the Draft RP/EA #8 and to seek public comments on the document.

DATES: The Louisiana TIG will consider public comments received on or before April 18, 2022.

Virtual Public Meeting: Due to continuing Covid–19 limitations on gatherings of groups, the Louisiana TIG will conduct a public webinar to facilitate public review and comment on Tuesday, April 5, 2022 at 12:00 p.m. Central. The public may register for the webinar at: *https://attendee.gotowebinar.com/register/4964211858097860364.* After registering, participants will receive a confirmation email with instructions for joining the public webinar. The webinar will include a presentation of the Draft RP/EA #8 and opportunity for public comment. The presentation slides will be posted on the web shortly after the public meeting is completed. Comments will also be taken through submission online or through U.S. mail (see *Submitting Comments* below).

ADDRESSES:

Obtaining Documents: You may access the Draft RP/EA #8 from the ''News'' section of the Louisiana TIG website at: *http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana.* Alternatively, you may request a CD of the Draft RP/EA #8 (see **FOR FURTHER INFORMATION CONTACT** below).

Submitting Comments: You may submit comments on the Draft RP/EA #8 by one of the following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana;*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 29649, Atlanta, GA 30345. Please note that mailed comments must be postmarked on or before the comment deadline given in **DATES**; or
- *During the public webinar:* Comments may be provided during the webinar. Webinar information is provided above in **DATES**.

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: Mel Landry, NOAA Restoration Center, 310–427–8711, *gulfspill.restoration@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo

prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The DWH oil spill is the largest off shore oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over one million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The DWH Federal and State natural resource trustees (DWH Trustees) conducted the natural resource damage assessment for the DWH oil spill under OPA (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete.

The DWH Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

The Trustees reached and finalized a settlement of their natural resource damage claims with BP in an April 4, 2016, Consent Decree approved by the United States District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in the Louisiana Restoration Area are now selected and implemented by the Louisiana TIG. The Louisiana TIG is composed of the following Federal Trustees: NOAA; DOI; EPA; and USDA.

Background

The Draft RP/EA #8 is being released in accordance with OPA NRDA regulations at 15 CFR part 990, NEPA (42 U.S.C. 4321 *et seq.*), the Consent Decree, and the Final Programmatic Damage Assessment Restoration Plan/Programmatic Environmental Impact Statement (PDARP/PEIS), which provided for an overall goal of ''Restore and Conserve Habitat.'' This restoration planning activity is proceeding in accordance with the PDARP/PEIS, which provided for various types of restoration, including restoration of wetlands, coastal, and nearshore habitat. Information on the Restoration Type being considered in the Draft RP/EA #8, as well as the OPA criteria against which project ideas are being evaluated, can be viewed in the PDARP/PEIS (*http://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan*) and in the Overview of the PDARP/PEIS (*http://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan*).

Overview of the Louisiana TIG Draft RP/EA #8

For the Draft RP/EA #8, the Louisiana TIG assembled a list of 697 project alternatives for the restoration of wetlands, coastal, and nearshore habitat. These alternatives were based on proposals from the public as well as agencies, including projects submitted to the DWH Trustee or Louisiana TIG portals and projects submitted by individual state and Federal Trustees, including projects submitted on behalf of non-Trustee agencies. All alternatives underwent a step-wise screening process based on criteria established by OPA and the Louisiana TIG, whereby projects that did not meet the criteria were eliminated, and duplicative alternatives were combined. This resulted in six action alternatives for wetlands, coastal, and nearshore habitats, each of which are evaluated in the Draft RP/EA #8. Alternatives that meet the criteria but are not carried forward as preferred alternatives may be considered in future restoration plans.

Of the six alternatives evaluated, four are proposed as preferred alternatives for the restoration of wetlands, coastal, and nearshore habitats. Three of the alternatives evaluated consider projects for Engineering and Design (E&D), and three of the alternatives evaluated consider projects for full implementation. The alternatives analyzed include the following:

- Bayou Pointe-aux-Chenes Ridge Restoration and Marsh Creation (E&D)—Non-preferred, $4,736,900.
- New Orleans East Landbridge Restoration (E&D): Preferred, $4,000,000.
- Raccoon Island Barrier Island Restoration (E&D): Preferred, $8,200,000.
- Bayou Dularge Ridge and Marsh Restoration: Preferred, $41,400,000.
- Bayou La Loutre Ridge Restoration and Marsh Creation Project (PO–0178): Preferred, $21,200,000.
- Lake Lery Marsh Creation and Rim Restoration, Increment 3: Non-preferred, $19,420,000.

The Draft RP/EA #8 also evaluates a No Action Alternative, under which no project would be constructed and no additional costs would be incurred at this time.

The Louisiana TIG has examined the injuries assessed by the DWH Trustees and evaluated restoration alternatives to address the injuries. In Draft RP/EA #8, the Louisiana TIG presents to the public its draft plan for providing partial compensation to the public for injured natural resources and ecological services in the Louisiana Restoration Area. The proposed action is intended to continue the process of using DWH restoration funding to restore natural resources injured or lost as a result of the DWH oil spill. Additional restoration planning for the Louisiana Restoration Area will continue.

Next Steps

The public is encouraged to review and comment on the Draft RP/EA #8. A public webinar to facilitate the public review and comment process is scheduled for Tuesday, April 5 at 12:00 p.m. Central. After the public comment period ends, the Louisiana TIG will consider and address comments received before issuing a Final RP/EA #8. A summary of comments received and the Louisiana TIG's responses and any revisions to the document, as appropriate, will be included in the final document.

Additional Access to Materials

You may request a CD of the Draft RP/EA #8 (see **FOR FURTHER INFORMATION CONTACT** above). Copies of the Draft RP/EA #8 are also available during the public comment period at the following locations:

Library	Address	City	Zip code
St. Tammany Parish Library	310 W. 21st Avenue	Covington	70433
New Orleans Public Library, Louisiana Division	219 Loyola Avenue	New Orleans	70112
St. Bernard Parish Library	1125 E. St. Bernard Highway	Chalmette	70043
Plaquemines Parish Library	8442 Highway 23	Belle Chasse	70037
Jefferson Parish Library, East Bank Regional Library.	4747 W. Napoleon Avenue	Metairie	70001
Jefferson Parish Library, West Bank Regional Library.	2751 Manhattan Boulevard	Harvey	70058
Terrebonne Parish Library	151 Library Drive	Houma	70360
Martha Sowell Utley Memorial Library	314 St. Mary Street	Thibodaux	70301
South Lafourche Public Library	16241 E. Main Street	Cut Off	70345
East Baton Rouge Parish Library	7711 Goodwood Boulevard	Baton Rouge	70806
Alex P. Allain Library	206 Iberia Street	Franklin	70538
St. Martin Parish Library	201 Porter Street	St. Martinville	70582
Iberia Parish Library	445 E. Main Street	New Iberia	70560
Vermilion Parish Library	405 E. St. Victor Street	Abbeville	70510
Mark Shirley, LSU AgCenter	1105 West Port Street	Abbeville	70510
Calcasieu Parish Public Library Central Branch	301 W. Claude Street	Lake Charles	70605

Translation Opportunities

Vietnamese translated materials including the Executing Summary and project fact sheets are posted in the ''News'' section of the Louisiana TIG's website: *http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana.*

Administrative Record

The documents comprising the Administrative Record for the Draft RP/EA #8 can be viewed electronically at *http://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority of this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*) and its implementing Oil Pollution Act Natural Resource Damage Assessment regulations found at 15 CFR part 990 and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Dated: March 11, 2022.

Carrie Diane Robinson,

Director, Office of Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 2022–05553 Filed 3–17–22; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB799]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ferry Berth Improvements in Tongass Narrows in Ketchikan, Alaska

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the Alaska Department of Transportation and Public Facilities (ADOT) to incidentally harass, by Level A harassment and Level B harassment only, marine mammals during construction activities associated with construction of four ferry berth facilities in Tongass Narrows in Ketchikan, Alaska.

DATES: This authorization is effective from March 5, 2022 through March 4, 2023.

FOR FURTHER INFORMATION CONTACT: Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as

''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On August 19, 2021, NMFS received a request from the ADOT for an IHA to take marine mammals incidental to the construction of two ferry berth facilities in Tongass Narrows in Ketchikan, Alaska: The Gravina Airport Ferry Layup Facility and the Gravina Freight Facility. On December 17, 2021 we received a revised request that included additional work components associated with the Revilla New Ferry Berth and Upland Improvements and the New Gravina Island Shuttle Ferry Berth and Related Terminal Improvements in the same region. The application was deemed adequate and complete on January 4, 2022. ADOT's request is for take of a small number of eight species of marine mammals, by Level B harassment and Level A harassment. Of those eight species, five (Steller sea lion (*Eumetopias jubatus*), harbor seal (*Phoca vitulina richardii*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*) and minke whale (*Balaenoptera acutorostrata*)) may also be taken by Level A harassment. Neither ADOT nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued two consecutive IHAs and a Renewal IHA to ADOT for this work (85 FR 673, January 7, 2020; 86 FR 23938, May 05, 2021). ADOT complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Description of Marine Mammals in the Area of Specified Activities and Marine Mammal Occurrence and Take Calculation and Estimation sections. An IHA for the first phase of construction of the Ketchikan-Gravina Access Project was issued to ADOT on December 20, 2019 (85 FR 673, January 7, 2020). Complete construction of two of those components, the Revilla New Ferry Berth and Upland Improvements and Gravina Island Shuttle Ferry Berth Facility/Related Terminal Improvements, did not occur within the timeframe authorized by the Phase 1 IHA and will not be finished before the expiration of the subsequent one-year renewal (86 FR 23938, May 05, 2021). Therefore, ADOT requested a new IHA for incidental take associated with the continued marine construction of these facilities.

Description of the Specified Activity

ADOT is making improvements to existing ferry berths and constructing new ferry berths on Gravina Island and Revillagigedo (Revilla) Island in Tongass Narrows, near Ketchikan in southeast Alaska (Figure 1 of proposed IHA; 87 FR 5980; February 2, 2022). These ferry facilities provide the only public access between the city of Ketchikan, AK on Revilla Island, and the Ketchikan International Airport on Gravina Island. The project's planned activities that have the potential to take marine mammals, by Level A harassment and Level B harassment, include vibratory and impact pile driving, down-the-hole (DTH) operations for pile installation (rock socketing of piles and tension anchors to secure piles), and vibratory pile removal. The marine construction associated with the activities is planned to occur over 91 non-consecutive days over one year beginning March 2022.

A detailed description of the planned construction project is provided in the **Federal Register** notice for the proposed IHA (87 FR 5980; February 2, 2022). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to ADOT was published in the **Federal Register** on February 2, 2022 (87 FR 5980). That notice described, in detail, ADOT's activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS did not receive any public comments.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa .gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa .gov/find-species*).

Table 1 lists all species or stocks for which take is expected and proposed to be authorized for this specified activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2021). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Alaska SARs (*e.g.,* Muto *et al.* 2021). All values presented in Table 1 are the most recent available at the time of publication and are available in the draft 2021 SARs (Muto *et al.* 2021; available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

TABLE 1—MARINE MAMMAL SPECIES OR STOCKS FOR WHICH TAKE IS EXPECTED AND AUTHORIZED

Common name	Scientific name	MMPA stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance Nbest, (CV; N_{min}; most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidae:						
Humpback whale	*Megaptera novaeangliae*	Central North Pacific	E, D, Y	10,103 (0.3; 7,890; 2006)	83	26
Minke whale	*Balaenoptera acutorostrata*	Alaska	-, N	N.A. (See SAR; N.A.; see SAR).	UND	0
Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale	*Orcinus orca*	Alaska Resident	-, N	2,347 (N.A.; 2,347; 2012)	24	1
		West Coast Transient	-, N	349 (N.A, 349; 2018)	3.5	*0.4
		Northern Resident	-, N	302 (N.A.; 302; 2018	2.2	0.2
Pacific white-sided dolphin	*Lagenorhynchus obliquidens*	North Pacific	-,-; N	26,880 (N.A.; N.A.; 1990)	UND	0
Family Phocoenidae:						
Harbor porpoise	*Phocoena phocoena*	Southeast Alaska	-, Y	See SAR (see SAR; see SAR; 2012).	See SAR	34
Dall's porpoise	*Phocoenoides dalli*	Alaska	-, N	See SAR (see SAR; see SAR; 2015).	See SAR	37
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller sea lion	*Eumetopias jubatus*	Eastern U.S.	-,-, N	43,201 (see SAR; 43,201; 2017).	2,592	112
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina richardii*	Clarence Strait	-, N	27,659 (See SAE; 24,854; 2015).	746	40

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable (N.A.).

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury (M/SI) from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

All species that could potentially occur in the project area are included in Table 3–1 of ADOT's IHA application. However, the spatial occurrence of gray whale and fin whale is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Gray whales have not been reported by any local experts or recorded in monitoring reports and it would be extremely unlikely for a gray whale to enter Tongass Narrows or the small portions of Revillagigedo Channel this project will impact. Similarly for fin whale, sightings have not been reported and it would be unlikely for a fin whale to enter the project area as they are generally associated with deeper, more offshore waters. The eight species (with 10 managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have authorized it.

A detailed description of the of the species likely to be affected by ADOT's project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (87 FR 5980; February 2, 2022); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.* 2006; Kastelein *et al.* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Eight marine mammal species (six cetacean and two pinniped (one otariid and one phocid) species) have the reasonable potential to co-occur with the planned activities. Please refer to Table 1. Of the cetacean species that may be present, two are classified as low-frequency cetaceans (*i.e.,* all mysticete species), two are classified as mid-frequency cetaceans (*i.e.,* all delphinid and ziphiid species and the sperm whale), and two are classified as high-frequency cetaceans (*i.e.,* harbor porpoise, Dall's porpoise and *Kogia spp.*).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the ADOT's activities have the potential to result in take of marine mammals by Level B harassment and Level A harassment in the vicinity of the survey area. The notice of proposed IHA (87 FR 5980; February 2, 2022) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from ADOT's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA and is not repeated here; please refer to the notice of the proposed IHA (87 FR 5980; February 2, 2022).

The Estimated Take section in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Mitigation Measures section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks. We also provided additional description of sound sources in our notice of proposed IHA (87 FR 5980; February 2, 2022).

Estimated Take

This section provides an estimate of the number of incidental takes authorized through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes will primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile driving and DTH) have the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for mysticetes, high frequency species and phocids because predicted auditory injury zones are larger than for mid-frequency species and otariids. Auditory injury is unlikely to occur to mid-frequency species and otariids. The required mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable.

As described previously, no mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and

can be difficult to predict (Southall *et al.* 2007, Ellison *et al.* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 microPascal (μPa) (root mean square (rms)) for continuous (*e.g.,* vibratory pile-driving, DTH) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. This take estimation includes disruption of behavioral patterns resulting directly in response to noise exposure (*e.g.,* avoidance), as well as that resulting indirectly from associated impacts such as TTS or masking. ADOT's planned activity includes the use of continuous (vibratory pile driving/removal and DTH) and impulsive (impact pile driving and DTH) sources, and therefore both the 120 and 160 dB re 1 μPa (rms) thresholds are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). ADOT's planned activity includes the use of impulsive (impact pile driving and DTH) and non-impulsive (vibratory pile driving/removal and DTH) sources.

These thresholds are provided in Table 3 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile driving, vibratory pile removal, and DTH).

In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for the methods and piles being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels for the various pile types, sizes and methods (Table 4). Note that piles of differing sizes have different sound source levels (SSLs).

Empirical data from recent ADOT sound source verification (SSV) studies at Ketchikan were used to estimate SSLs for vibratory and impact driving of 30-inch steel pipe piles (Denes *et al.* 2016). Data from Ketchikan was used because of its proximity to this project in Tongass Narrows. However, the use of data from Alaska sites was not appropriate in all instances. Details are described below.

For vibratory driving of 24-inch steel piles, data from a Navy pile driving project in the Puget Sound, WA was reviewed (Navy 2015). From this review, ADOT determined the Navy's suggested source value of 161 decibels (dB) root mean squared (rms) was an appropriate proxy source value, and NMFS concurs. Because the source value of smaller piles of the same general type (steel in this case) are not expected to exceed a larger pile, the same 161 dB rms source value was used for 20-inch steel piles. This assumption conforms with source values presented in Navy (2015) for a project using 16-inch steel piles at Naval Base Kitsap in Bangor, WA.

ADOT used source values of 177 dB sound exposure level (SEL) and 190 dB rms for impact driving of 24-inch and 20-inch steel piles. These values were determined based on summary values presented in Caltrans (2015) for impact driving of 24-inch steel piles. NMFS concurs that the same source value was an acceptable proxy for impact driving of 20-inch steel piles.

Sound pressure levels in the water column resulting from DTH are not well studied. Because DTH hole creation includes both impulsive and continuous components, NMFS guidance currently recommends that it be treated as a continuous sound for Level B calculations and as an impulsive sound for Level A calculations (Table 10). In the absence of data specific to different hole sizes, current NMFS guidance

recommends that calculation of Level B zones for DTH use the same continuous SSL of 167 dB SEL for all hole sizes (Heyvaert and Reyff 2021).

Recommended SSLs for 30-inch and 24-inch holes as well as 8-inch holes for tension anchors and micropiles for use in the calculation of Level A harassment thresholds are provided by current NMFS guidance and in Table 4.

TABLE 4—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY AND IMPACT PILE INSTALLATION, DTH, AND VIBRATORY PILE REMOVAL

Method and pile type	SSL at 10 m		Literature source
Vibratory hammer	dB rms		
30-inch steel piles	162		Denes *et al.* 2016.
24-inch steel piles	161		Navy 2015.
20-inch steel piles	161		Navy 2015.
DTH of rock sockets and tension anchors.	dB rms		
All pile diameters	167		Heyvaert and Reyff 2021.
DTH of rock sockets and tension anchors.	dB SELss	dB peak	
30-inch rock socket	164	194	Reyff and Heyvaert 2019; Reyff 2020; Denes *et al.* 2016.
24-inch rock socket	159	184	Heyvaert and Reyff 2021.
8-inch tension anchor/micropile	144	170	Reyff 2020.

Impact Hammer	dB rms	dB SEL	dB peak	
30-inch steel piles	195	181	209	Denes *et al.* 2016.
24-inch steel piles	190	177	203	Caltrans 2015.
20-inch steel piles	190	177	202	Caltrans 2015.

Note: It is assumed that noise levels during pile installation and removal are similar. SEL = sound exposure level; dB peak = peak sound level; rms = root mean square.

Simultaneous use of two impact, vibratory, or DTH hammers, or any combination of those equipment, could occur. Such occurrences are anticipated to be infrequent, will be for short durations on any given day, and ADOT anticipates that no more than two hammers will be operated concurrently. Simultaneous use of two hammers or DTH systems could occur at the same project site, or at two different, but nearby project sites. Simultaneous use of hammers could result in increased SPLs and harassment zone sizes given the proximity of the component driving sites and the physical rules of decibel addition. ADOT anticipates that concurrent use of two hammers producing continuous noise could occur on 44 days, which is half the anticipated number of days of construction (91 days) and represents complete overlap between the two contracts and/or represents use of two hammers by a single contractor. Although it is unlikely that overlap will be complete, ADOT anticipates, and NMFS concurs, this scenario represents the potential worst case scenario, given that a more accurate estimate is not possible, and concurrent operation of hammers will be incidental. Given that the use of more than one hammer for pile installation on the same day (whether simultaneous or not) will increase the number of piles installed per day, this is anticipated to result in a reduction of the total number of days of pile installation. Table 5 shows how potential scenarios would reduce the total number of pile driving days and weeks. However, as described in the *Marine Mammal Occurrence and Take Calculation and Estimation* section below, ADOT has conservatively calculated take with the assumption that pile driving will occur on all 91 days.

TABLE 5—CALCULATED REDUCTION OF PILE DRIVING DAYS BASED ON PERCENTAGE OF PROJECT DAYS WITH TWO HAMMERS IN USE

Percent overlap	Days of overlap	Days of work completed during overlap (2 hammers)	Remaining days of work with single hammer	Total number of days of work	Weeks of work
0	0.0	0.0	91.0	91.0	15.2
10	9.1	18.2	72.8	81.9	13.7
20	18.2	36.4	54.6	72.8	12.1
30	27.3	54.6	36.4	63.7	10.6

TABLE 5—CALCULATED REDUCTION OF PILE DRIVING DAYS BASED ON PERCENTAGE OF PROJECT DAYS WITH TWO HAMMERS IN USE—Continued

Percent overlap	Days of overlap	Days of work completed during overlap (2 hammers)	Remaining days of work with single hammer	Total number of days of work	Weeks of work
40	36.4	72.8	18.2	54.6	9.1
50	45.5	91.0	0.0	45.5	7.6

NMFS (2018b) handles overlapping sound fields created by the use of more than one hammer differently for impulsive (impact hammer and Level A harassment zones for drilling with a DTH hammer) and continuous sound sources (vibratory hammer and Level B harassment zones for drilling with a DTH hammer; Table 6) and differently for impulsive sources with rapid impulse rates of multiple strikes per second (DTH) and slow impulse rates (impact hammering) (NMFS 2021). It is unlikely that the two impact hammers will strike at the same instant, and therefore, the SPLs will not be adjusted regardless of the distance between impact hammers. In this case, each impact hammer will be considered to have its own independent Level A harassment and Level B harassment zones.

When two DTH hammers operate simultaneously their continuous sound components overlap completely in time. When the Level B isopleth of one DTH sound source encompasses the isopleth of another DTH sound source, the sources are considered additive and combined using the following rules (Table 7). The method described below was based on one created by Washington State Department of Transportation (WSDOT) and has been updated and modified by NMFS (WSDOT 2020). For addition of two simultaneous DTH hammers, the difference between the two SSLs is calculated, and if that difference is between 0 and 1 dB, 3 dB are added to the higher SSL; if difference is between 2 or 3 dB, 2 dB are added to the highest SSL; if the difference is between 4 to 9 dB, 1 dB is added to the highest SSL; and with differences of 10 or more decibels, there is no addition.

When two continuous noise sources, such as vibratory hammers, have overlapping sound fields, there is potential for higher sound levels than for non-overlapping sources.

When two or more vibratory hammers are used simultaneously, and the isopleth of one sound source encompasses the isopleth of another sound source, the sources are considered additive and source levels are combined using the rules in Table 6, similar to that described above for DTH.

TABLE 6—RULES FOR COMBINING SOUND SOURCE LEVELS GENERATED DURING PILE INSTALLATION

Hammer types	Difference in SSL	Level A zones	Level B zones
Vibratory, Impact	Any	Use impact zones	Use largest zone.
Impact, Impact	Any	Use zones for each pile size and number of strikes.	Use zone for each pile size.
Vibratory, Vibratory or DTH, DTH	0 or 1 dB	Add 3 dB to the higher source level	Add 3 dB to the higher source level
	2 or 3 dB	Add 2 dB to the higher source level.	Add 2 dB to the higher source level.
	4 to 9 dB	Add 1 dB to the higher source level	Add 1 dB to the higher source level.
	10 dB or more	Add 0 dB to the higher source level	Add 0 dB to the higher source level.

During pile driving, it is common for pile installation to start and stop multiple times as each pile is adjusted and its progress is measured and documented, though as stated above, for short durations, it is anticipated that multiple hammers could be in use simultaneously. Following an approach modified from WSDOT in their Biological Assessment manual (WSDOT 2020) and described in Table 7, decibel addition calculations were carried out for possible combinations of pile driving and DTH throughout the project area. The source levels included in Table 7 are used to estimate the Level A harassment zones and the Level B harassment zones.

TABLE 7—COMBINED SSLS (dB AT 10 m) GENERATED DURING PILE INSTALLATION AND REMOVAL FOR COMBINATIONS OF TWO PIECES OF EQUIPMENT: IMPACT HAMMER, VIBRATORY HAMMER, AND DOWN-THE-HOLE DRILL

Method			Vibratory (RMS)			DTH (RMS)			DTH (SEL)		
	Pile diameter		20	24	30	8	24	30	8	24	30
		SSL	161	161	162	167	167	167	144	159	164
Vibratory (RMS)	20	161	164	164	165	168	168	168	.....	.....	.....
	24	161	164	164	165	168	168	168	.....	.....	.....
	30	162	165	165	165	168	168	168	.....	.....	.....
DTH (RMS)	8	167	168	168	168	170	170	170	.....	.....	.....
	24	167	168	168	168	170	170	170	.....	.....	.....
	30	167	168	168	168	170	170	170	.....	.....	.....
DTH (SEL)	8	144	.....	.....	.....	.....	.....	.....	147	159	164
	24	159	.....	.....	.....	.....	.....	.....	159	162	165
	30	164	.....	.....	.....	.....	.....	.....	164	165	167

No addition is warranted for impact pile driving in combination with vibratory or impact pile driving or DTH (NMFS 2021).

Level B Harassment Zones

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10 (R1/R2),

Where:

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that will lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for ADOT's planned activity in the absence of specific modelling.

All Level B harassment isopleths are reported in Table 8 and Table 9 below. It should be noted that based on the geography of Tongass Narrows and the surrounding islands, sound will not reach the full distance of the Level B harassment isopleth in most directions. Generally, due to interaction with land, only a thin slice of the possible area is ensonified to the full distance of the Level B harassment isopleth.

The size of the Level B harassment zone during concurrent operation of two vibratory or DTH hammers will depend on the combination of sound sources and the decibel addition of two hammers producing continuous noise. Table 8 shows the distances to Level B harassment isopleths during simultaneous hammering from two sources, based on the combined SSL. Because the calculated Level B harassment isopleths for two sources are dependent upon the combined SSL, the Level B harassment zone for each combined sound source level included in Table 8 is consistent, regardless of the equipment combination. Please refer to Table 7 to determine which sound sources apply to each combined SSL.

As noted previously, pile installation often involves numerous stops and starts of the hammer for each pile. Therefore, decibel addition is applied only when the adjacent continuous sound sources experience overlapping sound fields, which generally requires close proximity of driving locations.

TABLE 8—LEVEL B HARASSMENT ISOPLETHS FOR MULTIPLE VIBRATORY HAMMER ADDITIONS

Combined SSL (dB)	Level B harassment isopleth (m) [a]
164	8,577
165	10,000
166	11,659
167	13,594
168	15,849
169	18,478
170	21,544

[a] These larger zones are truncated to the southeast by islands, which prevent propagation of sound in that direction beyond the confines of Tongass Narrows. To the northwest of Tongass Narrows, combined sound levels that exceed 167 dB rms extend into Clarence Strait before attenuating to sound levels that are anticipated to be below 120 dB rms.

TABLE 9—LEVEL B HARASSMENT ISOPLETHS FOR SINGLE HAMMER USE BY ACTIVITY AND PILE SIZE

Activity	Pile diameter	Level B harassment isopleth (m)
Vibratory Installation	30-inch	6,310
	24-inch	5,412
	20-inch.	
Vibratory Removal	24-inch.	
DTH Rock Sockets	30-inch	13,594
	24-inch.	
DTH Tension Anchor/Micropile	8-inch.	
Impact Installation	30-inch	2,154
	24-inch	1,000
	20-inch	1,000

Level A Harassment Zones

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of takes by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as pile driving or removal and DTH using any of the methods discussed above, NMFS' User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it will incur PTS. Inputs used in the User Spreadsheet are reported in Table 10 and Table 11, and the resulting isopleths are reported below in Table 12 and Table 13. Pile installation and removal can occur at variable rates, from a few minutes one day to many hours the next. ADOT anticipates that one permanent pile will be installed per day on 27 non-consecutive days, two temporary piles will be installed per day on 10 non-consecutive days, and two temporary piles will be removed per day on 10 days.

TABLE 10—NMFS USER SPREADSHEET INPUTS FOR SINGLE HAMMER USE

Equipment type	Vibratory pile driver (installation of 30-inch steel piles)	Vibratory pile driver (installation and removal of 24-inch steel piles)	Vibratory pile driver (installation of 20-inch steel piles)	DTH rock sockets (30-inch)	DTH rock sockets (24-inch)	DTH tension anchor (8-inch)	Impact pile driver (30-inch steel piles)	Impact pile driver (24-inch steel piles)	Impact pile driver (20-inch steel piles)
Spreadsheet tab used	(A.1) vibratory pile driving	(A.1) vibratory pile driving	(A.1) vibratory pile driving	(E.2) DTH pile driving	(E.2) DTH pile driving	(E.2) DTH pile driving	(E.1) impact pile driving	(E.1) impact pile driving	(E.1) impact pile driving
Weighting Factor Adjustment (kHz)	2.5	2.5	2.5	2	2	2	2	2	2
SSL	[a] 162	[a] 161	[a] 161	[b] 164	[b] 159	[b] 144	[b] 181	[b] 177	[b] 177
Activity duration (hours) within 24 hours	1	1	1	1–10	1–10	2–4	.....	.....	.....
Number of piles per day	1	1	1	1	1	1	1	1	1
Strike rate strikes per second	.....	.....	.....	15	15	25.83	.....	.....	.....
Number of strikes per pile	.....	.....	.....	.....	.....	.....	50	50	50

Notes: Propagation loss coefficient in all cases is 15. Duration estimates for DTH are based on assumption of multiple rock sockets and tension anchors being installed each day, with the maximum duration time for installation per day predicted to be 10 hours for rock socket DTH and 4 hours for tension anchor DTH. For specifics regarding the number of strikes and number of piles that will be used in a given situation, please refer to Table 1 in the notice of proposed IHA (87 FR 5980; February 2, 2022).

[a] dB rms at 10m.

[b] dB SEL at 10m.

Regarding implications for Level A harassment zones when two vibratory hammers are operating concurrently, given the small size of the estimated Level A harassment isopleths for all hearing groups during vibratory pile driving, the zones of any two hammers are not expected to overlap. Therefore, compounding effects of multiple vibratory hammers operating concurrently are not anticipated, and NMFS has treated each source independently.

Regarding implications for Level A harassment zones when one vibratory hammer and one DTH hammer are operating concurrently, combining isopleths for these sources is difficult for a variety of reasons. First, vibratory pile driving relies upon non-impulsive PTS thresholds, while DTH/rock hammers use impulsive thresholds. Second, vibratory pile driving account for the duration to drive a pile, while DTH account for strikes per pile. Thus, it is difficult to measure sound on the same scale and combine isopleths from these impulsive and non-impulsive, continuous sources. Therefore, NMFS has treated each source independently at this time.

Regarding the operation of two DTH hammers concurrently, since DTH hammers are capable of multiple strikes per second, there is potential for multiple DTH/rock hammer sources' isopleths to overlap in space and time (a higher strike rate indicates a greater potential for overlap). Therefore, NMFS has calculated distances to Level A harassment isopleths, by hearing group for simultaneous use of two DTH hammers (Table 13), using NMFS' User Spreadsheet. The inputs for these calculations are outlined in Table 11. When the Level A isopleth of one DTH sound source encompasses the isopleth of another DTH sound source, the sources are considered additive and combined using the rules in Table 7 as described above. The number of piles per day is altered to reflect only a single pile for all those that overlap in space and time (*i.e.,* no double counting of overlapping piles). The maximum strike rate and duration of the two DTH systems is used in the User Spreadsheet calculations.

TABLE 11—NMFS USER SPREADSHEET INPUTS FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

Spreadsheet tab used	(E.2) DTH pile driving
Weighting Factor Adjustment (kHz).	2.
SSL(dB SEL at 10m) [a]	
8-in pile/8-in pile	147.
8-in pile, 24-in pile	159.
8-in pile, 30-in pile	164.
24-in pile, 24-in pile	162.
24-in pile, 30-in pile	165.
30-in pile, 30-in pile	167.
Activity duration (minutes) within 24 hours [b].	60, 120, 180 or 240 [c].
Number of piles per day [b]	1.
Strike rate (strikes per second).	15 or 25.83 [d].

[a] SSL reflects the combined SSLs calculated in Table 7.

[b] ADOT anticipates that DTH could occur at one site for up to 10 hours (600 minutes) per day, and overlap between two sites could occur for up to 4 hours (240 minutes) per day. Since the potential overlap in sources is accounted for in the SSL adjustment, and the total potential duration (even with two hammers) is accounted for in the ''Activity duration (minutes) within 24 hours,'' the ''Number of piles per day'' is assumed to be 1.

[c] Duration will vary.

[d] 25.83 for combinations that include 8-in piles. 15 for all other combinations.

Level A harassment thresholds for impulsive sound sources (impact pile driving and DTH) are defined for both SELcum and Peak SPL with the threshold that results in the largest modeled isopleth for each marine mammal hearing group used to establish the Level A harassment isopleth. In this project, Level A harassment isopleths based on cumulative sound exposure level (SELcum) were always larger than those based on Peak SPL (for both single hammer use and simultaneous use of two hammers). It should be noted that there is a duration component when calculating the Level A harassment isopleth based on SELcum, and this duration depends on the number of piles that will be driven in a day and strikes per pile. For some activities, ADOT plans to drive variable numbers of piles per day throughout the project (See ''Average Piles per Day (Range)'' in Table 1 in the notice of proposed IHA (87 FR 5980; February 2, 2022)), and determine at the beginning of each pile driving day, the maximum number or duration piles will be driven that day. Here, this flexibility has been accounted for by modeling multiple durations for the activity, and determining the relevant isopleths.

TABLE 12—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS, BY HEARING GROUP, AND AREA OF LEVEL A HARASSMENT ZONES, FOR SINGLE HAMMER USE DURING PILE INSTALLATION AND REMOVAL

Activity	Pile diameter(s)	Minutes per pile or strikes per pile	Level A harassment isopleth (m)					Level A harassment areas (km^2) all hearing groups [a]
			LF	MF	HF	PW	OW	
Vibratory Installation	30-inch	60 minutes	8	1	12	5	1	<0.1
	24-inch [b]	60 minutes	7	1	11	5	1	<0.1
	20-inch	60 minutes	7	1	11	5	1	<0.1
Vibratory Removal	24-inch	60 minutes	7	1	11	5	1	<0.1
DTH Rock Sockets	30-inch	60 minutes	773	28	920	414	31	<0.9
		300 minutes	2,258	81	2,690	1,209	88	<3.5
		600 minutes	3,584	128	4,269	1,918	140	<6.6
	24-inch	60 minutes	359	13	427	192	15	<0.2
		300 minutes	1,048	38	1,249	561	41	<1.4
		600 minutes	1,664	60	1,982	891	65	<2.4
DTH Tension Anchor	8-inch	120 minutes	82	3	98	44	4	<0.1
		240 minutes	130	5	155	70	6	<0.1
Impact Installation	30-inch	50 strikes	100	4	119	54	4	<0.1
	24-inch	50 strikes	54	2	65	29	3	<0.1
	20-inch	50 strikes	54	2	65	29	3	<0.1

[a] Please refer to Table 6–4 of ADOT's IHA application for hearing group-specific areas.
[b] Includes vibratory installation and removal.

TABLE 13—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

Activity combination	Duration	Level A harassment isopleth (m)				
		LF	MF	HF	PW	OW
8-in pile, 8-in pile	60	82	3	98	44	3
	120	130	5	155	70	5
	180	170	6	202	91	7
	240	206	7	245	110	8
8-in pile, 24-in pile	60	515	18	613	276	20
	120	817	29	974	437	32
	180	1,071	38	1,276	573	42
	240	1,297	46	1,545	694	51
8-in pile, 30-in pile	60	1,109	40	1,321	594	43
	120	1,761	63	2,097	942	69
	180	2,307	82	2,748	1,235	90
	240	2,796	99	3,329	1,496	109
24-in pile, 24-in pile	60	568	20	677	304	22
	120	902	32	1,074	483	35
	180	1,181	42	1,407	632	46
	240	1,431	51	1,705	766	56
24-in pile, 30-in	60	900	32	1,072	482	35
	120	1,429	51	1,702	765	56
	180	1,873	67	2,230	1,002	73
	240	2,268	81	2,702	1,214	88
30-in pile, 30-in pile	60	1,224	44	1,458	655	48
	120	1,943	69	2,314	1,040	76
	180	2,545	91	3,032	1,362	99
	240	3,084	110	3,673	1,650	120

Regarding implications for impact hammers used in combination with a vibratory hammer or DTH drill, the likelihood of these multiple sources' isopleths to completely overlap in time is slim primarily because impact pile driving is intermittent. Furthermore, non-impulsive, continuous sources rely upon non-impulsive TTS/PTS thresholds, while impact pile driving uses impulsive thresholds, making it difficult to calculate isopleths that may overlap from impact driving and the simultaneous action of a non-impulsive continuous source or one with multiple strikes per second. Thus, with such slim potential for multiple different sources' isopleths to overlap in space and time, specifications should be entered as ''normal'' into the User Spreadsheet for each individual source separately.

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. Additionally, we describe how the occurrence information is brought together to produce a quantitative take estimate for each phase. A summary of the estimated take, including as a percentage of population for each of the species, is shown in Table 14.

Steller Sea Lion

Steller sea lion abundance in the Tongass Narrows area is not well known. No systematic studies of Steller sea lions have been conducted in or near the Tongass Narrows area. Steller sea lions are known to occur year-round and local residents report observing Steller sea lions approximately once or twice per week (based on communication outlined in Section 6 of ADOT's IHA application). Abundance

appears to increase during herring runs (March to May) and salmon runs (July to September). Group sizes may reach up to 6 to 10 individuals (Freitag 2017 as cited in 83 FR 37473; August 1, 2018), though groups of up to 80 individuals have been observed (HDR, Inc. 2003).

ADOT conservatively estimates that one group of 10 Steller sea lions may be present in the project area each day, but this occurrence rate may as much as double (20 Steller sea lions per day) during periods of increased abundance associated with the herring and salmon runs (March to May and July to September). Therefore, ADOT anticipates that two large groups (20 individuals) may be taken by Level B harassment each day during these months. To be conservative, we assume all 91 days of work could be completed during these months of increased abundance and thus estimate 1,820 potential takes by Level B harassment of Steller sea lions in Tongass Narrows (*i.e.,* 2 groups of 10 sea lions per day × 91 construction days = 1,820 takes by Level B harassment; Table 14).

ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, Level B harassment zones will extend into Clarence Strait. Steller sea lions are known to swim across Clarence Strait and to use offshore areas with deeper waters, although no estimates of at-sea density or abundance in Clarence Strait are available. Therefore, ADOT has conservatively estimated, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, a group of 10 Steller sea lions may occur in the portion of the Level B harassment zone in Clarence Strait each day (one group of 10 sea lions per day × 44 days = 440 individuals). Therefore, the preliminary sum of estimated takes by Level B harassment of Steller sea lions between Tongass Narrows and Clarence Strait is 2,260 (1,820 + 440 = 2,260 takes by Level B harassment).

The largest Level A harassment zone for otariid pinnipeds could extend 140 m from the noise source for 10 hours of DTH using a single hammer, or 120m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types will occur on no more than 44 days). Zones for shorter durations and other activities will be smaller (Table 12). For some DTH activities, the estimated Level A harassment zone is larger than the shutdown zone, and therefore, some Level A harassment could occur. Further, while unlikely, it is possible that a Steller sea lion could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the zone long enough to be taken by Level A harassment before being observed and a shutdown occurring. ADOT therefore requested, and NMFS authorized, one take by Level A harassment on each of the 91 construction days (91 takes by Level A harassment). Authorized take by Level B harassment was calculated as the total calculated Steller sea lion takes by Level B harassment minus the takes by Level A harassment (2,260 takes − 91 takes by Level A harassment) for a total of 2,169 takes by Level B harassment. Therefore, ADOT requested, and NMFS authorized, 91 takes of Steller sea lion by Level A harassment and 2,169 takes of Steller sea lion by Level B harassment (2,260 total takes of Steller sea lion; Table 14).

Harbor Seal

Harbor seal densities in the Tongass Narrows area are not well known. No systematic studies of harbor seals have been conducted in or near Tongass Narrows. They are known to occur year-round with little seasonal variation in abundance (Freitag 2017 as cited in 83 FR 37473; August 1, 2018) and local experts estimate that there are about 1 to 3 harbor seals in Tongass Narrows every day, in addition to those that congregate near the seafood processing plants and fish hatcheries. NMFS has indicated that the maximum group size in Tongass Narrows is three individuals (83 FR 22009; May 11, 2018); however, ADOT monitoring in March 2021 observed several groups of up to 5 individuals. Based on this knowledge, the expected maximum group size in Tongass Narrows is five individuals. Harbor seals are known to be curious and may approach novel activity. For these reasons ADOT conservatively estimates that up to two groups of 5 harbor seals per group could be taken by Level B harassment due to project-related underwater noise each construction day for a total of 910 takes by Level B harassment of harbor seal in Tongass Narrows (*i.e.,* 2 groups of 5 harbor seals per day × 91 construction days = 910 total takes by Level B harassment of harbor seal; Table 14).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, Level B harassment zones will extend into Clarence Strait. Harbor seals are known to swim across Clarence Strait, although no estimates of at-sea density or abundance in Clarence Strait are available. It is likely that harbor seal abundance in Clarence Strait is lower than in Tongass Narrows, as harbor seals generally prefer nearshore waters. Therefore, ADOT has conservatively estimated, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, a group of 5 harbor seals may occur in the portion of the Level B harassment zone in Clarence Strait each day (one group of 5 harbor seals per day × 44 days = 220 individuals). Therefore, the sum of total estimated takes by Level B harassment of harbor seals between Tongass Narrows and Clarence Strait is 1,130 (910 + 220 = 1,130 takes by Level B harassment).

The largest Level A harassment zone for harbor seals could extend 1,918 m from the noise source for 10 hours of DTH using a single hammer, or 1,640 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types will occur on no more than 44 days). Zones for shorter durations and other activities will be smaller (Table 12). Due to practicability concerns, NMFS is requiring a 200 m shutdown zone for harbor seals during 24-in and 30-in DTH activities (Table 15). Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the shutdown zone, and therefore, some Level A harassment could occur. Harbor seals may enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment. Additionally, while unlikely, it is possible that a harbor seal could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (1,918 m − 200 m shutdown zone = 1,718 m) to the Level B harassment zone isopleth (13,594 m; 1,718 m/13,594 m = 0.1264). ADOT multiplied the resulting ratio by the total potential take in Tongass Narrows, resulting in 116 takes by Level A harassment (*i.e.,* 910 takes by Level B harassment × 0.1264 = 116 takes by Level A harassment). NMFS reviewed, and concurs with and adopts this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/

30-in pile combinations would result in larger Level A harassment isopleths than 1,918 m, however, such concurrent work will rarely occur, if at all, and therefore, NMFS expects that calculating Level A harassment take using those zones would be overly conservative and unrealistic. Moreover, since the method used above assumes 30-inch DTH on all days it provided a precautionary cushion since activities with smaller Level A harassment zone sizes will occur on many days.) Authorized take by Level B harassment was calculated as the total calculated harbor seal takes by Level B harassment minus the takes by Level A harassment (1,130 takes − 116 takes by Level A harassment) for a total of 1,014 takes by Level B harassment. ADOT therefore requested, and NMFS authorized, 116 takes of harbor seal by Level A harassment and 1,014 takes of harbor seal by Level B harassment (1,130 total takes of harbor seal; Table 14).

Harbor Porpoise

Harbor porpoises are non-migratory; therefore, our occurrence estimates are not dependent on season. Freitag (2017 as cited in 83 FR 37473; August 1, 2018) observed harbor porpoises in Tongass Narrows zero to one time per month. Harbor porpoises observed in the project vicinity typically occur in groups of one to five animals with an estimated maximum group size of eight animals (83 FR 37473, August 1, 2018, Solstice 2018). ADOT's 2020 and 2021 monitoring program in Tongass Narrows did not result in sightings of this species; however, ADOT assumes an occurrence rate of one group per month in the following take estimations. For our analysis, we are considering a group to consist of five animals. Based on Freitag (2017), and supported by the reports of knowledgeable locals as described in ADOT's application, ADOT estimates that one group of five harbor porpoises could enter Tongass Narrows and potentially taken by Level B harassment due to project-related noise each month for a total of 15 potential harbor porpoise takes by Level B harassment in Tongass Narrows (*i.e.,* 1 group of 5 individuals × 3 months (91 days) = 15 harbor porpoises).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone will extend into Clarence Strait. Harbor porpoises are known to swim across Clarence Strait and to use other areas of deep, open waters. Dahlheim *et al.* (2015) estimated a density of 0.02 harbor porpoises/km² in an area that encompasses Clarence Strait. ADOT estimates, and NMFS concurs that during the 44 days with potential simultaneous use of two hammers, 17 harbor porpoises (0.02 harbor porpoises/km² × 18.5 km² × 44 days = 17 harbor porpoises) may occur in the portion of the Level B harassment zone in Clarence Strait during the project (though ADOT and NMFS anticipate that this is a conservative estimate, given the entire 18.5 km² area will rarely be ensonified above the Level B harassment threshold). Therefore, the sum of total estimated takes by Level B harassment of harbor porpoise between Tongass Narrows and Clarence Strait is 32 (15 + 17 = 32 takes by Level B harassment).

The largest Level A harassment zone for harbor porpoises extends 4,269 m from the noise source for 10 hours of DTH using a single hammer, and 3,673 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types will occur on no more than 44 days). Zones for shorter durations and other activities will be smaller (Table 12). Due to practicability concerns, NMFS is requiring a 500 m shutdown zone for high frequency cetaceans during 24-in and 30-in DTH activities. Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the shutdown zone, and therefore, some Level A harassment could occur. Harbor porpoises may enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment. Additionally, given the large size of required shutdown zones for some activities and the cryptic nature of harbor porpoises, it is possible that a harbor porpoise could enter a shutdown zone without detection and remain in the zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (4,269 m − 500 m = 3,769 m) to the Level B harassment zone isopleth (13,594 m; 3,769/13,594 = 0.2773). ADOT multiplied the resulting ratio by the total potential take in Tongass Narrows, resulting in 5 takes by Level A harassment (*i.e.,* 15 takes by Level B harassment × 0.2773 = 5 takes by Level A harassment). NMFS reviewed and concurs with this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 4,269 m, however, such concurrent work would rarely occur, if at all, and therefore, as described above, NMFS expects that calculating Level A harassment take using those zones is unnecessary.) Authorized take by Level B harassment was calculated as the total calculated harbor porpoise takes by Level B harassment minus the takes by Level A harassment (32 takes − 5 takes by Level A harassment) for a total of 27 takes by Level B harassment. ADOT therefore requested and NMFS authorized 5 takes by Level A harassment and 27 takes by Level B harassment (32 total takes of harbor porpoise; Table 14).

Dall's Porpoise

Dall's porpoises are expected to only occur in the project area a few times per year. Their relative rarity is supported by Jefferson *et al.'*s (2019) presentation of historical survey data showing very few sightings in the Ketchikan area and conclusion that Dall's porpoise generally are rare in narrow waterways, like the Tongass Narrows. ADOT's monitoring program from 2020 and 2021 recorded one sighting of 6 individuals over 23 days of observation, 16 days of observations with no sightings, and two sightings of 10 individuals in 14 days of observation; this equates to one sighting every approximately 17 days (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d) or approximately two sightings per month. This species is non-migratory; therefore, the occurrence estimates are not dependent on season. ADOT anticipates that one large Dall's porpoise pod (12 individuals) may be present in the project area and exposed to project related underwater noise twice each month during 3 months of construction (91 days rounded to 3 months) for a total of 72 potential takes by Level B harassment in Tongass Narrows (*i.e.,* 2 groups of 12 Dall's porpoises per month × 3 months = 72 potential takes by Level B harassment).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone will extend into Clarence Strait, where Dall's porpoises are known to occur. Jefferson *et al.* (2019) estimated an average density of 0.19 Dall's porpoises/km² in Southeast Alaska. ADOT estimates, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, 155 Dall's porpoises (0.19 Dall's porpoises/km² × 18.5 km² × 44 days = 155 Dall's porpoises) may occur

in the portion of the Level B harassment zone in Clarence Strait during the project (though ADOT and NMFS anticipate that this is a conservative estimate, given the entire 18.5 km^2 area will rarely be ensonified above the Level B harassment threshold). Therefore, the sum of total estimated takes by Level B harassment of harbor porpoise between Tongass Narrows and Clarence Strait is 227 (72 + 155= 227 takes by Level B harassment).

The largest Level A harassment zone for Dall's porpoises extends 4,269 m from the noise source for 10 hours of DTH using a single hammer, and 3,673 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types will occur on no more than 44 days.) Zones for shorter durations and other activities will be smaller (Table 12). Due to practicability concerns, NMFS proposes to require a 500 m shutdown zone for high frequency cetaceans during 24-in and 30-in DTH activities. Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the shutdown zone, and therefore, some Level A harassment could occur. Dall's porpoises may enter and remain within the area between the Level A harassment zone and the shutdown zone and be exposed to sound levels for a duration long enough to be taken by Level A harassment. Additionally, given the large size of the required shutdown zones for some activities, it is possible that a Dall's porpoise could enter a shutdown zone without detection and remain in the zone for a duration long enough to taken by Level A harassment before being observed and a shutdown occurring.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (4,269 m − 500 m = 3,769 m) to the Level B harassment zone isopleth (13,594 m; 3,769/13,594 = 0.2773). ADOT multiplied the resulting ratio by the total potential take in Tongass Narrows, resulting in 20 takes by Level A harassment (*i.e.,* 72 takes by Level B harassment × 0.2773 = 20 takes by Level A harassment). NMFS revised and concurs with this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 4,269 m, however, such concurrent work would rarely occur, if at all, and therefore, as described above, NMFS expects that calculating Level A harassment take using those zones is unnecessary.) Authorized take by Level B harassment was calculated as the total calculated Dall's porpoise takes by Level B harassment minus the takes by Level A harassment (227 takes − 20 takes by Level A harassment) for a total of 207 takes by Level B harassment. ADOT therefore requested and NMFS authorized 20 takes by Level A harassment, and 207 takes by Level B harassment (227 total takes of Dall's porpoise; Table 14).

Pacific White-Sided Dolphin

Pacific white-sided dolphins do not generally occur in the shallow, inland waterways of Southeast Alaska. There are no records of this species occurring in Tongass Narrows, and it is uncommon for individuals to occur in the project area. However, historical sightings in nearby areas (Dahlheim and Towell 1994; Muto *et al.* 2018) and recent fluctuations in distribution and abundance mean it is possible the species could be present.

To account for the possibility that this species could be present in the project area, ADOT conservatively estimates, and NMFS concurs, that one large group (92 individuals) of Pacific white-sided dolphins may be taken by Level B harassment in Tongass Narrows during the activity.

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone will extend into Clarence Strait. However, no additional takes of Pacific white-sided dolphin are anticipated to occur due to simultaneous use of two hammers, given that Pacific white-sided dolphins are uncommon in the project area. Therefore, NMFS authorized 92 takes by Level B harassment of Pacific white-sided dolphins.

ADOT did not request, nor did NMFS authorize take by Level A harassment for this activity given that Pacific white-sided dolphins are uncommon in the project area. Further, considering the small Level A harassment zones for mid-frequency cetaceans (Table 12 and Table 13) in comparison to the required shutdown zones, it is unlikely that a Pacific white-sided dolphin will enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment.

Killer Whale

Killer whales are observed in Tongass Narrows irregularly with peaks in abundance between May and July. During 7 months of intermittent marine mammal monitoring (October 2020–February 2021; May–June 2021), there were five killer whale sightings in 4 months (November, February, May, June) totaling 22 animals; sightings occurred on 5 out of 88 days of monitoring (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Pod sizes ranged from two to eight animals (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). Previous incidental take authorizations in the Ketchikan area have estimated killer whale occurrence in Tongass Narrows at one pod per month, except during the peak period of May to July when estimates have included two pods per month (Freitag 2017 as cited in 83 FR 37473; August 1, 2018 and 83 FR 34134; July 17, 2019).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone will extend into Clarence Strait. In estimating take by Level B harassment, ADOT assumed a pod size of 12 killer whales, that all 91 days of work will occur between May and July during the peaks in abundance, and that therefore, 2 pods may occur within the Level B harassment zone (including both Tongass Narrows and Clarence Strait) during each month of work, for a total of 72 takes by Level B harassment (2 groups × 12 individuals × 3 months = 72 killer whales). Therefore, ADOT estimates that a total of 72 killer whales may be taken by Level B harassment (*i.e.,* 2 pods of 12 individuals per month × 3 months (91 days) = 72 takes by Level B harassment). NMFS reviewed and concurs with this method, and authorized 72 takes by Level B harassment of killer whale.

ADOT did not request, nor did NMFS authorize take by Level A harassment of killer whales for this activity. Considering the small Level A harassment zones for mid-frequency cetaceans (Table 12 and Table 13) in comparison to the required shutdown zones, it is unlikely that a killer whale will enter and remain within the area between the Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment.

Humpback Whale

As discussed in the Description of Marine Mammals in the Area of Specified Activities section, locals have observed humpback whales an average of about once per week in Tongass Narrows, but there is evidence to suggest occurrence may be higher during some periods of the year. The December 19, 2019 Biological Opinion

stated that based on observations by local experts, approximately one group of two individuals will occur in Tongass Narrows during ADOT's activity two times per seven days during pile driving, pile removal, and DTH activities throughout the year. The assumption was based on differences in abundance throughout the year, recent observations of larger groups of whales present during summer, and a higher than average frequency of occurrence in recent months (NMFS 2019). ADOT's 2020 and 2021 monitoring program documented a similar sighting rate, with 30 humpback whale sightings over 53 days of in-water pile driving; some of the sightings were believed to be repeated sightings of the same individual (DOT&PF 2020, 2021a, 2021b, 2021c, 2021d). ADOT therefore predicts, and NMFS concurs, that one group of two individuals may occur within the Level B harassment zones twice per week during the planned activities. As noted previously, ADOT estimates that pile driving will occur over the course of 91 days (13 weeks). Therefore, ADOT estimates, and NMFS concurs that 52 takes by Level B harassment of humpback whales (1 group of 2 individuals × 2 groups per week × 13 weeks = 52 takes by Level B harassment) from the Central North Pacific stock may occur in Tongass Narrows.

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone will extend into Clarence Strait. Local specialists estimated that approximately four humpback whales could pass through or near the portion of the Level B harassment zone in Clarence Strait each day. Therefore, ADOT estimates, and NMFS concurs, that during the 44 days with potential simultaneous use of two hammers, 176 takes by Level B harassment of humpback whale could occur in Clarence Strait (4 humpback whales × 44 days = 176 takes by Level B harassment). Therefore, the sum of total estimated takes by Level B harassment of humpback whale between Tongass Narrows and Clarence Strait is 228 (52 + 176 = 228 takes by Level B harassment), and NMFS authorized 228 takes by Level B harassment of humpback whale.

As noted previously, Wade *et al.* (2021) estimates that approximately 2 percent of all humpback whales in Southeast Alaska and northern British Columbia are of the Mexico DPS, while all others are of the Hawaii DPS. However, NMFS has conservatively assumed here that 6.1 percent of the total humpback population in Southeast Alaska is from the Mexico DPS (Wade *et al.* 2016). Therefore, of the 228 takes of humpback whale authorized, NMFS expects that a total of 14 takes will be of individuals from the Mexico DPS. NMFS expects that all other instances of take will be from the non-listed Hawaii DPS.

Take by Level A harassment of humpback whales is neither anticipated nor authorized because of the expected effectiveness of the required monitoring and mitigation measures (see Mitigation Measures section below for more details). For all pile driving and DTH activities, the shutdown zone exceeds the calculated Level A harassment zone. Humpbacks are usually readily visible, and therefore, we expect protected species observers (PSOs) to be able to effectively implement the required shutdown measures prior to any humpback whales incurring PTS within Level A harassment zones.

Minke Whales

Minke whales may be present in Tongass Narrows year-round. Their abundance throughout Southeast Alaska is very low, and anecdotal reports have not included minke whales near the project area. ADOT's monitoring program in Tongass Narrows also did not report any minke whale sightings. However, minke whales are distributed throughout a wide variety of habitats and could occur near the project area. Minke whales are generally sighted as solo individuals (Dahlheim *et al.* 2009).

As noted above, ADOT estimates that simultaneous use of two hammers (any combination) could occur on up to 44 days during the project. On those days, the Level B harassment zone will extend into Clarence Strait. Based on Freitag (2017; as cited in 83 FR 37473; August 1, 2018 and 83 FR 34134; July 17, 2019), ADOT estimates that three individual minke whales may occur near or within the Level B harassment zone (including both Tongass Narrows and Clarence Strait) every four months. Based on that estimated occurrence rate, NMFS estimates that 3 minke whales may occur in the Level B harassment zone during the planned activities (occurring over approximately 3 months), and authorized 3 takes by Level B harassment of minke whales (Table 14).

The largest Level A harassment zone for minke whale extends 3,584 m from the noise source for 10 hours of DTH using a single hammer, and 3,084 m from the noise source for 4 hours of DTH using two hammers for 30-in piles simultaneously. (As noted previously, ADOT estimates that simultaneous use of any two hammer types will occur on no more than 44 days.) Zones for shorter durations and other activities will be smaller (Table 13). NMFS required a 1,500 m shutdown zone for minke whales during 24-in and 30-in DTH activities. Therefore, for some DTH activities, the estimated Level A harassment zone is larger than the required shutdown zone, and Level A harassment could occur.

To calculate take by Level A harassment, ADOT first calculated the ratio of the maximum Level A harassment isopleth for 30-in DTH using a single hammer minus the shutdown zone isopleth (3,584 m − 1,500 m = 2,084 m) to the Level B harassment zone isopleth (13,594 m; 2,084 m/13,594 m = 0.1533). ADOT multiplied the resulting ratio by the total potential take by Level B harassment, resulting in 1 take by Level A harassment (*i.e.,* 3 takes by Level B harassment × 0.1533 = 1 take by Level A harassment). NMFS reviewed and concurs with this method. (Potential operation of two DTH hammers for 24-in/30-in or 30-in/30-in pile combinations would result in larger Level A harassment isopleths than 4,269 m, however, such concurrent work would rarely occur, if at all, and therefore, as described above NMFS expects that calculating Level A harassment take using those zones is unnecessary.) Take by Level B harassment was calculated as the total potential minke whale takes by Level B harassment minus the takes by Level A harassment. ADOT therefore requested, and NMFS authorized 1 take by Level A harassment and 2 takes by Level B harassment (3 total takes of minke whale; Table 14).

TABLE 14—AUTHORIZED TAKE AS A PERCENTAGE OF STOCK ABUNDANCE, BY STOCK AND HARASSMENT TYPE

Species	DPS/stock	Authorized take			Percent of stock
		Level A harassment	Level B harassment	Total	
Steller sea lion	Eastern U.S.	91	2,169	2,260	5.2
Harbor seal	Clarence Strait	116	1,014	1,130	4.1
Harbor porpoise	Southeast Alaska	5	27	32	2.5
Dall's porpoise	Alaska	20	207	227	1.7
Pacific white-sided dolphin	North Pacific	0	92	92	0.3
Killer whale	Alaska Resident	0	72	72	[a] 3.1
	West Coast Transient				[a] 20.1
	Northern Resident				[a] 23.8
Humpback whale	Central North Pacific	0	228	228	2.3
Minke whale	Alaska	1	2	3	N/A

[a] Conservatively assumes that all 72 takes occur to each stock.

Mitigation Measures

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Because of the need for an ESA Section 7 consultation for effects of the project on ESA listed humpback whales, there are a number of mitigation measures that go beyond, or are in addition to, typical mitigation measures we would otherwise require for this sort of project. However, these measures are typical for actions in the Ketchikan area. The mitigation measures included herein include measures that align with the 2019 Biological Opinion. ADOT must employ the following mitigation measures as included in the proposed IHA:

- Avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions (note that NMFS expects that a 10 m shutdown zone is sufficient to avoid direct physical interaction with marine mammals, but ADOT conservatively proposed a 20 m shutdown zone to avoid physical interaction for in-water other than vessel transit);
- Ensure that construction supervisors and crews, the monitoring team and relevant ADOT staff are trained prior to the start of all pile driving and DTH activity, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work;
- Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;
- For any marine mammal species for which take by Level B harassment has not been requested or authorized, in-water pile installation/removal and DTH will shut down immediately when the animals are sighted;
- Employ PSOs and establish monitoring locations as described in the Marine Mammal Monitoring Plan and Section 5 of the IHA. The Holder must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all pile driving and removal at least three PSOs must be used;
- The placement of the PSOs during all pile driving and removal and DTH activities will ensure that the entire shutdown zone is visible during pile installation;
- Monitoring must take place from 30 minutes prior to initiation of pile driving or DTH activity (*i.e.,* pre-clearance monitoring) through 30 minutes post-completion of pile driving or DTH activity;
- If in-water work ceases for more than 30 minutes, ADOT will conduct pre-clearance monitoring of both the Level B harassment zone and shutdown zone;
- Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 15 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals;
- If a marine mammal is observed entering or within the shutdown zones

indicated in Table 15, pile driving must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone (Table 15) or 15 minutes have passed without re-detection of the animal (30 minutes for humpback whales);

- As required by the 2019 Biological Opinion, if waters exceed a sea state that restricts the PSOs' ability to make observations within the shutdown zone, in-water pile installation and removal will cease. Pile installation and removal will not be initiated or continue until the appropriate shutdown zone is visible in its entirety;
- For humpback whales, if the boundaries of the harassment zone have not been monitored continuously during a work stoppage, the entire harassment zone will be surveyed again to ensure that no humpback whales have entered the harassment zone that were not previously accounted for;
- In-water activities will take place only: Between civil dawn and civil dusk when PSOs can effectively monitor for the presence of marine mammals; during conditions with a Beaufort Sea State of 4 or less; when the entire shutdown zone and adjacent waters are visible (*e.g.,* monitoring effectiveness is not reduced due to rain, fog, snow, etc.). Pile driving may continue for up to 30 minutes after sunset during evening civil twilight, as necessary to secure a pile for safety prior to demobilization for the evening. PSO(s) will continue to observe shutdown and monitoring zones during this time. The length of the post-activity monitoring period may be reduced if darkness precludes visibility of the shutdown and monitoring zones;
- Vessel operators will implement the following required measures: Maintain a watch for marine mammals at all times while underway; remain at least and at least 91 m (100 yards (yd)) from all other listed marine mammals, travel at less than 5 knots (9 km/hr) when within 274 m (300 yd) of a whale; avoid changes in direction and speed when within 274 m (300 yd) of whales, unless doing so is necessary for maritime safety; not position vessel(s) in the path of whales, and will not cut in front of whales in a way or at a distance that causes the whales to change their direction of travel or behavior (including breathing/surfacing pattern); check the waters immediately adjacent to the vessel(s) to ensure that no whales will be injured when the propellers are engaged; adhere to the Alaska Humpback Whale Approach Regulations when transiting to and from the project site (see 50 CFR 216.18, 223.214, and 224.103(b)); not allow lines to remain in the water, and not throw trash or other debris overboard, thereby reducing the potential for marine mammal entanglement; follow established transit routes and travel <10 knots while in the harassment zones; follow the speed limit within Tongass Narrows (7 knots for vessels over 23 ft in length). If a whale's course and speed are such that it will likely cross in front of a vessel that is underway, or approach within 91 m (100 yards (yd)) of the vessel, and if maritime conditions safely allow, the engine will be put in neutral and the whale will be allowed to pass beyond the vessel, except that vessels will remain 460 m (500 yd) from North Pacific right whales; if a humpback whale comes within 10 m (32.8 ft) of a vessel during construction, the vessel will reduce speed to the minimum level required to maintain safe steerage and working conditions until the humpback whale is at least 10 m (32.8 ft) away from the vessel; vessels are prohibited from disrupting the normal behavior or prior activity of a whale by any other act or omission.
- ADOT must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer; and
- If take by Level B harassment reaches the authorized limit for an authorized species, pile installation will be stopped as these species approach the Level B harassment zone to avoid additional take of them.

Further, on days when simultaneous use of two hammers producing continuous noise (two DTH hammers, one DTH and one vibratory hammer, or two vibratory hammers) is expected:

- When combinations of one DTH hammer with a vibratory hammer or two DTH hammers are used simultaneously, each PSO of the two contractors will have three PSOs working and the PSO teams will work together to monitor the entire area;
- One or more PSOs will be present at each construction site during in-water pile installation and removal so that Level A harassment zones and shutdown zones are monitored by a dedicated PSO at all times.
- The ADOT environmental coordinator for the project will implement coordination between or among the PSO contractors. ADOT will include in the contracts that PSOs must coordinate, collaborate, and otherwise work together to ensure compliance with project permits and authorizations.

The following specific mitigation measures will also apply to ADOT's in-water construction activities:

Establishment of Level A Harassment Zones and Shutdown Zones—For all pile driving/removal and DTH activities, ADOT will establish a shutdown zone (Table 15). The purpose of a shutdown zone is generally to define an area within which shutdown of activity will occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones vary based on the activity type and duration and marine mammal hearing group (Table 15). For vibratory installation and removal and impact installation, shutdown zones will be based on the Level A harassment isopleth distances for each hearing group.

ADOT anticipates that the daily duration of DTH use may vary significantly, with large differences in maximum zones sizes possible depending on the work planned for a given day. Given this uncertainty and concerns related to ESA-listed humpback whales, ADOT will utilize a tiered system to identify and monitor the appropriate Level A harassment zones and shutdown zones, based on the maximum expected DTH duration. At the start of any work involving DTH, ADOT will first determine whether DTH may occur at two sites concurrently or just at one site. If DTH may occur at two sites concurrently, then ADOT will implement the Level A harassment zones and shutdown zones associated with simultaneous DTH use of the relevant pile sizes (Table 13 and Table 15). If DTH may only occur at one site, ADOT will then determine the maximum duration of DTH possible that day (according to the defined duration intervals in Table 15), which will determine the appropriate Level A harassment isopleth for that day (Table 12 and Table 13). This Level A harassment zone and associated shutdown zone must be observed by PSO(s) for the entire work day or until it is determined that, given the duration of activity for the day, the Level A harassment isopleth cannot exceed the next lower Level A harassment isopleth size in Table 12.

Due to practicability concerns, shutdown zones for some species during some activities may be smaller than the Level A harassment isopleths (Table 15). The placement of PSOs during all pile

driving, pile removal, and DTH activities (described in detail in the Monitoring and Reporting section) will ensure that the entire shutdown zones are visible during pile installation.

TABLE 15—SHUTDOWN ZONES AND LEVEL B HARASSMENT ISOPLETHS FOR EACH ACTIVITY

Activity	Pile size (in)	Minutes per pile or strikes per pile	Shutdown distances (m)						Level B harassment isopleth (m)
			LF (humpback whales)	LF (minke whales)	MF	HF	PW	OW	
Vibratory Installation	30	60 min	50			20			6,310
	24	60 min							5,412
	20	60 min							
Vibratory Removal	24	60 min							
DTH of Rock Sockets	30	60 min	780	1,500	30	500	200	40	13,594
		120 min	1,300		50			50	
		180 min	1,700		60			70	
		240 min	2,000		70			80	
		300 min	2,300		90			90	
		360 min	2,600		100			100	
		420 min	2,900						
		480 min	3,100						
		540 min	3,400						
		600 min	3,600		130			100	
	24	60 min	360	1,500	20	500	200	20	
		120 min	570		30			30	
		180 min	750		30			30	
		240 min	910		40			40	
		300 min	1,100		40			50	
		360 min	1,200		50			50	
		420 min	1,400		50			60	
		480 min	1,500		60			60	
		540 min	1,600		60			70	
		600 min	1,700		60			70	
DTH of Tension Anchor	8	120 min	90	90	20	100	50	20	
		240 min	130	130		160	70		
Impact Installation	30	50 strikes	100	100	20	120	60	20	2,154
	24	50 strikes	60	60		70	30		1,000
	20	50 strikes							

TABLE 16—SHUTDOWN ZONES, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

Activity combination	Duration (minutes)	Level A harassment isopleth (m)				
		LF	MF	HF	PW	OW
8-in pile, 8-in pile	60	90	20	100	50	20
	120	130		160	70	
	180	170		200	100	
	240	210		250	110	
8-in pile, 24-in pile	60	520	20	500	200	20
	120	820	30			40
	180	1,080	40			50
	240	1,300	50			60
8-in pile, 30-in pile	60	1,110	40			50
	120	1,770	70			70
	180	2,310	90			90
	240	2,800	100			110
24-in pile, 24-in pile	60	570	20			30
	120	910	32			40
	180	1,190	42			50
	240	1,440	60			60
24-in pile, 30-in	60	900	40			40
	120	1,430	60			60
	180	1,880	70			80
	240	2,270	90			90
30-in pile, 30-in pile	60	1,230	50			50
	120	1,950	70			80

TABLE 16—SHUTDOWN ZONES, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS—Continued

Activity combination	Duration (minutes)	Level A harassment isopleth (m)				
		LF	MF	HF	PW	OW
	180	2,550	100			100
	240	3,090	110			120

ADOT also must abide by the terms and conditions of the December 19, 2019 Biological Opinion and Incidental Take Statement issued by NMFS pursuant to section 7 of the Endangered Species Act.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has determined that the required mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the project area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following:

- PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods. At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA. Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization. PSOs must be approved by NMFS prior to beginning any activity subject to this IHA; and
- PSOs must record all observations of marine mammals as described in the Section 5 of the IHA and the Marine Mammal Monitoring Plan, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed;

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary;

Additionally, as required by NMFS' December 2019 Biological Opinion, each PSO will be trained and provided with reference materials to ensure standardized and accurate observations and data collection.

ADOT must employ three PSOs during all pile driving and DTH. A minimum of one PSO (the lead PSO) must be assigned to the active pile driving or DTH location to monitor the shutdown zones and as much of the Level B harassment zones as possible. Two additional PSOs are also required, though the observation points may vary depending on the construction activity and location of the piles. To select the best observation locations, prior to start of construction, the lead PSO will stand at the construction site to monitor the Level A harassment zones while two or more PSOs travel in opposite directions from the project site along Tongass Narrows until they have reached the edge of the appropriate Level B harassment zone, where they will identify suitable observation points from which to observe. When needed, an additional PSO will be stationed on the north end of Revilla Island observing to the northwest. See Figure 2–11 of ADOT's Marine Mammal

Monitoring and Mitigation Plan for a map of planned PSO locations. If visibility deteriorates so that the entire width of Tongass Narrows at the harassment zone boundary is not visible, additional PSOs may be positioned so that the entire width is visible, or work will be halted until the entire width is visible to ensure that any humpback whales entering or within the harassment zone are detected by PSOs.

When DTH use occurs, or simultaneous use of one DTH with a vibratory hammer or two DTH systems occurs, creating Level B harassment zones that exceed 13 km and 21 km, respectively, and Level A harassment zones that extend over 6 km, one additional PSO will be stationed at the northernmost land-based location at the entrance to Tongass Narrows (at least two PSOs total at that location, four PSOs on duty across all PSO locations). One of these PSO will focus on Tongass Narrows, specifically watching for marine mammals that could approach or enter Tongass Narrows and the project area. The second PSO will look out into Clarence Strait, watching for marine mammals that could swim through the ensonified area. No additional PSOs will be required at the southern-most monitoring location because the Level B harassment zones are truncated to the southeast by islands, which prevent propagation of sound in that direction beyond the confines of Tongass Narrows. Takes by Level B harassment will be recorded by PSOs and extrapolated based upon the number of observed takes and the percentage of the Level B harassment zone that was not visible.

Each construction contractor managing an active construction site and on-going in-water pile installation or removal will provide qualified, independent PSOs for their specific contract. The ADOT environmental coordinator for the project will implement coordination between or among the PSO contractors. It will be a required component of their contracts that PSOs coordinate, collaborate, and otherwise work together to ensure compliance with project permits and authorizations.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact, vibratory or DTH) and the total equipment duration for vibratory removal or DTH for each pile or hole or total number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min/max/best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, sex class, etc.); Animal's closest point of approach and estimated time spent within the harassment zone; Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones and shutdown zones, by species;
- Table summarizing any incidents resulting in take of ESA-listed species;
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any;
- Description of other human activity within each monitoring period;
- Description of any deviation from initial proposal in pile numbers, pile types, average driving times, etc.;
- Brief description of any impediments to obtaining reliable observations during construction period;
- Description of any impediments to complying with these mitigation measures; and
- If visibility degrades to where the PSO(s) cannot view the entire impact or vibratory harassment zones, take of humpback whales will be extrapolated based on the estimated percentage of the monitoring zone that remains visible and the number of marine mammals observed.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the IHA-holder must immediately cease the specified activities and report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to the Alaska Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, ADOT must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all species listed in Table 1 for which take could occur, given that NMFS expects the anticipated effects of the planned pile driving/removal and DTH on different marine mammal stocks to be similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, NMFS has identified species-specific factors to inform the analysis.

Pile driving and DTH activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment and, for some species Level A harassment, from underwater sounds generated by pile driving and DTH. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment or Level A harassment, identified above, while activities are underway.

NMFS does not anticipate that serious injury or mortality will occur as a result of ADOT's planned activity given the nature of the activity, even in the absence of required mitigation. Further, no take by Level A harassment is anticipated for Pacific white-sided dolphin, killer whale, or humpback whale, due to the likelihood of occurrence and/or required mitigation measures. As stated in the mitigation section, ADOT will implement shutdown zones that equal or exceed many of the Level A harassment isopleths shown in Table 12. Take by Level A harassment is authorized for some species (Steller sea lions, harbor seals, harbor porpoises, Dall's porpoises, and minke whales) to account for the potential that an animal could enter and remain within the area between a Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment, and in some cases, to account for the possibility that an animal could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the Level A harassment zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring. Any take by Level A harassment is expected to arise from, at most, a small degree of PTS because animals would need to be exposed to higher levels and/or longer duration than are expected to occur here in order to incur any more than a small degree of PTS. Additionally, and as noted previously, some subset of the individuals that are behaviorally harassed could also simultaneously incur some small degree of TTS for a short duration of time. Because of the small degree anticipated, though, any PTS or TTS potentially incurred here is not expected to adversely impact individual fitness, let alone annual rates of recruitment or survival.

For all species and stocks, take will occur within a limited, confined area (adjacent to the project site) of the stock's range. Take by Level A harassment and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further the amount of take authorized is small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving, pile removal, and DTH at the sites in Tongass Narrows are expected to be mild, short term, and temporary. Marine mammals within the Level B harassment zones may not show any visual cues they are disturbed by activities or they could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given that pile driving, pile removal, and DTH will occur for only a portion of the project's duration and often on nonconsecutive days, any harassment will be temporary. Additionally, many of the species present in Tongass Narrows or Clarence Strait will only be present temporarily based on seasonal patterns or during transit between other habitats. These temporarily present species will be exposed to even smaller periods of noise-generating activity, further decreasing the impacts.

For all species except humpback whales, there are no known Biologically Important Areas (BIAs) near the project zone that will be impacted by ADOT's planned activities. For humpback whales, the whole of Southeast Alaska is a seasonal BIA from spring through late fall (Ferguson *et al.* 2015), however, Tongass Narrows and Clarence Strait are not important portions of this habitat due to development and human presence. Tongass Narrows is also a small passageway and represents a very small portion of the total available habitat. Also, while southeast Alaska is considered an important area for feeding humpback whales between March and May (Ellison *et al.* 2012), it is not currently designated as critical habitat for humpback whales (86 FR 21082; April 21, 2021).

More generally, there are no known calving or rookery grounds within the project area, but anecdotal evidence from local experts shows that marine mammals are more prevalent in Tongass Narrows and Clarence Strait during spring and summer associated with feeding on aggregations of fish, meaning the area may play a role in foraging. Because ADOT's activities could occur during any season, takes may occur during important feeding times. However, the project area represents a small portion of available foraging habitat and impacts on marine mammal feeding for all species, including humpback whales, should be minimal.

Any impacts on marine mammal prey that occur during ADOT's planned activity will have, at most, short-term effects on foraging of individual marine mammals, and likely no effect on the populations of marine mammals as a whole. Indirect effects on marine mammal prey during the construction are expected to be minor, and these

effects are unlikely to cause substantial effects on marine mammals at the individual level, with no expected effect on annual rates of recruitment or survival.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat will have any effect on the reproduction or survival of any individuals, much less the stocks' annual rates of recruitment or survival. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will, therefore, not result in population-level impacts.

In summary, and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Take by Level A harassment of Pacific white-sided dolphin, killer whale, and humpback whale is not anticipated or authorized;
- ADOT will implement mitigation measures including soft-starts for impact pile driving and shutdown zones to minimize the numbers of marine mammals exposed to injurious levels of sound, and to ensure that any take by Level A harassment is, at most, a small degree of PTS;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks and will not be of a duration or intensity expected to result in impacts on reproduction or survival;
- The only known area of specific biological importance covers a broad area of southeast Alaska for humpback whales, and the project area is a very small portion of that BIA. No other known areas of particular biological importance to any of the affected species or stocks are impacted by the activity, including ESA-designated critical habitat;
- The project area represents a very small portion of the available foraging area for all potentially impacted marine mammal species and stocks and anticipated habitat impacts are minor; and
- Monitoring reports from similar work in Tongass Narrows have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The instances of take NMFS authorized are below one third of the estimated stock abundance for all stocks (see Table 14). The number of animals that we expect to authorize to be taken from these stocks is considered small relative to the relevant stocks' abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario. Some individuals may return multiple times in a day, but PSOs will count them as separate takes if they cannot be individually identified.

The Alaska stock of Dall's porpoise has no official NMFS abundance estimate for this area, as the most recent estimate is greater than eight years old. The most recent estimate was 13,110 animals for just a portion of the stock's range. Therefore, the 227 authorized takes of this stock clearly represent small numbers of this stock.

Likewise, the Southeast Alaska stock of harbor porpoise has no official NMFS abundance estimate as the most recent estimate is greater than 8 years old. The most recent estimate was 11,146 animals (Muto *et al.* 2021) and it is highly unlikely this number has drastically declined. Therefore, the 32 authorized takes of this stock clearly represent small numbers of this stock.

There is no current or historical estimate of the Alaska minke whale stock, but there are known to be over 1,000 minke whales in the Gulf of Alaska (Muto *et al.* 2018), so the 3 authorized takes clearly represent small numbers of this stock. Additionally, the range of the Alaska stock of minke whales is extensive, stretching from the Canadian Pacific coast to the Chukchi Sea, and ADOT's project area impacts a small portion of this range.

Based on the analysis contained herein of the planned activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaska Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Harbor seals are the marine mammal species most regularly harvested for subsistence by households in Ketchikan and Saxman (a community a few miles south of Ketchikan, on the Tongass Narrows). Eighty harbor seals were harvested by Ketchikan residents in 2007, which ranked fourth among all communities in Alaska that year for harvest of harbor seals. Thirteen harbor seals were harvested by Saxman residents in 2007. In 2008, two Steller sea lions were harvested by Ketchikan-based subsistence hunters, but this is the only record of sea lion harvest by residents of either Ketchikan or Saxman. In 2012, the community of Ketchikan had an estimated subsistence take of 22 harbor seals and 0 Steller sea lion (Wolf *et al.* 2013). NMFS is not aware of more recent data. Hunting usually occurs in October and November (ADF&G 2009), but there are also records of relatively high harvest in May (Wolfe *et al.* 2013). The Alaska Department of Fish and

Game (ADF&G) has not recorded harvest of cetaceans from Ketchikan or Saxman (ADF&G 2018).

All project activities will take place within the industrial area of Tongass Narrows immediately adjacent to Ketchikan where subsistence activities do not generally occur. Both the harbor seal and the Steller sea lion may be temporarily displaced from the project area. The project will also not have an adverse impact on the availability of marine mammals for subsistence use at locations farther away, where these construction activities are not expected to take place. Some minor, short-term harassment of the harbor seals could occur, but given the information above, we do not expect such harassment to have effects on subsistence hunting activities.

Based on the description of the specified activity and the required mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from ADOT's planned activities.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the issuance of an IHA) and alternatives with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that this action qualifies to be categorically excluded from further NEPA review.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS' Office of Protected Resources (OPR) consults internally whenever we propose to authorize take for endangered or threatened species, in this case with NMFS' Alaska Regional Office (AKRO).

NMFS OPR is proposing to authorize take of the Central North Pacific stock of humpback whales, of which a portion belong to the Mexico DPS of humpback whales, which are ESA-listed. On February 6, 2019, NMFS AKRO completed consultation with NMFS for the Tongass Narrows Project and issued a Biological Opinion. Reinitiation of formal consultation was required to analyze changes to the action that were not considered in the February 2019 opinion (PCTS# AKR–2018–9806/ECO# AKRO–2018–01287). The original opinion considered the effects of only one project component being constructed at a time and did not analyze potential effects of concurrent pile driving that may cause effects to the listed species that were not considered in the original opinion; therefore, reinitiation of formal consultation was required. NMFS' AKRO issued a revised Biological Opinion to NMFS' OPR on December 19, 2019 that concluded that issuance of IHAs to ADOT is not likely to jeopardize the continued existence of Mexico DPS humpback whales. The effects of this Federal action were adequately analyzed in NMFS' *Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion for Construction of the Tongass Narrows Project (Gravina Access),* revised December 19, 2019, which concluded that the take NMFS proposes to authorize through this IHA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat. NMFS has determined that issuance of this IHA does not require reinitiation of the December 2019 Biological Opinion.

Authorization

NMFS has issued an IHA to ADOT for the potential harassment of small numbers of eight marine mammal species incidental to construction of four facilities in the channel between Gravina Island and Revillagigedo (Revilla) Island in Ketchikan, Alaska, that includes the previously explained mitigation, monitoring and reporting requirements.

Dated: March 11, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–05561 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket ID No.: NOAA–NOS–2022–0033]

Deep Seabed Hard Minerals; Request for Extension of Exploration Licenses; Comments Request

AGENCY: Office for Coastal Management (OCM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of receipt of application to extend Deep Seabed Mineral Exploration Licenses USA–1 and USA–4; request for comments.

SUMMARY: NOS has received from the Lockheed Martin Corporation (''Lockheed Martin'' or ''Licensee'') a request to extend to 2027 two deep seabed hard mineral exploration licenses issued pursuant to the Deep Seabed Hard Mineral Resources Act (DSHMRA). Lockheed Martin's extension request includes an updated exploration plan for activities conducted under the licenses. Lockheed Martin's request and accompanying exploration plan are available for public review and comment on whether the Licensee has met the criteria for the issuance of extensions specified in DSHMRA.

DATES: Comments may be submitted on or before May 17, 2022.

ADDRESSES: To access and review all documents related to the extension request under consideration, please use *http://www.regulations.gov* by searching the Docket ID number NOAA–NOS–2022–0033. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number.

FOR FURTHER INFORMATION CONTACT: Kerry Kehoe, Federal Consistency Specialist, NOAA Office of Coastal Management, at *kerry.kehoe@noaa.gov*, or at 240–560–8515.

SUPPLEMENTARY INFORMATION: NOAA has received an application from Lockheed Martin for a five-year extension of its two Deep Seabed Hard Mineral Exploration Licenses, USA–1 and USA–4. Lockheed Martin's application includes a single revised exploration plan for both licenses that sets forth the activities to be conducted during the extension.

DSHMRA exploration licenses USA–1 and USA–4 were issued in 1984 and both are presently held by Lockheed

Martin. USA–1 and USA–4 were most recently extended in 2017 (82 FR 42327, September 7, 2017). The current terms of Exploration Licenses USA–1 and USA–4 end on June 2, 2022. Section 107(a) of DSHMRA provides that NOAA shall extend exploration licenses for a term of not more than five years if the licensee has substantially complied with the license and exploration plan and has requested an extension of the license. 30 U.S.C. 1417.

Lockheed Martin has submitted this request to maintain its interests and rights under these exploration licenses. Lockheed Martin is not currently conducting at-sea activities under DSHMRA exploration licenses USA–1 or USA–4, nor is the company proposing any such activities in this license extension request. Lockheed Martin has stated that at-sea exploration activities have been delayed for several reasons including conditions in the metals markets and the lack of international recognition of the DSHMRA licenses USA–1 and USA–4.

DSHMRA, which establishes a domestic licensing regime for United States citizens who engage in exploration of deep seabed hard mineral resources in areas beyond national jurisdiction, was enacted in 1980 as an interim statute pending the completion of negotiations on a Law of the Sea Convention (LOSC) acceptable to the United States. See 30 U.S.C. 1401(a). Although the LOSC was opened for signature in 1982, the United States has yet to become a party, and thus is not a member of the International Seabed Authority (ISA), the body established under LOSC to regulate deep seabed mining and award exploration and mining contracts in areas beyond national jurisdiction. DSHMRA exploration licenses USA–1 and USA–4 predate the establishment of the ISA in 1994. As the United States is not a party to the Law of the Sea Convention and thus not a member of the ISA, the United States is unable to seek from the ISA an exploration contract to obtain international legal recognition of Lockheed Martin's domestic law rights under DSHMRA exploration licenses USA–1 and USA–4. Recently, the ISA established an Area of Particular Environmental Interest that partially overlaps with DSHMRA exploration license USA–1. The ISA designation has no bearing on the extension request currently under consideration as it is not within the criteria specified within DSHMRA and its implementing regulations for granting license extensions.

During the requested five-year extension, Lockheed Martin would continue to conduct various preparatory activities in advance of at-sea exploration, which may become feasible at some future date. If NOAA grants this extension request, Lockheed Martin would need to obtain additional authorization from the agency before it would be allowed to conduct at-sea exploration activities under these licenses. Among other requirements, any request by Lockheed Martin for authorization from NOAA to conduct at-sea exploration activities would require the agency to conduct additional environmental analysis pursuant to NOAA's obligations under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.,* and DSHMRA.

NOAA is required under 30 U.S.C. 1417 to approve an extension request if the licensee has substantially complied with the license and its associated exploration plan. In determining substantial compliance, the DSHMRA implementing regulations at 15 CFR 970.515(b) provide that NOAA may make allowance for deviation from the exploration plan for good cause such as significantly changed market conditions.

The request for extension and revised exploration plan can be viewed at *www.regulations.gov*, by searching for docket number ''NOAA–NOS–2022–0033''. NOAA is seeking comments on Lockheed Martin's request to extend DSHMRA exploration licenses USA–1 and USA–4 including whether the company has substantially complied with the licenses and exploration plans, and whether the revised exploration plans for USA–1 and USA–4 meet the terms, conditions and restrictions of DSHMRA and the licenses issued thereunder.

Keelin S. Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2022–05793 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Emergency Beacon Registrations

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 12/17/2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic & Atmospheric Administration (NOAA), Commerce.

Title: Emergency Beacon Registrations.

OMB Control Number: 0648–0295.

Form Number(s): None.

Type of Request: Regular submission, Revision of a currently approved information collection.

Number of Respondents: 343,808.

Average Hours per Response: 15 Minutes.

Total Annual Burden Hours: 85,952.

Needs and Uses: The United States, Canada, France, and Russia operate the Search and Rescue Satellite-Aided Tracking (COSPAS/SARSAT), a satellite system with equipment that can detect and locate ships, aircraft, and individuals in distress if an emergency radio beacon is being carried.

This system is used to detect digitally encoded signals in the 406.000–406.100 MHz range, coming from these emergency beacons. The 406.000–406.100 MHz beacons transmit a unique identifier, making possible the ability to combine previously collected data associated with that beacon and transmit this vital data along with the beacon's position to the appropriate rescue coordination center.

Persons buying 406.000–406.100 MHz emergency radio beacons are required to register them with NOAA prior to installation. These requirements are contained in Federal Communications Commission (FCC) regulations at 47 CFR 80.1061, 47 CFR 87.199 and 47 CFR 95.1402.

The registration data is used to facilitate a rescue and to suppress the costly consequences of false alarms, which if unsuppressed would initiate the launch of a rescue mission and thereby deplete limited resources and possibly result in the loss of lives. This is accomplished through the use of the data provided to the rescue forces from the beacon registration database maintained by the NOAA's United States Mission Control Center (USMCC)

for Search and Rescue, to contact the distressed person(s) or alternate party via a phone call or radio broadcast. Other data provides rescuers with descriptive material of the element in distress. The registration information must be kept up-to-date.

Four registration forms are used. The EPIRB (Emergency Position Indicating Radio Beacon) form is used for nautical beacons. The ELT (Emergency Locator Transmitter) form is used for aircraft beacons. The PLB (Personal Locator Beacon) is used to register portable beacons carried by individuals. Ship Security Alerting System (SSAS) beacons are carried aboard ships, are similar to EPIRBs and are used in the event of an emergency situation such as piracy or terrorism.

These forms are being updated in response to the development of 406MHz second generation beacons (SGBs), which are in development and are projected to be available to the public in 2023. Changes to the forms are as follows:

23-Hex Beacon ID line: SGBs have 23-character hexadecimal unique identifiers. NOAA's 406 MHz Beacon Registration Database (RGDB) currently allows registrations for first generation beacons (FGBs) that contain 15-character hexadecimal identifiers. Once SGBs are on the market, beacon owners will have the capability to register either FGBs or SGBs in the RGDB. Even though each registration will be for only one beacon ID, the hardcopy registration form must contain separate lines for FGBs and SGBs due to the differing number of characters and their presentation on manufacture labels and packaging—FGB IDs are presented in groups of 5–5–5 and SGB IDs will be 6–6–6–5.

Old 23-Hex ID: This field was added to enable registration of a replacement SGB beacon. The RGDB will continue to capture data for both FGB and SBG replacements.

Beacon Serial No.: This field was added to capture the beacon's serial number, which appears on the manufacturer-supplied label and/or on the beacon or its packaging. The serial number provides additional verification of the beacon ID and can be used by RGDB staff to resolve cases of incorrect or duplicate beacon IDs.

Other: An Automatic Identification System (AIS) Maritime Mobile Service Identity (MMSI) number was added to the EPIRB form. The following fields were added to the PLB form to provide additional pertinent information to search and rescue (SAR) forces: Radio Call Sign (on EPIRB form), Vessel MMSI # (on EPIRB form), AIS MMSI # (just added to EPIRB form), and Aircraft Registration (Tail) No. (on ELT form).

Affected Public: Individuals or households; Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government; Federal government.

Respondent's Obligation: Mandatory.

Legal Authority: Federal Communications Commission (FCC) regulations at 47 CFR 80.1061, 47 CFR 87.199 and 47 CFR 95.1402.

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 0648–0295.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2022–05792 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–HR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB886]

Atlantic Coastal Fisheries Cooperative Management Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS, has made a preliminary determination that an Exempted Fishing Permit application from Pioneers for a Thoughtful Coexistence, Inc. contains all the required information and warrants further consideration. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Coastal Fisheries Cooperative Management Act require publication of this notice to provide interested parties the opportunity to comment on applications for proposed Exempted Fishing Permits.

DATES: Comments must be received on or before April 4, 2022.

ADDRESSES: You may submit written comments by any of the following methods:

- *Email: NMFS.GAR.EFP@noaa.gov.* Include in the subject line ''Comments on Pioneers Ropeless Fishing EFP.'' If you are unable to submit comments via the above email, please contact Laura Hansen at (978) 281–9225, or email at *Laura.Hansen@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Laura Hansen, Fishery Management Specialist, (978) 281–9225.

SUPPLEMENTARY INFORMATION: Pioneers for a Thoughtful Coexistence Inc. (Pionners), in collaboration with the Northeaster Fisheries Science Center (NEFSC) submitted a complete application for an Exempted Fishing Permit (EFP) on December 20, 2021, to conduct a ropeless lobster gear testing project. Pioneers is requesting an exemption from Federal lobster regulations that would authorize three federally permitted commercial lobster vessels to participate in a ropeless lobster gear study in the Massachusetts Bay Restricted Area (MBRA). Pioneers is requesting an exemption from gear marking requirements at 50 CFR 697.21(b)(2) to allow for the use of no surface markers on a trawl of more than three traps.

The purpose of this study is to test real-world use of acoustic-release systems that would reduce the risk of entangling protected species, including the North Atlantic right whale.

The EFP would authorize three federally permitted lobster vessels to modify some of their existing trawls to use ''on-demand access'' technology for the retrieval of the gear. Each vessel would use 10 sets of acoustic releases and equipment to fish 10, 20-pot trawls each. Experimental trawls would either have a rope spool, a buoy and stowed rope system, or a lift bag system fitted with an acoustic release, deployed on one end of the trawl. One vessel would have 5 of the 10 trawls fixed with acoustic releases on both ends of the trawl. Two state-permitted vessels would also participate in the study exclusively in state waters of the MBRA, and do not require Federal EFPs. Participating vessels would be testing gear in discrete areas in the MBRA that were selected by the applicant based on their claim of limited historical right whale usage, desired bottom composition, minimal gear conflict

exposure, and history of viable fishing grounds. NEFSC and project participants have been working to develop and test ropeless gear technology since 2019. To date, there have been no premature releases of the gear. Smart Buoy technology would be used to send an automated electronic notification to an email list within approximately 20 minutes of surfacing in the event of an unintended release. The mail list includes the Principal Investigator, Lori Caron, and Eric Matzen, NEFSC, who would immediately notify enforcement and any on-the-water marine patrol, research, and/or rescue efforts. Positioning will be tracked in real time and recovery would occur as soon as possible. The gear would be transported ashore for assessment. For a map of the areas where sampling would occur, please see Figure 1.

Soak time would be no longer than 14 days, gear retrieval would be limited to daylight hours, and gear would not be set or retrieved when right whales are in close proximity, to further minimize any potential interactions with right whales. Sampling would occur from the date the permit is issued, through the end of the closure on April 30, 2022. Pioneers estimated that there would be approximately 117 hauls of the ropeless gear. Data would be collected with data sheets developed by the NEFSC to ensure consistency among and between different ropeless fishing projects. This project would also collect whale sighting data. NEFSC staff would assist with data recording, when available. The outcome of this project would be to inform discussions on the utility of ropeless gear to allow potential fishing access to vertical line closure areas.

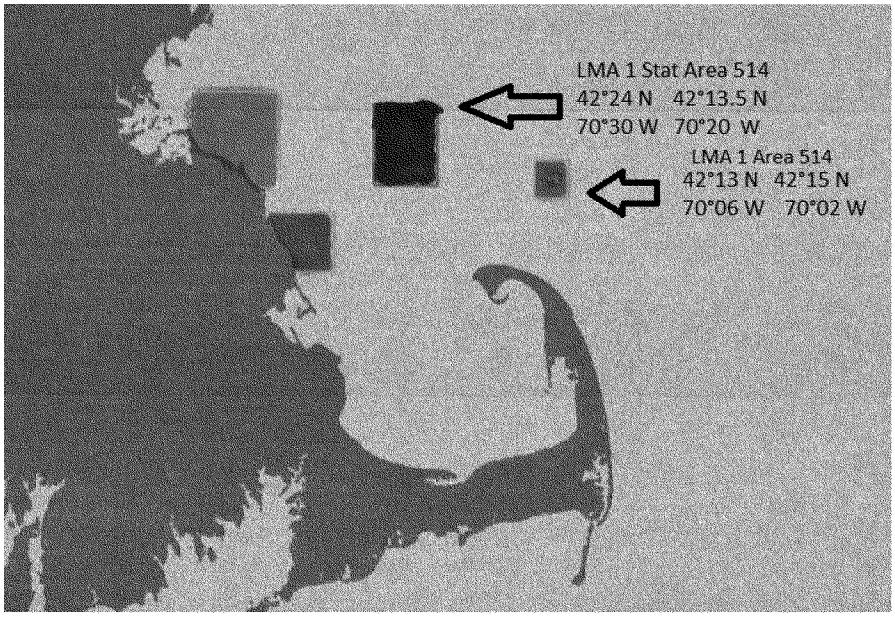

Figure 1: Map of Discrete Sampling Areas in the MBRA

Participants would adhere to additional precautions to mitigate concerns regarding enforcement, gear identification and retrieval, and protected species interactions including:

- Unique marking of ground lines and on-demand vertical lines beyond the regional requirements and the on-demand vertical line would be supervised while in the water column at all times;
- Unique flag would be flown by participating vessels for enforcement recognition;
- Weekly mandatory gear loss and gear conflict reporting;
- Stored vertical lines would be enhanced with weak links every 40 feet and are designed to break at less than 1700 lb (771 kg);
- Participating vessels would operate at a 10-knot (18.5 kph) speed limit and, if within a 500 yard (457.2 m) buffer zone of a surfacing right whale, would immediately depart the area at a safe, slow speed;
- Weekly communication with Massachusetts Division of Marine Fisheries and NEFSC on project activities; and,
- Use of the Trap Tracker application for retrieval and set positioning of trawls. This information would be accessible to Federal, state, and corresponding enforcement personnel, as requested.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. We may grant EFP modifications and extensions without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. The EFP would prohibit any fishing activity conducted outside the scope of the exempted fishing activities.

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

Dated: March 15, 2022.

Ngagne Jafnar Gueye,

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

[FR Doc. 2022–05765 Filed 3–17–22; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to the Procurement List.

SUMMARY: The Committee is proposing to add product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* April 17, 2022.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the product(s) and service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following product(s) and service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Product(s)

NSN(s)—Product Name(s):
MR 10830—Leakproof Baking Mat, Includes Shipper 20830
MR 10833—Foldout Tool Flashlight, Includes Shipper 20833
Designated Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: Military Resale-Defense Commissary Agency
Distribution: C-List
Mandatory For: The requirements of military commissaries and exchanges in accordance with the 41 CFR 51–6.4

Service(s)

Service Type: Base Supply Center
Mandatory for: Forbes Field Air National Guard Base, Topeka, KS
Designated Source of Supply: Industries for the Blind and Visually Impaired, Inc., West Allis, WI
Contracting Activity: DEPT OF THE ARMY

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2022–05777 Filed 3–17–22; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date added to and deleted from the Procurement List:* April 17, 2022.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 12/10/2021, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product(s) and service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the product(s) and service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) and service(s) to the Government.

2. The action will result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Document Destruction.
Mandatory for: DCSA, Federal Investigative Records Enterprise Operations (FIRE), Boyers, PA.
Designated Source of Supply: PAK, Hermitage, PA.
Contracting Activity: DEFENSE COUNTERINTELLIGENCE AND SECURITY SERVICE, DEFENSE CI AND SECURITY AGENCY.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2022–05778 Filed 3–17–22; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Strategic Plan Notice

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Request for comments on the agency's draft Strategic Plan for FY 2022–2026.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled, operating as the U.S. AbilityOne Commission, is seeking public comment on its draft Strategic Plan for FY 2022–2026.

DATES: The Commission will consider all comments submitted electronically on or before April 16, 2022.

You may submit comments, identified by Docket ID No. CPPBSD–2022–0003, only through the Federal eRulemaking Portal: *http://www.regulations.gov/.* To locate the Strategic Plan, use Docket ID No. CPPBSD–2022–0003 or key words such as ''Strategic Plan,'' ''Committee for Purchase,'' or ''AbilityOne'' to search documents accepting comments. Follow the online instructions for submitting comments. Please be advised that comments received will be posted without change to *http://www.regulations.gov/,* including any personal information provided. Once submitted, comments cannot be edited or withdrawn.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain

this document in an alternative accessible format.

Electronic Access to This Document: This document is available on *http://www.regulations.gov/* and the U.S. AbilityOne Commission website at *www.abilityone.gov.*

FOR FURTHER INFORMATION CONTACT: Shelly Hammond, Director of Contracting and Policy, by telephone (571) 457–9468 or by email at *shammond@abilityone.gov.*

During and after the comment period, you may inspect all public comments about the draft Strategic Plan by accessing *http://www.regulations.gov.*

Assistance to Individuals with Disabilities in Reviewing the Strategic Plan: Upon request, we will provide an appropriate accommodation to an individual with a disability who needs assistance to review the comments for the draft Strategic Plan. If you want to request assistance, please contact the person listed in this section.

SUPPLEMENTARY INFORMATION: The draft Strategic Plan for FY 2022–2026 is provided as part of the strategic planning process under the Government Performance and Results Modernization Act of 2010 (GPRA–MA) (Pub. L. 111–352) to ensure that agency stakeholders have an opportunity to provide feedback on this plan.

The Strategic Plan includes three strategic objectives:

(1) Expand competitive integrated employment (CIE) for people who are blind or have other significant disabilities.

(2) Ensure effective governance across the AbilityOne Program.

(3) Partner with Federal agencies and AbilityOne stakeholders to increase and improve CIE opportunities for people who are blind or have other significant disabilities.

The plan also includes outcome goals, strategies, and performance measures, as well as updated mission and vision statements that reinforce the purpose of the AbilityOne Program.

By providing opportunity for public comment on its draft Strategic Plan for FY 2022–2026, as well as by posting it on the agency's website at *www.abilityone.gov,* the U.S. AbilityOne Commission continues its ongoing commitment to transparency about the agency's future plans and actions.

The Commission intends to consider all comments received during the comment period. The Commission may also use some of those comments to amend or modify the Strategic Plan, but commenters should note that this posting and any public comments are not subject to Administrative Procedure Act (5 U.S.C. 551–559) and its implementing regulations.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2022–05794 Filed 3–17–22; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2022–HQ–0004]

Submission for OMB Review; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: Emergency 10-day information collection notice.

SUMMARY: Consistent with the Paperwork Reduction Act of 1995 and its implementing regulations, this document provides notice that DoD is submitting an Information Collection Request to the Office of Management and Budget (OMB) to understand the senior level perspectives as it relates to direct or indirect barriers women face in advancing to executive leadership. DoD requests emergency processing and OMB authorization to collect the information after publication of this notice for a period of six months.

DATES: Comments must be received by March 28, 2022.

ADDRESSES: The Department has requested emergency processing from OMB for this information collection request by 10 days after publication of this notice. Interested parties can access the supporting materials and collection instrument as well as submit comments and recommendations to OMB at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 10-day Review—Open for Public Comments'' or by using the search function. Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION: The survey is based on initial research conducted by Ms. Wanda Jones-Heath that highlighted women may experience challenges or obstacles associated with gender gap, placement in non-leadership roles, gender bias, stereotyping, and skills being underrated during their journey to executive leader opportunities. The 2020 Department of the Air Force (DAF) Racial Disparity Review highlighted the fact that the DAF has not maintained a diverse senior civilian workforce (GS13–SES level) and women are significantly underrepresented at the senior level. The 2021 DAF Disparity Review specifically calls outs gender as a significant challenge at the senior level. In addition, the civilian career progression line of effort under the barrier analysis working group is providing barrier and challenge information from the lower level viewpoint. If the survey is not conducted, then the research project will not include both views which will be vital to helping the DAF understand the barriers and determine specific actions (policy, programs, etc.) needed to provide more opportunities to women. The survey is a list of 13 questions using the Likert Scale that asks participants to provide their opinion on the barriers that limit opportunities for women to gain senior leadership positions. The participation is voluntary and the responses are completely anonymous. The responses will provide perspectives that would otherwise not be available through literature review.

Title; Associated Form; and OMB Number: The Underrepresentation of Women in Executive Leadership Survey; OMB Control Number 0701–UWEL.

Survey

Type of Request: Emergency.
Number of Respondents: 75.
Responses per Respondent: 1.
Annual Responses: 75.
Average Burden per Response: 15 minutes.
Annual Burden Hours: 18.75 hours.

Interviews

Number of Respondents: 16.
Responses per Respondent: 1.
Annual Responses: 16.
Average Burden per Response: 40 minutes.
Annual Burden Hours: 10.67 hours.

Totals

Number of Respondents: 75.
Responses per Respondent: 1.2.
Annual Responses: 91.
Average Burden per Response: 19.4 minutes.
Annual Burden Hours: 29.42 hours.
Affected Public: Individuals or households.
Frequency: Once.
Respondent's Obligation: Voluntary.

Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information collected has practical utility; (2) the accuracy of DoD's estimate of the burden (including hours and cost) 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 automated collection techniques or the use of other forms of information technology.

Dated: March 15, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–05791 Filed 3–17–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2022–HQ–0003]

Submission for OMB Review; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: Emergency 15-day information collection notice.

SUMMARY: Consistent with the Paperwork Reduction Act of 1995 and its implementing regulations, this document provides notice that DoD is submitting an Information Collection Request to the Office of Management and Budget (OMB) to develop a leadership curriculum that will help the U.S. Air Force (USAF) Academy produce leaders of character who will contribute to a culture of civility as they become officers in the USAF. DoD requests emergency processing and OMB authorization to collect the information after publication of this notice for a period of six months.

DATES: Comments must be received by April 4, 2022.

ADDRESSES: The Department has requested emergency processing from OMB for this information collection request by 15 days after publication of this notice. Interested parties can access the supporting materials and collection instrument as well as submit comments and recommendations to OMB at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 15-day Review—Open for Public Comments'' or by using the search function. Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION: This study supports the Sexual Assault Prevention and Response Office's (SAPRO) mission (and that of the larger USAF) to work toward an Air Force culture that is free of sexual violence. This effort will also support completion of USAF Academy SAPRO's DoD Junior Leader Working Group's plan of action and milestones. Ultimately, the implementation of the adapted curriculum may result in a reduced number of sexual assaults and enhanced psychological health and well-being among Airmen, enabling them to remain fit for duty.

This study will collect formative research data through focus groups and interviews to inform recommendations to enhance the current USAF Academy sexual assault leadership training curriculum. Research partners at the University of Florida and RTI International will collect feedback from trainees in Squadron Officer School at Maxwell Air Force Base concerning perceived readiness for duty, perceptions of the leadership training received at USAF Academy, and opportunities for enhancement across the four-year USAF Academy curriculum.

Title; Associated Form; and OMB Number: Formative Research for Sexual Assault Leadership Training at the U.S. Air Force Academy; OMB Control Number 0701–FRSA.

Type of Request: Emergency.

Number of Respondents: 20.

Responses per Respondent: 1.

Annual Responses: 20.

Average Burden per Response: 1 hour.

Annual Burden Hours: 20 hours.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Voluntary.

Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information collected has practical utility; (2) the accuracy of DoD's estimate of the burden (including hours and cost) 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 automated collection techniques or the use of other forms of information technology.

Dated: March 15, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–05796 Filed 3–17–22; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability for the Supplement to the Gulf of Alaska Navy Training Activities Draft Supplemental Environmental Impact Statement/ Overseas Environmental Impact Statement

AGENCY: Department of the Navy (DoN), Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Department of the Navy (DoN) has prepared and filed with the U.S. Environmental Protection Agency (EPA) a supplement to the December 2020 Gulf of Alaska (GOA) Navy Training Activities Draft Supplemental Environmental Impact Statement (EIS)/ Overseas Environmental Impact Statement (OEIS). This supplement to the Draft Supplemental EIS/OEIS will address a change in the Study Area and the addition of a new Continental Shelf and Slope Mitigation Area.

DATES: The supplement to the Draft Supplemental EIS public review period will begin March 18, 2022, and end on May 2, 2022. Comments may be submitted by U.S. mail or electronically via the project website as detailed below.

ADDRESSES: Naval Facilities Engineering Command, Northwest, Attention: GOA Supplemental EIS/OEIS Project Manager, 1101 Tautog Circle, Suite 203, Silverdale, Washington 98315–1101, *projectmanager@goaeis.com.*

Written comments can be submitted via the electronic comment form at *http://www.GOAEIS.com* or by mailing them to: Naval Facilities Engineering Systems Command Northwest, Attention: GOA Supplemental EIS/OEIS Project Manager, 1101 Tautog Circle, Suite 203, Silverdale, WA 98315–1101. All comments must be received or postmarked by May 2, 2022, to ensure they become part of the official record.

SUPPLEMENTARY INFORMATION: With the filing of the supplement to the Draft

Supplemental EIS/OEIS, the DoN is initiating a 45-day public comment period. Federal, state, and local agencies and interested parties are encouraged to provide written comments on the supplement to the Draft Supplemental EIS anytime during the public comment period. This notice announces the opportunity to review and comment on the Draft Supplemental EIS, and provides supplementary information about the environmental planning effort.

All comments submitted during the public review period will become part of the public record and will be responded to in the Final Supplemental EIS/OEIS. All public comments received during the Draft Supplemental EIS/OEIS comment period (December 11, 2020, through February 16, 2021) are still valid and will be considered in the Final Supplemental EIS/OEIS for this action. Previously submitted comments need not be resubmitted.

Pursuant to section 102(2)(c) of the NEPA, regulations implemented by the Council on Environmental Quality (40 CFR parts 1500–1508), and Presidential Executive Order 12114, the DoN announced its intent to prepare a supplement to the 2011 GOA Navy Training Activities EIS/OEIS and 2016 GOA Navy Training Activities Supplemental EIS/OEIS in the **Federal Register** (FR) on February 10, 2020 (85 FR 7538), and invited the public to comment on the scope of the Supplemental EIS/OEIS. A Draft Supplemental EIS/OEIS was subsequently released on December 11, 2020 (85 FR 80093), in which the potential environmental effects associated with military readiness training activities conducted within the GOA Study Area were evaluated.

Since the release of the Draft Supplemental EIS/OEIS on December 11, 2020, the DoN recognized that the size and shape of the Temporary Maritime Activities Area (TMAA) in the Gulf of Alaska no longer provides sufficient space for the realistic maneuvering of vessels and aircraft during training exercises. The DoN announced its intent to prepare a supplement to the December 2020 GOA Navy Training Activities Draft Supplemental EIS/OEIS on February 1, 2022 (87 FR 5472). Proposed changes to the Study Area include additional airspace and sea space to the west and south of the TMAA. The area is referred to as the Western Maneuver Area and adds approximately 185,806 square nautical miles to the Study Area. This additional space would enable Navy personnel and units to practice more realistic, complex training scenarios in a safer, more efficient manner that would better prepare them to respond to real-world incidents. The TMAA (approximately 42,146 square nautical miles) would remain unchanged and any activities involving active sonar or explosives would, as in the past, occur in this area only. The DoN is not proposing new or increased number of training activities in the Western Maneuver Area, only an expansion of the area the Navy may use for vessel and aircraft maneuvering purposes during exercises. The number of vessels, aircraft, underway steaming hours, events, and flight times remains the same. Although the Study Area has expanded, the conclusions regarding potential impacts have not significantly changed from the 2020 Draft Supplemental EIS/OEIS.

In direct response to agency, tribal, and public comments, the DoN also proposes implementing a new mitigation area within the continental shelf and slope area of the TMAA (approximately 14,600 square nautical miles). The DoN would expand its mitigation measures for explosives detonated at or near the surface and prohibit the use of explosives during training (up to 10,000 feet altitude) in areas of less than 4,000 meter depth to protect marine species and biologically important habitat. The DoN anticipates the implementation of the proposed mitigation area would reduce impacts on marine mammals, fish, and marine birds.

Dated: March 14, 2022.

J.M. Pike,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2022–05655 Filed 3–17–22; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0039]

Agency Information Collection Activities; Comment Request; Public Service Loan Forgiveness Reconsideration Request

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: The Department is requesting emergency processing and OMB approval for this information collection by March 31, 2022; and therefore, the Department is requesting public comments by March 29, 2022. A regular clearance process is also hereby being initiated to provide the public with the opportunity to comment under the full comment period. Interested persons are invited to submit comments on or before May 17, 2022.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2022–SCC–0039. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Ian Foss, 202–602–9669.

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: Public Service Loan Forgiveness Reconsideration Request.

OMB Control Number: 1845–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 36,000.

Total Estimated Number of Annual Burden Hours: 9,000.

Abstract: The Department of Education (Department) is requesting an emergency clearance for a new information collection at the same time requesting a 60-day public comment period. This collection will be used to obtain information from federal student loan borrowers to determine eligibility for reconsideration of their Public Service Loan Forgiveness (PSLF) or Temporary Expanded Public Service Loan Forgiveness (TEPSLF) denial notification on the basis of payment counts or employer eligibility determinations pursuant to a settlement agreement between the Department and the American Federation of Teachers (ATF) which was signed on October 12, 2021. The settlement between the Department and the AFT requires that ''as soon as practicable but no later than April 30, 2022, the Department will establish an interim reconsideration process that will be available to any borrower whose application for PSLF or TEPSLF has been or is denied''. In order to meet the requirements of this settlement, the Department must gather the information needed from the borrowers to reconsider their denial. This collection will allow for the collection and review of such reconsideration requests.

Additional Information: Due to the limited time from the approval of the agreement and to be able to meet the court-ordered timeline, we request that OMB allow the Department to clear the collection associated with the implementation of the reconsideration process using the emergency clearance procedures of the Paperwork Reduction Act of 1995, outlined in 42 U.S.C. 3507(j) as soon as possible.

Dated: March 15, 2022.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–05740 Filed 3–17–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Proposed Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA, pursuant to the Paperwork Reduction Act of 1995, intends to extend (with changes) for three years with the Office of Management and Budget (OMB), Form GC–859 *Nuclear Fuel Data Survey,* OMB Control Number 1901–0287. Form GC–859 *Nuclear Fuel Data Survey* collects data on spent nuclear fuel from all utilities that operate commercial nuclear reactors and from all others that possess irradiated fuel from commercial nuclear reactors.

DATES: Comments regarding this proposed information collection must be received on or before May 17, 2022. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Submit comments electronically to Bonnie Gajewski at *Bonnie.Gajewski@eia.gov* or mail comments to U.S. Energy Information Administration, Attn: Bonnie Gajewski/Form GC–859 Survey Team, Office of Energy Production & Markets Analysis (EI–31), 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: If you need additional information, contact Bonnie Gajewski, U.S. Energy Information Administration, via email at *Bonnie.Gajewski@eia.gov,* or by telephone (202) 586–2415. Current and proposed Form GC–859 and instructions are available on EIA's website at *https://www.eia.gov/survey/#gc-859.*

SUPPLEMENTARY INFORMATION: 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 might have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains:

(1) *OMB No.:* 1901–0287;

(2) *Information Collection Request Title:* Nuclear Fuel Data Survey;

(3) *Type of Request:* Renewal;

(4) *Purpose:* The Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101 *et seq.*) authorized DOE to enter into Standard Contracts with generators or owners of spent nuclear fuel and high-level radioactive waste of domestic origin. Form GC–859 (formerly Form RW–859) originated from an appendix to this Standard Contract. Form GC–859 *Nuclear Fuel Data Survey* collects information on nuclear fuel use and spent fuel discharges from all utilities that operate commercial nuclear reactors and from others that possess irradiated fuel from commercial nuclear reactors. The data collection provides stakeholders with detailed information concerning the spent nuclear fuel generated by the respondents (commercial utility generators of spent nuclear fuel and other owners of spent nuclear fuel within the U.S.).

Data collected from the survey are utilized by personnel from DOE Office of Nuclear Energy (NE), DOE Office of Environmental Management (EM), and the national laboratories to meet their research objectives of developing a range of options and supporting analyses that facilitate informed choices about how best to manage spent nuclear fuel (SNF);

(4a) *Proposed Changes to Information Collection:*

- Collection method. DOE will provide respondents with an online platform to facilitate their responses. The Form GC–859 data collection system is automated. Respondents will also be provided with electronic files to aid in the current submittal and operating instructions for the software. To the greatest extent practicable, respondents will provide data either in the data collection system or as any commonly readable, present-day electronic spreadsheet file type. The following website will be used to submit data: *https://gc859.ornl.gov.* Alternatively, a standalone copy of the submission software may be requested

from the EIA GC–859 Survey Team contact identified earlier in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

• Appendix E, Fuel Assembly Type Codes has been modified to include codes submitted on the 2018 data collection that were not already on the list, for the respondents convenience.

(5) *Annual Estimated Number of Respondents:* 125;

(6) *Annual Estimated Number of Total Responses:* 42;

(7) *Annual Estimated Number of Burden Hours:* 3,680;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* The information is maintained in the normal course of business. The cost of the burden hours is estimated to be $306,838 (3,680 burden hours times $83.38 per hour). EIA estimates that there are no additional costs to respondents associated with the survey other than the costs associated with the burden hours. EIA estimates that respondents will have no additional costs associated with the surveys other than the burden hours and the maintenance of the information during the normal course of business.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Public Law 93–275, codified as 15 U.S.C. 772(b) and the DOE Organization Act of 1977, Public Law 95–91, codified at 42 U.S.C. 7101 *et seq.* The Nuclear Waste Policy Act of 1982 codified at 42 U.S.C. 10222 *et seq.*

Signed in Washington, DC, on March 15, 2022.

Samson A. Adeshiyan,

Director, Office of Survey Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2022–05770 Filed 3–17–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX22–2–000]

EnerSmart Murray BESS, LLC; Notice of Filing

Take notice that on March 11, 2022, pursuant to section 211 of the Federal Power Act,[1] EnerSmart Murray BESS LLC (EnerSmart Murray) filed an application requesting that the Federal Energy Regulatory Commission (Commission) issue an order requiring San Diego Gas & Electric Company (SDG&E) to provide interconnection and transmission service for delivery of the output from EnerSmart Murray's seven (7) 3 MW battery energy storage system across SDG&E Participating Transmission Owner's Interconnection Facilities to Points of Interconnection with the California Independent System Operator Corporation Controlled Grid, including Network Upgrades to be constructed to accommodate service to EnerSmart Murray.

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 and 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

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 FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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.

Comment Date: 5:00 p.m. Eastern Time on April 1, 2022.

Dated: March 14, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–05764 Filed 3–17–22; 8:45 am]

BILLING CODE 6717–01–P

[1] 16 U.S.C. 824j (2018).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER22–1272–000]

Phillips 66 Energy Trading LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Phillips 66 Energy Trading LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is April 4, 2022.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://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. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: March 14, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–05761 Filed 3–17–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–696–000.

Applicants: Trailblazer Pipeline Company LLC.

Description: § 4(d) Rate Filing: TPC 2022–03–11 Fuel and L&U Reimbursement and Power Cost Tracker to be effective 5/1/2022.

Filed Date: 3/11/22.

Accession Number: 20220311–5101.

Comment Date: 5 p.m. ET 3/23/22.

Docket Numbers: RP22–697–000.

Applicants: Columbia Gulf Transmission, LLC.

Description: § 4(d) Rate Filing: Sabine Pass Interim NRA Amendment to be effective 3/11/2022.

Filed Date: 3/11/22.

Accession Number: 20220311–5125.

Comment Date: 5 p.m. ET 3/23/22.

Docket Numbers: RP22–698–000.

Applicants: Empire Pipeline, Inc.

Description: § 4(d) Rate Filing: Empire Rate Tracker (Tracking Supply Period 2 Rates) to be effective 4/1/2022.

Filed Date: 3/11/22.

Accession Number: 20220311–5162.

Comment Date: 5 p.m. ET 3/23/22.

Docket Numbers: RP22–699–000.

Applicants: National Grid LNG LLC.

Description: Petition for Limited Waiver of National Grid LNG, LLC.

Filed Date: 3/11/22.

Accession Number: 20220311–5197.

Comment Date: 5 p.m. ET 3/16/22.

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.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 14, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–05762 Filed 3–17–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1818–029.

Applicants: Public Service Company of Colorado.

Description: Triennial Market Power Analysis for Southwest Region of Public Service Company of Colorado.

Filed Date: 3/11/22.

Accession Number: 20220311–5304.

Comment Date: 5 p.m. ET 5/10/22.

Docket Numbers: ER10–2137–025; ER10–2124–022; ER10–2125–023; ER10–2127–021; ER10–2128–022; ER10–2131–025; ER10–2132–022; ER10–2133–023; ER10–2138–026; ER10–2139–026; ER10–2140–025; ER10–2141–025; ER10–2764–022; ER11–3872–024; ER11–4044–027; ER11–4046–026; ER14–2187–019; ER15–1873–014; ER18–471–008; ER18–472–008; ER18–1197–005; ER20–387–004; ER20–388–004; ER20–956–003; ER20–2444–002; ER20–2445–002; ER21–258–002; ER21–1838–001; ER21–2137–003; ER21–2715–001; ER21–2716–001; ER14–2799–017.

Applicants: Beech Ridge Energy Storage LLC, Fairbanks Solar Holdings LLC, Fairbanks Solar Energy Center LLC, IR Energy Management LLC, Orangeville Energy Storage LLC, Todd Solar LLC, Prineville Solar Energy LLC, Millican Solar Energy LLC, Thunderhead Wind Energy LLC, Traverse Wind Energy Holdings LLC, Traverse Wind Energy LLC, Camilla Solar Energy LLC, States Edge Wind I Holdings LLC, States Edge Wind I LLC, Buckeye Wind Energy LLC, Grand Ridge Energy Storage LLC, Gratiot County Wind II LLC, Gratiot County Wind LLC, Stony Creek Energy LLC, Vantage Wind Energy LLC, Grand Ridge Energy V LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy III LLC, Grand Ridge Energy II LLC, Beech Ridge Energy LLC, Sheldon Energy LLC, Willow Creek Energy LLC, Grand Ridge Energy LLC, Wolverine Creek Energy LLC, Invenergy TN LLC, Judith Gap Energy LLC, Spring Canyon Energy LLC.

Description: Notice of Change in Status of Beech Ridge Energy LLC, et al.

Filed Date: 3/3/22.

Accession Number: 20220303–5167.

Comment Date: 5 p.m. ET 3/24/22.

Docket Numbers: ER22–379–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: Deficiency Response—Revisions to Implement ELCC Methodology to be effective 2/15/2022.

Filed Date: 3/14/22.

Accession Number: 20220314–5215.

Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–772–001.

Applicants: New York Independent System Operator, Inc.

Description: Tariff Amendment: Deficiency Response—BSM Capacity Accreditation Market Design to be effective 5/11/2022.

Filed Date: 3/11/22.

Accession Number: 20220311–5224.

Comment Date: 5 p.m. ET 4/1/22.

Docket Numbers: ER22–834–001.

Applicants: PacifiCorp.

Description: Tariff Amendment: Deficiency response OATT Revised LGIP & SGIP Sections to be effective 4/1/2022.

Filed Date: 3/14/22.

Accession Number: 20220314–5259.

Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1277–000.

Applicants: Idaho Power Company.

Description: § 205(d) Rate Filing: Attachment M, Articles 5 and 8 and Attachment H, Section 1 to be effective 3/11/2022.

Filed Date: 3/11/22.
Accession Number: 20220311–5212.
Comment Date: 5 p.m. ET 4/1/22.

Docket Numbers: ER22–1278–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2022–03–11 Resource Sufficiency Evaluation Enhancements to be effective 12/31/9998.
Filed Date: 3/11/22.
Accession Number: 20220311–5214.
Comment Date: 5 p.m. ET 4/1/22.

Docket Numbers: ER22–1279–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA No. 6370; Queue No. AC1–191 to be effective 2/10/2022.
Filed Date: 3/14/22.
Accession Number: 20220314–5057.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1285–000.
Applicants: Front Range-Midway Solar Project, LLC.
Description: Petition for Limited Waiver of Front Range-Midway Solar Project, LLC.
Filed Date: 3/14/22.
Accession Number: 20220314–5088.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1287–000.
Applicants: Midcontinent Independent System Operator, Inc., American Transmission Company LLC.
Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2022–03–14_SA 2773 ATC-Adams-Columbia 2nd Rev CFA to be effective 5/14/2022.
Filed Date: 3/14/22.
Accession Number: 20220314–5101.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1288–000.
Applicants: Midcontinent Independent System Operator, Inc., American Transmission Company LLC.
Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2022–03–14_SA 2798 ATC-City of Menasha 2nd Rev CFA to be effective 5/14/2022.
Filed Date: 3/14/22.
Accession Number: 20220314–5105.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1289–000.
Applicants: Midcontinent Independent System Operator, Inc., American Transmission Company LLC.
Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2022–03–14_SA 2806 ATC-City of Oconomowoc 2nd Rev CFA to be effective 5/14/2022.
Filed Date: 3/14/22.
Accession Number: 20220314–5136.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1290–000.
Applicants: Maine Power Link, LLC.
Description: Maine Power Link, LLC submits an Application for Authority to Charge Negotiated Rates With Transmission Capacity Rights on Its Proposed Transmission Project.
Filed Date: 3/10/22.
Accession Number: 20220310–5205.
Comment Date: 5 p.m. ET 3/31/22.

Docket Numbers: ER22–1291–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6369; Queue No. AE2–029 to be effective 2/10/2022.
Filed Date: 3/14/22.
Accession Number: 20220314–5181.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1292–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA, Service Agreement No. 6382; Queue No. AE1–061 to be effective 2/10/2022.
Filed Date: 3/14/22.
Accession Number: 20220314–5190.
Comment Date: 5 p.m. ET 4/4/22.

Docket Numbers: ER22–1293–000.
Applicants: Public Service Company of Colorado.
Description: Formula Rate Post-Retirement Benefits Other than Pensions filing of Public Service Company of Colorado.
Filed Date: 3/11/22.
Accession Number: 20220311–5314.
Comment Date: 5 p.m. ET 4/1/22.

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: March 14, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–05763 Filed 3–17–22; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0200, FRL–9669–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Final Authorization for Hazardous Waste Management Programs (Renewal)

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Final Authorization for Hazardous Waste Management Programs (EPA ICR Number 0969.12, OMB Control Number 2050–0041) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through May 31, 2022. Public comments were previously requested via the **Federal Register** on September 28, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 18, 2022.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OLEM–2018–0200, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the

proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0453; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov.* For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is 202–566–1744.

Abstract: In order for a State to obtain final authorization for a State hazardous waste program or to revise its previously authorized program, it must submit an official application to the EPA Regional office for approval. The purpose of the application is to enable the EPA to properly determine whether the State's program meets the requirements of § 3006 of RCRA. A State with an approved program may voluntarily transfer program responsibilities to EPA by notifying the EPA of the proposed transfer, as required by section 271.23. Further, the EPA may withdraw a State's authorized program under section 271.23.

State program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. In the event that the State is revising its program by adopting new Federal requirements, the State shall prepare and submit modified revisions of the program description, Attorney General's statement, Memorandum of Agreement, or such other documents as the EPA determines to be necessary. The State shall inform the EPA of any proposed modifications to its basic statutory or regulatory authority in accordance with section 271.21. If a State is proposing to transfer all or any part of any program from the approved State agency to any other agency, it must notify the EPA in accordance with section 271.21 and submit revised organizational charts as required under section 271.6, in accordance with section 271.21. These paperwork requirements are mandatory under § 3006(a). The EPA will use the information submitted by the State in order to determine whether the State's program meets the statutory and regulatory requirements for authorization.

Form Numbers: None.

Respondents/affected entities: State/territorial governments.

Respondent's obligation to respond: Mandatory (RCRA § 3006(a)).

Estimated number of respondents: 50.

Frequency of response: Annual.

Total estimated burden: 10,794 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $427,536 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase in annual burden for this renewal of 798 hours. The reason for this increase is an increase in the number of revision applications from 6 to 7. EPA expects that a greater number of states will seek to revise their authorization and receive approval from EPA due greater emphasis on increasing authorization progress and recent high profile rulemakings.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05702 Filed 3–17–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–008]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed March 7, 2022 10 a.m. EST

Through March 14, 2022 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20220030, Final, BR, WY, Adoption—Leavitt Reservoir Expansion Project, Review Period Ends: 04/18/2022, Contact: Shain L. Wright 307–261–5664.

The Bureau of Reclamation (BR) has adopted the Bureau of Land Management's Final EIS No. 20190076, filed 4/24/2019 with the Environmental Protection Agency. The BR was not a cooperating agency on this project. Therefore, republication of the document is necessary under Section 1506.3(c) of the CEQ regulations.

EIS No. 20220031, Final, USCG, Other, Waterways Commerce Cutter Acquisition, Review Period Ends: 04/18/2022, Contact: Andrew Haley 202–372–1821.

EIS No. 20220032, Draft, FHWA, SC, Bishopville Truck Route Project, Comment Period Ends: 05/09/2022, Contact: Jeffrey Belcher 803–253–3187.

EIS No. 20220033, Third Draft Supplemental, USN, AK, Gulf of Alaska Navy Training Activities, Comment Period Ends: 05/02/2022, Contact: Kimberly Kler 360–315–5103.

EIS No. 20220034, Draft Supplement, USACE, LA, West Shore Lake Pontchartrain Hurricane and Storm Damage Risk Reduction Study, Comment Period Ends: 05/02/2022, Contact: Landon Parr 504–862–1908.

EIS No. 20220035, Draft, NOAA, OR, Western Oregon State Forests Habitat Conservation Plan, Comment Period Ends: 05/17/2022, Contact: Michelle McMullin 541–957–3378.

Dated: March 14, 2022.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2022–05736 Filed 3–17–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2021–0121; FRL—9668–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Industrial, Commercial, and Institutional Boilers Area Sources (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NESHAP for Industrial, Commercial, and Institutional Boilers Area Sources (EPA ICR Number 2253.05, OMB Control Number 2060–0668) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently

approved through April 30, 2022. Public comments were previously requested via the **Federal Register** on April 13, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 18, 2022.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2021–0121, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0833; email address: *ali.muntasir@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov* or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Owners and operators of new or existing industrial, commercial, or institutional boilers are required to comply with reporting and record keeping requirements for the general provisions of 40 CFR part 63, subpart A, as well as the applicable specific standards in 40 CFR part 63 subpart JJJJJJ. This includes submitting initial notifications, performance tests, biennial tune-ups, and periodic compliance reports and results, maintaining records of fuel usage, and any period during which the control system is inoperative. These reports are used by EPA to determine compliance with the standards.

Form Numbers: 5900–568.

Respondents/affected entities: Owners and operators of new or existing industrial, commercial, or institutional boilers.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart JJJJJJ).

Estimated number of respondents: 64,344 (total).

Frequency of response: Initially, annually, biennially.

Total estimated burden: 1,140,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $214,000,000 (per year), includes $78,700,000 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease in burden from the most recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This is due to several considerations. The primary reason for the decrease in burden is a decrease in the estimated number of respondents using liquid-fueled boilers. U.S. Energy Information Administration data indicates the consumption of fuel oil in the commercial sector has decreased by 33 percent in the past 9 years and is anticipated to decrease by 1 percent per year for the next three years. This ICR assumes that this decrease in consumption corresponds to an equivalent decrease in the number of small and large boilers firing liquid fuels and adjusts the number of small liquid-fired and large liquid-fired boilers and respondents accordingly. This ICR assumes that, due to the decrease in respondents over the past nine years, no new liquid-fired boilers were constructed during that time period. The decrease in the estimated number of respondents firing liquid fuels resulted in a decrease in labor burden for the small and large liquid-fired categories. The estimated decrease in the number of respondents firing liquid fuels also results in a decrease of the number of liquid-fired sources required to do periodic stack testing and operate ESPs. This results in a significant decrease in periodic stack testing and O&M costs for large liquid-fired boilers constructed since the rule was promulgated in June 2010. This ICR assumes that growth in the small and large solid-fueled categories will continue according to past trends. The increase in the estimated number of respondents firing solid fuels resulted in an increase in labor burden and capital/O&M costs for the small and large solid-fired categories. This ICR also corrects mathematical errors in the calculation of O&M costs for respondents firing solid fuels and required to perform triennial stack testing for Hg, CO, and PM. This correction results in an increase of capital and O&M costs. However, the overall results of the adjustments to this ICR is a decrease in burden and capital and O&M costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05705 Filed 3–17–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2007–0932, FRL–9675–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Management Standards for Hazardous Waste Pharmaceuticals (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Management Standards for Hazardous Waste Pharmaceuticals (EPA ICR Number 2486.03, OMB Control Number 2050–0212) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through May 31, 2022. Public comments were previously requested via the **Federal Register** on October 12, 2021 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before April 18, 2022.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–RCRA–2007–0932, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 2821T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Kristin Fitzgerald, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0512; email address: *fitzgerald.kristin@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov.* For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is 202–566–1744.

Abstract: Some pharmaceuticals are regulated as hazardous waste under the Resource Conservation and Recovery Act (RCRA) when discarded. In 2019 EPA promulgated regulations for the management of hazardous waste pharmaceuticals by healthcare facilities and reverse distributors (84 FR 5816, February 22, 2019). Healthcare facilities (for both humans and animals) and reverse distributors now manage their hazardous waste pharmaceuticals under a new set of sector-specific standards in lieu of the existing hazardous waste generator regulations. These regulations are found in 40 CFR 266, subpart P, and are mandatory. The new requirements include labeling containers holding non-creditable hazardous waste pharmaceuticals and evaluated hazardous waste pharmaceuticals with the words ''Hazardous Waste Pharmaceuticals''. Healthcare facilities and reverse distributors must also track or manage rejected shipments by sending a copy of the manifest to the designated facility that returned or rejected the shipment. Additionally, healthcare facilities and reverse distributors must submit exception reports for a missing copy of a manifest. Reverse distributors are required to amend their contingency plan under 40 CFR 262 subpart M. A reverse distributor must submit an unauthorized hazardous waste report if it receives waste it is not authorized to receive.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are the private sector.

Respondent's obligation to respond: Mandatory (RCRA Section 3001).

Estimated number of respondents: 8,163.

Frequency of response: Annual.

Total estimated burden: 40,045 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $3,580,140 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 3,532 hours compared to the currently approved ICR due to a decrease in the universe. The universe estimates are based on real data for this renewal.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2022–05769 Filed 3–17–22; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Thursday, March 24, 2022 at 10:00 a.m.

PLACE: Hybrid meeting: 1050 First Street NE, Washington, DC (12th floor) and virtual. *Note:* Due to the covid-19 pandemic, the FEC's hearing room remains closed to visitors for the near term as we implement procedures for the public to safely attend. If you would like to access the meeting, see the instructions below.

STATUS: This meeting will be open to the public. To access the virtual meeting, go to the commission's website *www.fec.gov* and click on the banner to be taken to the meeting page.

MATTERS TO BE CONSIDERED:

Audit Division Recommendation Memorandum on the Democratic Party of Arkansas (A19–15)

Audit Division Recommendation Memorandum on the Kentucky State Democratic Central Executive Committee (A19–13)

Management and Administrative Matters

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer Telephone: (202) 694–1220.

Authority: Government in the Sunshine Act, 5 U.S.C. 552b.

Laura E. Sinram,

Acting Secretary and Clerk of the Commission.

[FR Doc. 2022–05857 Filed 3–16–22; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than April 4, 2022.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Manager), P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org*:

1. *The Alice A. Proietti ABG Trust, Alice A. Proietti, as trustee, and the*

Joseph T. Proletti ABG Trust, Joseph T. Proietti, as trustee, all of Bentonville, Arkansas; to become members of the Walton Family Group, a group acting in concert, to acquire voting shares of Arvest Bank Group, Inc., Bentonville, Arkansas, and thereby indirectly acquire voting shares of Arvest Bank, Fayetteville, Arkansas.

B. Federal Reserve Bank of Minneapolis (Chris P. Wangen, Assistant Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Brice Kluth, Shelby, Montana; Coby Kluth, Whitefish, Montana; John Byron Love, Kalispell, Montana; and Lisette Pickens, Missoula, Montana*; to retain voting shares of Prairie Bancshares Corporation, and thereby indirectly retain voting shares of The First State Bank of Shelby, both of Shelby, Montana.

2. *Austin McLaen, Forman, North Dakota*; to retain voting shares of Napoleon Bancorporation, Inc., Napoleon, North Dakota, and thereby indirectly retain voting shares of Stock Growers Bank, Forman, North Dakota.

Board of Governors of the Federal Reserve System, March 15, 2022.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2022–05784 Filed 3–17–22; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Notice of Board Meeting; Correction

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Notice; correction.

SUMMARY: The FRTIB published a document in the **Federal Register** of March 14, 2022, concerning a notice of its March 2022 Board Meeting. The date of that meeting has since changed.

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of March 14, 2022, in FR Doc 2022–05319, on page 14265, change the date of the Board Meeting: ''March 24, 2022 at 10:00 a.m.''

Dated: March 15, 2022.

Dharmesh Vashee,

General Counsel.

[FR Doc. 2022–05730 Filed 3–17–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0059; Docket No. 2022–0053; Sequence No. 1]

Submission for OMB Review; North Carolina Sales Tax Certification

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding North Carolina sales tax certification.

DATES: Submit comments on or before April 18, 2022.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

Additionally, submit a copy to GSA through *https://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0059, North Carolina Sales Tax Certification. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0059, North Carolina Sales Tax Certification.

B. Need and Uses

This clearance covers the information that contractors must submit to comply with the requirements of the Federal Acquisition Regulation clause at 52.229–2, North Carolina State and Local Sales and Use Tax. This clause requires contractors for construction or vessel repair to be performed in North Carolina to provide certified statements setting forth the cost of the property purchased from each vendor and the amount of sales or use taxes paid. The North Carolina Sales and Use Tax Act authorizes counties and incorporated cities and towns, to obtain each year from the Commissioner of Revenue of the State of North Carolina, a refund of sales and use taxes indirectly paid on building materials, supplies, fixtures, and equipment that become a part of or are annexed to any building or structure in North Carolina. However, to substantiate a refund claim for sales or use taxes paid on purchases of building materials, supplies, fixtures, or equipment by a contractor, the Government must secure from the contractor certified statements setting forth the cost of the property purchased from each vendor and the amount of sales or use taxes paid. Similar certified statements by subcontractors must be obtained by the general contractor and furnished to the Government.

The Government will use the information as evidence to establish exemption from State and local taxes.

C. Annual Burden

Respondents: 213.

Total Annual Responses: 213.

Total Burden Hours: 266.25.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 87 FR 1148, on January 10, 2022. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB

Control No. 9000–0059, North Carolina Sales Tax Certification.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2022–05694 Filed 3–17–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0007; Docket No. 2022–0053; Sequence No. 3]

Submission for OMB Review; Subcontracting Plans

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding subcontracting plans.

DATES: Submit comments on or before April 18, 2022.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

Additionally, submit a copy to GSA through *https://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0007, Subcontracting Plans. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0007, Subcontracting Plans.

B. Need and Uses

This clearance covers the information that offerors and contractors must submit to comply with the requirements in Federal Acquisition Regulation (FAR) 52.219–9, Small Business Subcontracting Plans, regarding subcontracting plans as follows:

1. Subcontracting plan. In accordance with section 8(d) of the Small Business Act (15 U.S.C. 637(d)), any contractor receiving a contract for more than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance. Further, 15 U.S.C. 637(d) imposes the requirement that contractors receiving a contract that is expected to exceed, or a contract modification that causes a contract to exceed, $750,000 ($1.5 million for construction) and has subcontracting possibilities, shall submit an acceptable subcontracting plan that provides maximum practicable opportunities for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Specific elements required to be included in the plan are specified in section 8(d) of the Small Business Act and implemented in FAR subpart 19.7 and the clause at FAR 52.219–9.

2. Summary Subcontract Report (SSR). In conjunction with the subcontracting plan requirements, contractors with subcontracting plans must submit an annual summary of subcontracts awarded as prime and subcontractors for each specific Federal Government agency. Contractors submit the information in a SSR through the Electronic Subcontracting Reporting System (eSRS). This is required for all contractors with subcontracting plans regardless of the type of plan (*i.e.,* commercial or individual).

3. Individual Subcontract Report (ISR). In conjunction with the subcontracting plan requirements, contractors with individual subcontracting plans must submit semi-annual reports of their small business subcontracting progress. Contractors submit the information through eSRS in an ISR, the electronic equivalent of the Standard Form (SF) 294, Subcontracting Report for Individual Contracts. Contracts that are not reported in the Federal Procurement Data System (FPDS) in accordance with FAR 4.606(c)(5) do not submit ISRs in eSRS; they will continue to use the SF 294 to submit the information to the agency.

4. Written explanation for not using a small business subcontractor as specified in the proposal or subcontracting plan. Section 1322 of the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240, amends the Small Business Act (15 U.S.C. 637(d)(6)) to require as part of a subcontracting plan that a prime contractor make good faith effort to utilize a small business subcontractor during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. If a prime contractor does not utilize a small business subcontractor as described above, the prime contractor is required to explain, in writing, to the contracting officer the reasons why it is unable to do so.

C. Annual Burden

Respondents: 36,088.

Total Annual Responses: 55,016.

Total Burden Hours: 135,595.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 87 FR 1751, on January 12, 2022. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0007, Subcontracting Plans.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2022–05744 Filed 3–17–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Meeting for Software Developers on the Common Formats for Patient Safety Data Collection

AGENCY: Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: The purpose of this notice is to announce a meeting to discuss implementation of the Common Formats with software developers and other interested parties. This meeting is designed as an interactive forum where software developers can provide input on use of the formats. AHRQ especially requests participation by and input from those entities which have used AHRQ's technical specifications and implemented, or plan to implement, the Common Formats electronically.

DATES: The meeting will be held from 1:00 to 2:30 p.m. Eastern on Thursday, March 31st, 2022.

ADDRESSES: The meeting will be held virtually.

FOR FURTHER INFORMATION CONTACT: Dr. Hamid Jalal, Medical Officer, Center for Quality Improvement and Patient Safety, AHRQ, 5600 Fishers Lane, Rockville, MD 20857; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; Email: *pso@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: AHRQ coordinates the development of sets of standardized definitions and formats (Common Formats) that make it possible to collect, aggregate, and analyze uniformly structured information about health care quality and patient safety for local, regional, and national learning. The Common Formats include technical specifications to facilitate the collection of electronically comparable data by Patient Safety Organizations (PSOs) and other entities. Additional information about the Common Formats can be obtained through AHRQ's PSO website at *https://pso.ahrq.gov/common-formats* and the PSO Privacy Protection Center's website at *https://www.psoppc.org/psoppc_web/publicpages/commonFormatsOverview.*

Background

The Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b–21 to 299b–26 (Patient Safety Act), and the related Patient Safety and Quality Improvement Final Rule, 42 CFR part 3 (Patient Safety Rule), published in the **Federal Register** on November 21, 2008, 73 FR 70731–70814, provide for the Federal listing of Patient Safety Organizations (PSOs), which collect, aggregate, and analyze confidential information (patient safety work product) regarding the quality and safety of health care delivery.

The Patient Safety Act requires PSOs, to the extent practical and appropriate, to collect patient safety work product from providers in a standardized manner that permits valid comparisons of similar cases among similar providers. (42 U.S.C. 299b–24(b)(1)(F)). The Patient Safety Act also authorizes the development of data standards, known as the Common Formats, to facilitate the aggregation and analysis of non-identifiable patient safety data collected by PSOs and reported to the network of patient safety databases (NPSD). (42 U.S.C. 299b–23(b)). The Patient Safety Act and Patient Safety Rule can be accessed at: *http://www.pso.ahrq.gov/legislation/.*

AHRQ has issued Common Formats for Event Reporting for three settings of care—hospitals, nursing homes, and community pharmacies. As part of the agency's efforts to improve diagnostic safety and quality in healthcare, AHRQ is in the process of developing Common Formats for Event Reporting—Diagnostic Safety (CFER–DS).

Federally listed PSOs can meet the requirement to collect patient safety work product in a standardized manner to the extent practical and appropriate by using AHRQ's Common Formats. The Common Formats are also available in the public domain to encourage their widespread adoption. An entity does not need to be listed as a PSO or working with one to use the Common Formats. However, the Federal privilege and confidentiality protections only apply to information developed as patient safety work product by providers and PSOs working under the Patient Safety Act.

Agenda, Registration, and Other Information About the Meeting

The March 31 meeting will be an interactive forum designed to allow meeting participants not only to provide input but also to respond to the input provided by others. To encourage stakeholder feedback, this meeting will feature a panel of representatives from two PSOs who will share insights from their experiences and challenges with incorporating Common Formats into the work of their PSOs and reporting providers. Sheila Rossi will represent the ECRI and ISMP PSO and Mike Personett will represent the Press Ganey PSO on the panel. Time will be allocated during the panel presentation to engage meeting participants and foster active discussion. AHRQ requests that interested persons send an email to *SDMeetings@infinityconferences.com* for registration information. Before the meeting, an agenda and logistical information will be provided to registrants.

Dated: March 14, 2022.

Marquita Cullom,

Associate Director.

[FR Doc. 2022–05731 Filed 3–17–22; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[60Day–22–0060; Docket No. ATSDR–2022–0002]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Agency for Toxic Substances and Disease Registry (ATSDR), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Assessment of Environmental Health and Land Reuse Certification Training. This certification is a joint collaboration between ATSDR and the National Environmental Health Association (NEHA) that is designed to increase participant awareness and knowledge, skills and feedback on environmental health and land reuse.

DATES: ATSDR must receive written comments on or before May 17, 2022.

ADDRESSES: You may submit comments, identified by Docket No. ATSDR–2022–0002 by either of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600

Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. ATSDR will post, without change, all relevant comments to *Regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; phone: 404–639–7118; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Assessment of Environmental Health and Land Reuse Certification Training (OMB Control No. 0923–0060, Exp. 08/31/2022)—Revision—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The Agency for Toxic Substances and Disease Registry (ATSDR) is requesting a three-year Paperwork Reduction Act (PRA) clearance for a Revision of an information collection request (ICR) titled Environmental Health and Land Reuse Certification Training (OMB Control No. 0923–0060, Exp. Date 08/31/2022).

This certification is a joint collaboration between ATSDR and the National Environmental Health Association (NEHA) under a cooperative agreement. ATSDR and NEHA are co-producing the certification, which is geared toward NEHA members and ATSDR stakeholders who are environmental professionals, primarily local and state health agency employees, but also planners, environmental consultants, environmental non-profits, and students in environmental science, environmental/public health, and planning. The certification goals and course objectives are:

- To increase participant awareness and knowledge of environmental health and land reuse,
- To increase skills and capacity of participants to engage in environmental health and land reuse work, and
- To assess participant feedback and assessment of their own increased awareness, skills, and knowledge in environmental health and land reuse.

Due to the prevalence of potentially contaminated land reuse sites such as brownfields, the certificate program and training modules focus on increasing skills in land reuse and redevelopment through the integration of epidemiology, risk assessment, risk communication, and toxicology concepts and resources. The certification is offered in two modes. The certificate registration and training is hosted on NEHA's existing online Learning Management System, which hosts a variety of certificate and credentialing courses. In addition, ATSDR's National Land Reuse Health Program offers registration and maintains a classroom version of the training for learners who prefer virtual/classroom instruction or who may have limited broadband. NEHA will verify and issue continuing education (CE) credits for the EHLR Certificate for both online and classroom courses.

ATSDR plans to eliminate the currently approved one-time collection of feedback within 6–12 months after participation as of 08/31/2022. This follow-up survey was designed to evaluate the subsequent use of the certificate program training materials and resources to build capacity, and skills in environmental health and land reuse (EHLR). The follow-up survey will be discontinued because the training course content has been successfully established based on the feedback received to date.

Additional revisions are also needed. Initially, the training was to be administered under the CDC Training and Continuing Education Online (TCEO) system (see ''Application for Training'' [OMB Control No. 0920–0017, Exp. Date 04/30/2022]). ATSDR has decided to transition the administration of the online course to NEHA. This revision ICR will add the following information collections: Online and classroom registration, and pre- and post-tests and self-assessments for each of the five modules: Engaging with Your Community, Evaluating Environmental and Health Risks, Communicating Environmental and Health Risks to the Community, Redesigning with Health in Mind, and Measuring Success. In addition, course evaluations for each module will be added for online training only. ATSDR and NEHA will share this information to make improvements to both the online and the classroom modules.

In the past 16 months, ATSDR and NEHA have enrolled 1,135 online participants (n=71 per month). Extrapolating this average over 12 months yields an estimated annual enrollment of 852 online participants. Likewise, ATSDR has enrolled approximately 100 participants per year for classroom learning. For burden hour estimation, we make a simplifying assumption that all students have completed all modules, pre- and post-tests, self-assessments, and evaluations (for online participants). In reality, the certification is self-paced, and participants are in varying stages of completion toward certification.

ATSDR and NEHA are also planning a third mode of instruction for supplemental ''EHLR Immersive Training'' in three new modules: Community engagement, evaluation of environmental and health risks, and risk communication. This training will be offered as a face-to-face classroom course at environmental conferences to those who have completed the prerequisite EHLR online or classroom certification. Should COVID–19 affect live training, ATSDR may consider delivering the immersive training virtually.

Regarding the supplemental immersive training, ATSDR estimates that 125 conference attendees will meet the prerequisite certification requirement and will register for the training through a conference portal. They will be asked to complete a self-assessment for each module to be submitted toward additional CE credits and to receive the supplemental certification.

ATSDR plans an annual enrollment of 1,077 participants, which is an increase of 877 participants over the previously approved 200 participants. Participation in this information collection is voluntary and there is no cost to respondents other than their time. CDC requests OMB for an estimated 2,424 annual burden hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)	Total burden (in hr)
Environmental Health Professionals and Affiliates.	EHLR Registration (online)	852	1	3/60	43
	Module 1 Pre-Test (online)	852	1	10/60	142
	Module 1 Post-Test and Self-assessment (online).	852	1	15/60	213
	Module 1 Evaluation (online)	852	1	5/60	71
	Module 2 Pre-Test (online)	852	1	10/60	142
	Module 2 Post-Test and Self-assessment (online).	852	1	15/60	213
	Module 2 Evaluation (online)	852	1	5/60	71
	Module 3 Pre-Test (online)	852	1	10/60	142
	Module 3 Post-Test and Self-assessment (online).	852	1	15/60	213
	Module 3 Evaluation (online)	852	1	5/60	71
	Module 4 Pre-Test (online)	852	1	10/60	142
	Module 4 Post-Test and Self-assessment (online).	852	1	15/60	213
	Module 4 Evaluation (online)	852	1	5/60	71
	Module 5 Pre-Test (online)	852	1	10/60	142
	Module 5 Post-Test and Self-assessment (online).	852	1	15/60	213
	Module 5 Evaluation (online)	852	1	5/60	71
	EHLR Registration (classroom)	100	1	3/60	5
	Module 1 Pre-Test (classroom)	100	1	10/60	17
	Module 1 Post-Test and Self-assessment (classroom).	100	1	15/60	25
	Module 2 Pre-Test (classroom)	100	1	10/60	17
	Module 2 Post-Test and Self-assessment (classroom).	100	1	15/60	25
	Module 3 Pre-Test (classroom)	100	1	10/60	17
	Module 3 Post-Test and Self-assessment (classroom).	100	1	15/60	25
	Module 4 Pre-Test (classroom)	100	1	10/60	17
	Module 4 Post-Test and Self-assessment (classroom).	100	1	15/60	25
	Module 5 Pre-Test (classroom)	100	1	10/60	17
	Module 5 Post-Test and Self-assessment (classroom).	100	1	15/60	25
	Immersive Training Registration (conference).	125	1	3/60	6
	Module 1 Self-assessment (conference).	125	1	15/60	10
	Module 2 Self-assessment (conference).	125	1	15/60	10
	Module 3 Self-assessment (conference).	125	1	15/60	10
Total					2,424

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2022–05759 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—GH22–001, Enhancing Capacity for Strategic and Applied Research Activities in Support of Control and Elimination of Malaria and Other Parasitic Diseases.

Date: April 12, 2022.

Time: 9:00 a.m.–2:00 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

FOR FURTHER INFORMATION CONTACT: Hylan Shoob, Ph.D., Scientific Review Officer, Center for Global Health, CDC, 1600 Clifton Road NE, Mailstop H21–9, Atlanta, Georgia 30329–4027, Telephone: (404) 639–4796; Email: *HShoob@cdc.gov*.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05750 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—GH19–005, Advancing Public Health Research in Bangladesh.

Date: April 14, 2022.

Time: 9:00 a.m.–2:00 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

FOR FURTHER INFORMATION CONTACT: Hylan Shoob, Ph.D., Scientific Review Officer, Center for Global Health, CDC, 1600 Clifton Road NE, Mailstop H21–9, Atlanta, Georgia 30329–4027, Telephone: (404) 639–4796; Email: *HShoob@cdc.gov*.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05752 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—CE22–005, ''Research Grants for Preventing Violence and Violence Related Injury (R01)''; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—*CE22–005, ''Research Grants for Preventing Violence and Violence Related Injury (R01),''* May 10–11, 2022, 8:30 a.m., EDT–5:30 p.m., EDT, Web Conference, in the original FRN. The meeting was published in the **Federal Register** on February 24, 2022, Volume 87, Number 37, page/s/10366.

The meeting is being amended to change the meeting date and should read as follows: *CE22–005, ''Research Grants for Preventing Violence and Violence Related Injury (R01),''* May 10, 2022, 8:30 a.m., EDT–5:30 p.m., EDT.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Aisha L. Wilkes, M.P.H., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341, Telephone (404) 639–6473, *AWilkes@cdc.gov*.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05755 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60–Day–22–0234; Docket No. CDC–2022–0038]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled the National Ambulatory Medical Care Survey (NAMCS). The goal of this project is to assess the health of the population through patient use of physician and advanced practice provider offices and health centers (HCs), and to monitor the characteristics of physician and provider practices.

DATES: CDC must receive written comments on or before May 17, 2022.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2022–0038 by either of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

National Ambulatory Medical Care Survey (NAMCS) (OMB Control No. 0920–0234, Exp. 07/31/2024)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Ambulatory Medical Care Survey (NAMCS) was conducted intermittently from 1973 through 1985, and annually since 1989. The survey is conducted under authority of Section 306 of the Public Health Service Act (42 U.S.C. 242k). NAMCS is part of the ambulatory care component of the National Health Care Surveys (NHCS), a family of provider-based surveys that capture health care utilization from a variety of settings, including hospital inpatient and long-term care facilities. NCHS surveys of health care providers include NAMCS, the National Hospital Ambulatory Medical Care Survey (NHAMCS) (OMB Control No. 0920–0278, Exp. 09/30/2023), the National Hospital Care Survey (NHCS) (OMB Control No. 0920–0212, Exp. 03/31/2022), and National Post-acute and Long-term Care Study (NPALS) (OMB Control No. 0920–0943, Exp. 09/30/2023).

An overarching purpose of NAMCS is to meet the needs and demands for statistical information about the provision of ambulatory medical care services in the United States; this fulfills one of NCHS' missions, to monitor the nation's health. In addition, NAMCS provides ambulatory medical care data to study: (1) Performance of the U.S. health care system, (2) care for the rapidly aging population, (3) changes in services such as health insurance coverage change, (4) introduction of new medical technologies, and (5) use of electronic health records (EHRs). Ongoing societal changes have led to considerable diversification in the organization, financing, and technological delivery of ambulatory medical care. This diversification is evidenced by the proliferation of insurance and benefit alternatives for individuals, the development of new forms of physician group practices and practice arrangements (such as office-based practices owned by hospitals), the increasing role of advanced practice providers delivering clinical care, and growth in the number of alternative sites of care.

Ambulatory services are rendered in a wide variety of settings, including physician/provider offices and hospital outpatient and emergency departments. Since more than 65% of ambulatory medical care visits occur in physician offices, NAMCS provides data on the majority of ambulatory medical care services. In addition to health care provided in physician offices and outpatient and emergency departments, health centers (HCs) play an important role in the health care community by providing care to people who might not be able to afford it otherwise. HCs are local, non-profit, community-owned health care settings, which serve approximately 28 million individuals throughout the United States.

This Revision seeks approval to conduct changes to all three components of NAMCS. We plan to adjust the HC Component and Provider Interview sample sizes. In 2022 the goal is to sample 5,000 physicians, 5,000 advanced practice providers, and 110 HCs. In 2023, we plan to sample up to 10,000 physicians, 20,000 advanced

practice providers, and 210 HCs, if funds allow. Lastly, if funds allow, in 2024 we will sample up to 20,000 physicians, 40,000 advanced practice providers, and 310 HCs. For 2022–2024, there will be an additional 3,000 physicians sampled yearly for the Provider Electronic Component. Questions on the Health Center Facility Interview will be modified. After 2021, the Physician Induction Interview will shift to a redesigned Ambulatory Care Provider Interview. Visit data collection via abstraction will be placed on a hold and the reinterview study will be discontinued. The provider incentive experiment will also no longer be taking place, as we will begin to conduct other methodological work to improve upon the survey.

CDC requests OMB approval for an estimated 32,302 annual burden hours. There are no costs to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)	Total burden (in hrs.)
Physician or Staff	Office-Based Physician Induction Interview.	500	1	30/60	250
	Reinterview Study	42	1	15/60	11
HC's Staff	Prepare and transmit EHR for Visit Data (quarterly).	17	4	60/60	68
	Set-up fee questionnaire	17	1	15/60	4
Physician or Staff	ACPI	11,667	1	30/60	5,834
Advanced Practice Provider or Staff	ACPI	21,667	1	30/60	10,834
Ambulatory Care Provider's or Group's or Conglomerate's Staff.	PFI	3,000	1	45/60	2,250
	Prepare and transmit Electronic Visit Data (quarterly).	3,000	4	60/60	12,000
HC's Staff	HC Facility Interview	210	1	45/60	158
	Prepare and transmit EHR for Visit Data (quarterly).	210	4	60/60	840
	Set-up fee questionnaire	210	1	15/60	53
Total					32,302

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2022–05757 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–22–1262]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled Barriers and Facilitators to Expanding the NHBS to Conduct HIV Behavioral Surveillance Among Transgender Women (NHBS-Trans) to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on November 2, 2021 to obtain comments from the public and affected agencies. CDC received four comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

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

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Barriers and Facilitators to Expanding the NHBS to Conduct HIV Behavioral Surveillance Among Transgender Women (NHBS-Trans) (OMB Control No. 0920–1262, Exp. 4/30/2022)—Revision—National Center for HIV, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of this project is to demonstrate the feasibility of a national surveillance system to monitor behaviors of transgender women that are related to Human Immunodeficiency Virus (HIV) transmission and prevention in the United States. Findings of the NHBS-Trans project will

be used by CDC and local health department staff to assess changes made to the NHBS-Trans system to monitor the prevalence of HIV among transgender women of color and to strengthen understanding of the behavioral and environmental HIV risk factors that contribute to the disproportionately high prevalence of HIV within this population. Improved surveillance of transgender women is necessary to help CDC and health departments identify areas for community-level interventions, track the progress of communities in implementing change, and evaluate interventions that seek to reduce HIV risk factors and increase engagement in HIV prevention and care.

CDC requests a three-year approval for a revised information collection. Based on completion of data collection in 2019–2020 and evaluation of the previous efforts, project activities and methods have expanded to allow for remote variants of our in-person methods, such as interview by videoconference or phone. The number of Metropolitan Statistical Areas (MSAs) participating in NHBS-Trans will increase (from nine to up to 14) and the number of respondents recruited per project area will increase from 200 to 300 adult minority transgender women (4,200 interviews total). Selected content of the eligibility screener and behavioral assessment was revised.

Data will be collected through anonymous, in-person interviews conducted with persons systematically selected from up to 14 MSAs throughout the United States. A brief screening interview will be used to determine eligibility for participation in the behavioral assessment. All participants will be provided HIV testing and referral to services (as needed) following CDC protocol. Each participant will respond one time over the course of the three-year project. Participants will be recruited through respondent-driven sampling (RDS), a scientifically proven recruitment strategy for reaching hidden, hard-to-reach, or stigmatized populations. To assess non-response bias from RDS, peer recruiters will be debriefed about their recruitment efforts when they return to the field site. This information will be used to understand if certain racial (or ethnic) groups are not responding or if persons are not responding for a particular reason. Interview data will be recorded on secure portable computers, without internet connections. Data will be transferred to secure, encrypted data servers. Data will be stored at CDC and shared with local health departments in accordance with existing data use agreements and the Assurance of Confidentiality for HIV/AIDS Surveillance Data. Data will be disseminated in aggregate through academic and agency publications, presentations, and reports. The information will be collected over a three-year period beginning no later than two months after OMB approval.

The NHBS-Trans behavioral assessment and optional HIV testing are anonymous (neither names nor Social Security numbers are collected). Data that will be collected through NHBS-Trans, while sensitive, are not personally identifying. These data will provide estimates of (1) behavior related to the risk of HIV and other sexually transmitted diseases, (2) prior testing for HIV, and (3) use of HIV prevention services. No other federal agency systematically collects this type of information from persons at risk for HIV infection. These data have substantial impact on prevention program development and monitoring at the local, state, and national levels.

The burden table below shows the estimated annualized burden hours for the participants' time. Annually, 1,540 participants will complete an eligibility screener (an average of five minutes to complete), 1,400 participants will complete the Behavioral Assessment (an average of 40 minutes to complete), and 1,400 will complete the Recruiter Debriefing Form (an average of two minutes to complete). The estimated total annualized burden is 1,108 hours. Participation of respondents is voluntary, and there are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Transgender Women, >18 years old	Eligibility Screener	1,540	1	5/60
Eligible and Consenting Respondents	NHBS-Trans Behavioral Assessment	1,400	1	40/60
Peer Recruiters	Recruiter Debriefing Form	1,400	1	2/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2022–05756 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—CE22–006, ''Research Grants To Evaluate the Effectiveness of Physical Therapy-Based Exercises and Movements Used To Reduce Older Adults Falls (U01)''; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—*CE22–006, ''Research Grants To Evaluate the Effectiveness of Physical Therapy-Based Exercises and Movements Used To Reduce Older Adults Falls (U01)'',* May 17–18, 2022, 8:30 a.m., EDT–5:30 p.m., EDT, Web Conference, in the original FRN. The meeting was published in the **Federal Register** on January 14, 2022, Volume 87, Number 10, page/s/ 2438.

The meeting is being amended to change the meeting date and should read as follows: *CE22–006, ''Research Grants To Evaluate the Effectiveness of Physical Therapy-Based Exercises and Movements Used To Reduce Older Adults Falls (U01)'',* May 17, 2022, 8:30 a.m., EDT–5:30 p.m., EDT.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Aisha L. Wilkes, M.P.H., Scientific

Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341, Telephone (404) 639–6473, *AWilkes@cdc.gov*.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05748 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—GH20–002, Malaria Operations Research to Improve Malaria Control and Reduce Morbidity and Mortality in Western Kenya; GH20–003, Conducting Public Health Research in Colombia; GH21–003, Advancing Public Health Research in Kenya; and GH22–001, Enhancing Capacity for Strategic and Applied Research Activities in Support of Control and Elimination of Malaria and Other Parasitic Diseases.

Date: April 13, 2022.

Time: 9:00 a.m.–2:00 p.m., EDT.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

FOR FURTHER INFORMATION CONTACT: Hylan Shoob, Ph.D., Scientific Review Officer, Center for Global Health, CDC, 1600 Clifton Road NE, Mailstop H21–9, Atlanta, Georgia 30329–4027, Telephone: (404) 639–4796; Email: *HShoob@cdc.gov*.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05751 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; (SEP)—CE22–008, ''Using Data Linkage To Improve Our Understanding of Suicide/Self-Inflicted Injury and/or Drowning''; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—*CE22–008, ''Using Data Linkage to Improve Our Understanding of Suicide/Self-inflicted Injury and/or Drowning*'', May 24–25, 2022, 8:30 a.m., EDT–5:30 p.m., EDT, Videoconference, in the original FRN. The meeting was published in the **Federal Register** on January 14, 2022, Volume 87, Number 10, page/s/2440–2441.

The meeting is being amended to change the meeting date and should read as follows:

CE22–008, ''Using Data Linkage to Improve Our Understanding of Suicide/Self-inflicted Injury and/or Drowning'', May 24, 2022, 1:00 p.m., EDT–5:00 p.m., EDT.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Mikel Walters, Ph.D., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341, Telephone (404) 639–0913, *MWalters@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05749 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2022–0037; NIOSH 278]

Board of Scientific Counselors, National Institute for Occupational Safety and Health (BSC, NIOSH)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following virtual meeting of the Board of Scientific Counselors, National Institute for Occupational Safety and Health (BSC, NIOSH). This is a virtual meeting and open to the public, limited only by web conference lines (500 web conference lines are available). Time will be available for public comment.

DATES: The meeting will be held on April 20, 2022, from 10:00 a.m.–3:00 p.m., EDT.

Written comments must be submitted by April 13, 2022.

ADDRESSES: This is a virtual meeting. You may submit comments, identified by Docket No. CDC–2022–0037; NIOSH–278 by mail. CDC does not accept comments by email.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Docket number CDC–2021–0037; NIOSH–278, c/o Sherri Diana, NIOSH Docket Office, National Institute

for Occupational Safety and Health, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226.

Instructions: All submissions received must include the Agency name and Docket Number. Written public comments received by April 13, 2022, will be provided to the BSC prior to the meeting. Docket number CDC–2022–0037; and NIOSH–278 will close April 13, 2022.

FOR FURTHER INFORMATION CONTACT: Emily J.K. Novicki, M.A., M.P.H., Executive Secretary, BSC, NIOSH, CDC, 1600 Clifton Avenue, MS V24–4, Atlanta, Georgia 30329–4027, Telephone: (404) 498–2581, Email: *enovicki@cdc.gov*.

SUPPLEMENTARY INFORMATION:

Purpose: The Secretary, the Assistant Secretary for Health, and by delegation the Director, Centers for Disease Control and Prevention, are authorized under Sections 301 and 308 of the Public Health Service Act to conduct directly or by grants or contracts, research, experiments, and demonstrations relating to occupational safety and health and to mine health. The Board of Scientific Counselors provides guidance to the Director, National Institute for Occupational Safety and Health on research and prevention programs. Specifically, the Board provides guidance on the Institute's research activities related to developing and evaluating hypotheses, systematically documenting findings and disseminating results. The Board evaluates the degree to which the activities of the National Institute for Occupational Safety and Health: (1) Conform to appropriate scientific standards, (2) address current, relevant needs, and (3) produce intended results.

Matters to be Considered: The agenda for the meeting addresses the evolving national landscape for respiratory protection and occupational robotics research. Agenda items are subject to change as priorities dictate.

An agenda is also posted on the NIOSH website (*http://www.cdc.gov/niosh/bsc/*).

Meeting Information: It is open to the public, limited only by web conference lines (500 web conference lines are available). If you wish to attend, please register at the NIOSH website *http://www.cdc.gov/niosh/bsc/* or call (404–498–2581) no later than April 13, 2022.

Public Participation

Comments received are part of the public record and are subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket. CDC does not accept comment by email.

Oral Public Comment: The public is welcome to participate during the public comment period, from 1:00 p.m. to 1:15 p.m., EDT, April 20, 2022. Please note that the public comment period ends at the time indicated above. Each commenter will be provided up to five minutes for comment. A limited number of time slots are available and will be assigned on a first come-first served basis. Members of the public who wish to address the BSC NIOSH are requested to contact the Executive Secretary for scheduling purposes (see **FOR FUTHER INFORMATION** above).

Written Public Comment: Written comments will also be accepted from those unable to attend the public session per the instructions provided in the addresses section above. Written comments received in advance of the meeting will be included in the official record of the meeting. Written comments received by April 13, 2022, will be provided to the BSC prior to the meeting.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–05798 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–22–1150; Docket No. CDC–2022–0035]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Generic Clearance for Lyme and other Tickborne Diseases (TBD) Knowledge, Attitudes, and Practices (KAP) Surveys. This data collection involves the administration of a set of surveys designed to understand KAPs related to prevention of Lyme and other TBDs and to inform implementation of future TBD prevention interventions.

DATES: CDC must receive written comments on or before May 17, 2022.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2022–0035 by either of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail*: Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS

H21–8, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov*.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Generic Clearance for Lyme and other Tickborne Diseases (TBD) Knowledge, Attitudes, and Practices (KAP) Surveys (OMB Control No. 0920–1150, Exp. 9/30/2022)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) Division of Vector-Borne Diseases (DVBD) and other programs working on tickborne diseases (TBDs) are requesting a Revision to a previously approved generic clearance to conduct TBD prevention studies to include knowledge, attitudes, and practices (KAP) surveys TBDs among residents and businesses offering pest control services in Lyme disease endemic areas of the United States. The data collection for which approval is sought will allow DVBD to use survey results to inform implementation of future TBD prevention interventions. The Revision involves a broadening of the secondary target population from owners and employees of pest control companies to stakeholders of local entities affected by TBDs (*e.g.,* leaders in local public health or local government; owners or employees of pest control companies, landscaping companies, or other at-risk occupations; non-governmental organizations serving at-risk populations; and/or clinicians serving at-risk populations).

TBDs are a substantial and growing public health problem in the United States. From 2004–2016, over 490,000 cases of TBDs were reported to CDC, including cases of anaplasmosis, babesiosis, ehrlichiosis, Lyme disease, Rocky Mountain spotted fever, and tularemia. Lyme disease accounted for 82% of all TBDs, with over 400,000 cases reported during this time period. Recent studies estimate nearly 500,000 cases of Lyme disease are diagnosed annually in the United States. In addition, several novel tickborne pathogens have recently been found to cause human disease in the United States. Factors driving the emergence of TBDs are not well defined and current prevention methods have been insufficient to curb the increase in cases. Data is lacking on how often certain prevention measures are used by individuals at risk as well as what the barriers to using certain prevention measure are.

The primary target population for these data collections are individuals and their household members who are at risk for TBDs associated with *I.scapularis* ticks and who may be exposed to these ticks residentially, recreationally, and/or occupationally. The secondary target population includes stakeholders of local entities affected by TBDs (*e.g.,* leaders in local public health or local government; owners or employees of pest control companies, landscaping companies, or other at-risk occupations; non-governmental organizations serving at-risk populations; and/or clinicians serving at-risk populations) in areas where *I. scapularis* ticks transmit diseases to humans. Specifically, these target populations include those residing or working in the 15 highest incidence states for Lyme disease (CT, DE, ME, MD, MA, MN, NH, NJ, NY, PA, RI, VT, VA, WI and WV). We anticipate conducting one to two surveys per year, for a maximum of six surveys conducted over a three-year period. Depending on the survey, we aim to enroll 500–10,000 participants per study. It is expected that we will need to target recruitment to about twice as many people as we intend to enroll. Surveys may be conducted daily, weekly, monthly, or bi-monthly per participant for a defined period (whether by phone or web survey), depending on the survey or study. The surveys will range in duration from approximately 5–30 minutes. Each participant may be surveyed 1–64 times in one year; this variance is due to differences in the type of information collected for a given survey. Specific burden estimates for each study and each information collection instrument will be provided with each individual project submission for OMB review.

Insights gained from KAP surveys will aid in prioritizing which prevention methods should be evaluated in future randomized, controlled trials and ultimately help target promotion of proven prevention methods that could yield substantial reductions in TBD incidence. CDC requests OMB approval for an estimated 98,830 annual burden hours. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
General public, individuals or households.	Screening instrument	20,000	1	15/60	5,000
	Consent form	10,000	1	20/60	3,330
	Introductory Surveys	10,000	1	30/60	5,000

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Stakeholders of local entities affected by TBDs.	Monthly surveys	10,000	12	15/60	30,000
	Final surveys	10,000	1	30/60	5,000
	Daily surveys	10,000	60	10/60	50,000
	Stakeholder Survey	1,000	1	30/60	500
Total					98,830

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2022–05753 Filed 3–17–22; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–0297]

Draft Pharmaceutical Quality/Chemistry Manufacturing and Controls Data Exchange; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is requesting comment on the draft Pharmaceutical Quality/Chemistry Manufacturing and Controls (PQ/CMC) Data Exchange for the electronic submission of PQ/CMC data. This document provides draft design of Health Level 7 (HL7) Fast Health Interoperability Resources (FHIR) profiles that contain the data elements and terminologies associated with PQ/CMC subject areas and scoped to some of what is currently submitted in Module 3 of the electronic Common Technical Document (eCTD) submission. It is not intended to be comprehensive in covering all eCTD product quality information, only those concepts that were considered amenable to structuring and would bring value to the quality review process. The Agency is seeking comment on the mapping of the PQ/CMC data elements to the various FHIR Resources. This document should not be viewed as guidance, technical specification, or an implementation guide, as it is meant solely for comment. The FHIR mapping presented in this document is bound to the HL7 FHIR R5 draft release. As such, it is likely that some parts of the mapping presented in this document may change based on comments during the HL7 balloting and reconciliation process. However, since HL7 balloting has variable and extensive timelines, the Agency determined that it would be prudent to provide an early opportunity for comment that will inform final development of the exchange standard.

DATES: Submit either electronic or written comments by May 17, 2022.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before May 17, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 17, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–N–0297 for ''Draft Pharmaceutical Quality/Chemistry Manufacturing and Controls (PQ/CMC) Data Exchange for the electronic submission of PQ/CMC data; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available

for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Bryan Spells, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1117, Silver Spring, MD 20993–0002, *Bryan.Spells@fda.hhs.gov,* 240–402–6511; Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911; Norman Gregory, Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl. (HFV–143), Rockville, MD 20855, *Norman.Gregory@fda.hhs.gov,* 240–402–0684; or Michael Kerrigan, Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl. (HFV–143), Rockville, MD 20855, 240–402–0644, *Michael.Kerrigan@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

PQ/CMC is a term used to describe manufacturing and testing data of pharmaceutical products. PQ/CMC encompasses topics such as drug stability, quality specification, batch formula, and batch analysis, which are important aspects of drug development. PQ/CMC plays an integral part in the regulatory review process and life cycle management of pharmaceutical products. The development of a structured format for PQ/CMC data will enable consistency in the content and format of PQ/CMC data submitted, thus providing a harmonized language for submission content, allowing reviewers to query the data, and, in general, contributing to a more efficient and effective regulatory decision-making process by creating a standardized data dictionary.

The impetus for this standardization effort was the provisions from the 2012 Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), which authorized the Agency to require certain submissions to be submitted in a specified electronic format. PQ/CMC standardization supports FDA's regulatory needs in receiving structured and standardized data in pharmaceutical quality and includes two objectives: (1) To standardize the pharmaceutical quality data that is currently received by FDA in eCTD Module 3 from the sponsoring organizations, and (2) to use these structured elements and develop a FHIR data exchange solution.

Through this notice, the Agency is seeking comment on the mapping of the PQ/CMC data elements to the various FHIR Resources. After receiving comments, the Agency intends to issue guidance on the standardization of PQ/CMC data elements and terminologies for electronic submissions.

II. Electronic Access

Persons with access to the internet may obtain the draft data elements and terminologies at either *https://www.fda.gov/industry/fda-resources-data-standards* or *https://www.regulations.gov.*

Dated: March 15, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05790 Filed 3–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–1517]

Agency Information Collection Activities; Proposed Collection; Comment Request; Abbreviated New Animal Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of abbreviated new animal drug applications.

DATES: Submit either electronic or written comments on the collection of information by May 17, 2022.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before May 17, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 17, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets

Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–N–1517 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Abbreviated New Animal Drug Applications.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Abbreviated New Animal Drug Applications—Section 512(b)(2) and (n)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(b)(2) and (n)(1))

OMB Control Number 0910–0669—Extension

Under section 512(b)(2) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), any person may file an abbreviated new animal drug application (ANADA) seeking approval of a generic copy of an approved new animal drug. The information required to be submitted as part of an ANADA is described in section 512(n)(1) of the FD&C Act. Among other things, an ANADA is required to contain information to show that the proposed generic drug is bioequivalent to, and has the same labeling as, the approved new animal drug. We allow applicants to submit a complete ANADA or to submit information in support of an ANADA for phased review. Applicants may submit Form FDA 356v with a complete ANADA or a phased review submission to ensure efficient and accurate processing of information. Form FDA 356v is approved under OMB control number 0910–0032. We use the information submitted, among other things, to assess bioequivalence to the originally approved drug and thus, the safety and effectiveness of the generic new animal drug.

The information collection also includes applicant requests to waive the requirement to establish bioequivalence through in vivo studies (biowaiver requests) for soluble powder oral dosage form products or certain Type A medicated articles based upon either of two methods. We use the information submitted by applicants in the biowaiver request as the basis for our decision whether to grant the request. Therefore, the information collection references the guidance document GFI #171—Demonstrating Bioequivalence for Soluble Powder Oral Dosage Form Products and Type A Medicated Articles Containing Active Pharmaceutical Ingredients Considered to Be Soluble in Aqueous Media, which discusses statutory bioequivalence requirements as well as qualifications for requesting a waiver from the requirements. The guidance can be viewed on our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cvm-gfi-171-demonstrating-bioequivalence-soluble-powder-oral-dosage-form-products-and-type-medicated.*

The reporting associated with ANADAs and related submissions is necessary to ensure that new animal drugs are in compliance with section 512(b)(2) of the FD&C Act. We use the information submitted, among other things, to assess bioequivalence to the originally approved drug and thus, the safety and effectiveness of the generic new animal drug.

Description of Respondents: The respondents for this collection of information are veterinary pharmaceutical manufacturers.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	FDA Form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
ANADA	356v	20	1	20	159	3,180
Phased review with administrative ANADA	356v	6	5	30	31.8	954
Biowaiver request for soluble powder oral dosage form product, using same formulation/manufacturing process approach	N/A	1	1	1	5	5
Biowaiver request for soluble powder oral dosage form product, using same API/solubility approach	N/A	5	1	5	10	50
Biowaiver request for Type A medicated article, using same formulation/manufacturing process approach	N/A	2	1	2	5	10
Biowaiver request for Type A medicated article, using same API/solubility approach	N/A	5	1	5	20	100
Total				63		4,299

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We base our estimates on our records of generic animal drug applications. We estimate that we will receive 26 ANADA submissions per year over the next 3 years and that 6 of those submissions will request phased review. We estimate that each applicant that uses the phased review process will have approximately five phased reviews per application. We estimate that an applicant will take approximately 159 hours to prepare either an ANADA or the estimated five ANADA phased review submissions and the administrative ANADA. Our estimates of the burden of biowaiver requests for generic soluble powder oral dosage form products and Type A medicated articles differ based on the type of product and the basis for the request, as shown in table 1. We estimate that an applicant will take between 5 and 20 hours to prepare a biowaiver request.

Our estimated burden for the information collection reflects an overall increase of 695 hours and a corresponding increase of 12 responses. Based on a review of the information collection since our last request for OMB renewal, the increase in the burden hours estimate is attributable to an increase in the number of respondents submitting generic drug applications.

Dated: March 14, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–05782 Filed 3–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; SHIP COVID–19 Testing and Mitigation Program Data Collection, OMB No. 0906–0066—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30 day comment period for this Notice has closed.

DATES: Comments on this ICR should be received no later than April 18, 2022.

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.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the acting HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–9094.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: SHIP COVID–19 Testing and Mitigation Program Data Collection OMB No. 0906–0066—Extension.

Abstract: The American Rescue Plan Act of 2021 (Pub. L. 117–2) provided one-time funding for awards that will be carried out under section 711 of the Social Security Act (42 U.S.C. 912(b)(5)). The Small Rural Hospital Improvement Program (SHIP) is requesting an extension of an information collection request. State grantees will improve health care in rural areas by using the funding to provide support to eligible rural hospitals to increase COVID–19 testing efforts, expand access to testing in rural communities, and expand the range of mitigation activities.

A 60-day Notice published in the **Federal Register**, 86 FR 74095 (December 29, 2021). There were no public comments.

Need and Proposed Use of the Information: The terms and conditions for this program specify that, ''hospitals will be required to report on the number of tests provided and categories in which the funding is spent.'' The data will allow HRSA to ensure SHIP COVID–19 recipients are meeting the terms and conditions of their funding, while providing HRSA with information on the effectiveness of funds distributed through this program.

Likely Respondents: The respondents will be hospital staff and designated Representatives, and State Office of Rural Health Staff.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and

maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
SHIP COVID–19 Testing and Mitigation Data Reporting.	1,540 Number of unique organizations funded through the program.	6 Reported on a quarterly basis during the 18 month program or until the end of the public health emergency (whichever is first).	9,240	.25	2,310 Total hours spent on responses for all funded organization over a 2-year period.
Total	1,540		9,240		2,310

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–05717 Filed 3–17–22; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; The Stem Cell Therapeutic Outcomes Database OMB No. 0915–0310—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with the requirement for an opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Before submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than May 17, 2022.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at (301) 443–9094.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: The Stem Cell Therapeutic Outcomes Database OMB No. 0915–0310—Revision.

Abstract: The Stem Cell Therapeutic and Research Act of 2005, Public Law (Pub. L.) 109–129, as amended by the TRANSPLANT Act of 2021, Public Law 117–15 (the Act), provides for the collection and maintenance of human blood stem cells for the treatment of patients and for research. The Act requires the Secretary to contract for the establishment and maintenance of information related to patients who have received stem cell therapeutic products and to do so using an electronic format. HRSA's Health Systems Bureau has established the Stem Cell Therapeutic Outcomes Database (SCTOD), one component of the C.W. Bill Young Cell Transplantation Program (Program) which necessitates certain electronic record keeping and reporting requirements to perform the functions related to hematopoietic stem cell transplantation (HCT) under contract to HHS. Data is collected from transplant centers by the Center for International Blood and Marrow Transplant Research and is used for ongoing analysis of transplant outcomes to improve the treatment, survival and quality of life for patients who may benefit from cellular therapies. Over time, there is an expected increase in the information reported as the number of transplants performed annually increases, and survivorship after transplantation improves. Similarly, because of ongoing rapid evolution in transplant indications, methods to establish diagnoses, disease prognostic factors, treatments provided before HCT, methods to determine donor matching, and transplantation techniques, the Program anticipates incremental changes in information collected by the SCTOD to reflect current clinical care and facilitate statistical modeling throughout the approval period to fulfill the requirements of the Program. Such small incremental changes will not significantly affect the burden.

Need and Proposed Use of the Information: Per statutory responsibilities, the collection of information outlined in the ''Total Estimated Annualized Burden Hours'' section below is needed to collect, analyze, and publish stem cell transplantation related data including patient outcomes data and provide the Secretary with an annual report of transplant center-specific survival data. The proposed revisions of this information collection reflect the most up-to-date medical evidence while simultaneously reducing HCT facility burden. Revisions fall into several categories: Consolidating questions, implementing interactive requests (electronic check boxes, check all that apply, and pull-down menus) to reduce data entry time, adding necessary information fields, adding clarity to information requests and removing items no longer clinically significant (*e.g.,* drugs). These revisions also

incorporate COVID–19 vaccine questions currently under emergency approval. From time to time, there may be refinements in the information collection to keep pace with changes in the field or to enhance the ability to collect information in an automated fashion from respondent source systems, such as electronic health records.

Likely Respondents: Transplant Centers.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below. The estimated total annual burden hours for this submission are 56,768 compared to 62,583 estimated in the 30-day **Federal Register** notice posted on August 22, 2019.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name [1]	Number of respondents [2]	Number of responses per respondent [3]	Total responses [4]	Average burden per response (in hours)	Total burden hours
Pre-Transplant Information Collection [5]	177	46.4	[6] 8,207	[7] 1.1	9,028
Transplant Procedure and Product Information [8]	177	46.4	[9] 8,207	1.0	8,207
Post-Transplant Periodic Information Collection based on Predetermined Schedule [10]	177	319.1	[11] 56,476	[12] 0.7	39,533
Total	177		72,890		56,768

[1] This burden estimate table refers to data collections at different time periods consistent with approved practice. The SCTOD contractor is working with respondents to reduce burden by submitting data using interoperability standards. These data collections may include OMB-approved forms.

[2] The Number of Responses the total number of transplant centers that submit data to the SCTOD is equal to 177.

[3] The Number of Responses per Respondent was calculated by dividing the Total Responses by the Number of Respondents and rounding to the nearest tenth.

[4] The Total Responses is less than previous calculations because of improvements in estimation. Previous estimates assumed all years had the same number of transplants. This improved estimate includes accurate transplant counts from prior years, which are often less than the current year leading to less follow-up activity.

[5] Pre-Transplant Data includes baseline recipient data including patient demographics, pertinent medical history, disease characteristics and status, and co-morbidities, transplant data procedure characteristics, including preparative regimen, and donor data.

[6] Total Responses for Pre-Transplant Information Collection equals number of new transplant patients in 2020.

[7] This number is rounded to nearest tenth. The actual burden estimate for these data is 1.11666666.

[8] Transplant Procedure and Product Information includes Graft-vs-Host Disease (GVHD) prophylaxis, graft source, donor type and degree of human leukocyte antigen matching and graft manipulation; graft characteristic data for cord blood units, including infused cell dose; and product information.

[9] Total Responses for Transplant Procedure and Product Information equals number of new transplant patients in 2020.

[10] Post-Transplant Data Collection includes hematopoietic recovery and engraftment, serious complications including GVHD and second cancers, disease status, survival status, and cause of death; and subsequent procedures.

[11] Total Responses for Post-Transplant Periodic Information Collection is based on a predetermined schedule: 100 days after transplant, 6 months after transplant, 1 year after transplant, annually for 6 years after transplant and then biennially thereafter. In any given year the number of responses is a function of the number of transplants in that year, the number of transplants in previous years, and expected patient survival between the time of transplant and any follow-up activity.

[12] This number is rounded to nearest tenth. The actual burden estimate is 0.74.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–05718 Filed 3–17–22; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Rural Health Clinic COVID–19 Reporting Portal, OMB No. 0906–0056—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30 day comment period for this Notice has closed.

DATES: Comments on this ICR should be received no later than April 18, 2022.

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.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the acting HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–9094.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Rural Health Clinic COVID–19 (RHC COVID–19) Reporting Portal, OMB No. 0906–0056—Revision.

Abstract: In October 2020, HRSA's Federal Office of Rural Health Policy (FORHP) created a monthly, aggregate data report to collect information on COVID–19 testing and related expenses conducted by funded organizations participating in the RHC COVID–19 Testing (RHCCT) Program funded through the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139). FORHP is expanding this data report to collect information on COVID–19 testing, COVID–19 mitigation, and related expenses conducted by funded organizations participating in the RHC COVID–19 Testing and Mitigation (RHCCTM) Program funded through the American Rescue Plan Act (Pub. L. 117–2). Funded organizations were identified by Tax Identification Number (TIN), and a TIN organization may operate one or more RHC sites which were identified by unique CMS Certification Numbers. Respondents are TIN organizations who received funding for COVID–19 testing, COVID–19 mitigation, and related expenses. HRSA issued RHCCTM funding as one-time payments to 2,301 TIN organizations based on the number of certified RHC sites they operate, providing $100,000 per clinic site (4,459 RHC sites total across the country). Data report information is needed to comply with federal requirements to monitor funds distributed under the Paycheck Protection Program and Health Care Enhancement Act and the American Rescue Plan Act.

A 60-day notice published in the **Federal Register**, 87 FR 103 (January 3, 2022). There were no public comments.

Need and Proposed Use of the Information: The RHC COVID–19 Reporting Portal collects information from RHC-funded providers who use RHCCT Program funding and RHCCTM Program funding to support COVID–19 testing, expand access to testing in rural communities, and other related expenses. The RHC COVID–19 Reporting Portal also collects information from RHC-funded providers who use RHCCTM Program funding to support COVID–19 mitigation and other related expenses. These data are critical to meet FORHP's requirements to monitor and report on how federal funding is being used and to measure the effectiveness of the RHCCT Program and RHCCTM Program. Revisions include a confirmation page for TIN organization self-certification following completion of each program after the period of availability. Specifically, these data will be used to assess the following:

- Whether program funds are being spent for their intended purposes;
- COVID–19 testing or testing related use(s) of RHCCTM funds;
- COVID–19 mitigation or mitigation related use(s) of RHCCTM funds;
- Where COVID–19 testing supported by these funds is occurring;
- Number of at-home (*i.e.,* home collection; direct-to-consumer; over-the-counter) COVID–19 tests distributed (optional);
- Number of COVID–19 tests;
- Number of positive COVID–19 tests;
- TIN organizations self-certification of complete expenditure of RHCCT Program funds and/or full or partial return of RHCCT Program funds; and
- TIN organizations self-certification of complete expenditure of RHCCTM Program funds and/or full or partial return of RHCCTM Program funds.

Likely Respondents: Respondents are TIN organizations who own or operate one or more RHC who received funding for COVID–19 testing, COVID–19 mitigation, and related expenses.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
RHC COVID–19 Reporting Portal	2,301	19	43,719	0.33	14,427
Total	2,301		43,719		14,427

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–05719 Filed 3–17–22; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 Neurological Disorders and Stroke Special Emphasis Panel; Clinical Trials and Biomarker Studies in Stroke.

Date: April 11, 2022.

Time: 8:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892, 301–435–6033, *rajarams@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: March 15, 2022.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05775 Filed 3–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Time-Sensitive Obesity PAR review.

Date: April 19, 2022.

Time: 11:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIDDK/National Institutes of Health, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 15, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05772 Filed 3–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; 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 Alcohol Abuse and Alcoholism Special Emphasis Panel; Exploratory/Developmental Research Grant Program Review Panel.

Date: April 8, 2022.

Time: 2:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451–2067, *srinivar@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: March 14, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05726 Filed 3–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 Mental Health Special Emphasis Panel; Deciphering Immune-CNS Interactions in HIV (R01, R21).

Date: April 14, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Rebecca Steiner Garcia, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: March 15, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–05771 Filed 3–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket Number USCG–2021–0191]

Final Programmatic Environmental Impact Statement Waterways Commerce Cutter Acquisition Program

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability; request for comments.

SUMMARY: The U.S. Coast Guard announces the availability of the Final Programmatic Environmental Impact Statement (PEIS) for the Waterways Commerce Cutter (WCC) Program's acquisition and operation of a planned 30 WCCs. In accordance with National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) NEPA implementing regulations, the Final PEIS analyzes the potential environmental and socioeconomic impacts, and identifies related mitigation measures, associated with acquisition and operation of a planned 30 WCCs to replace the capabilities of the existing inland tender fleet (Proposed Action).

DATES: Comments and related material must be post-marked or received by the Coast Guard on or before April 18, 2022. No decision will be made until at least 30 days after publication of the Notice of Availability (NOA) in the **Federal Register** by the U.S. Environmental Protection Agency, at which time the Coast Guard may execute a Record of Decision (ROD).

ADDRESSES: The Final PEIS is available in the docket which can be found by searching the docket number USCG–2021–0191 using the Federal Decision Making Portal at *https://www.regulations.gov* and for download on the project website at *https://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-Engineering-Logistics-CG-4-/Program-Offices/Environmental-Management/Environmental-Planning-and-Historic-Preservation/.* Requests for additional information should be sent to U.S. Coast Guard Headquarters, ATTN: LCDR S. Krolman (CG–9327), 2703 Martin Luther King Jr. Ave. SE, Stop 7800, Washington, DC 20593.

We encourage you to submit comments and related material on the Final PEIS. We will consider all submissions and may adjust our final action based on your comments. If you submit a comment, please include the docket number for this notice, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting Comments: You may submit comments on the Final PEIS by one of the following methods:

- *Via the Web:* You may submit comments identified by docket number USCG–2021–0191 using the Federal eRulemaking Portal at *https://www.regulations.gov.*
- *Via U.S. Mail:* U.S. Coast Guard Headquarters, ATTN: LCDR S. Krolman (CG–9327), 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 30 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: Please contact Lieutenant Commander S. Krolman, Waterways Commerce Cutter Program, U.S. Coast Guard; phone 202–475–3104; email *HQS-SMB-CG-WaterwaysCommerceCutter@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard has a statutory mission to establish, maintain, and operate aids to navigation (ATON) in the Inland Waterways and Western Rivers (IW&WR). The IW&WR includes the Gulf and Atlantic Intracoastal Waterway; the Mississippi, Missouri, Alabama, Tennessee, Columbia, and Ohio Rivers, their associated tributaries and other connecting waterways; portions of the Alaska Inside Passage; portions of the Great Lakes; and several other navigable waterways around the United States. The 35 cutters and associated 27 barges that comprise the existing inland tender fleet servicing the IW&WR are, on average, more than 54 years old and all have significantly exceeded their design service life of 30 years. There is no redundant vessel capability within the Coast Guard, Department of Homeland Security (DHS), or other government agencies. Without replacement of the existing inland tender fleet, the Coast Guard could face an increasing risk of failure to maintain the capability to execute its ATON mission and provide timely ATON services in the IW&WR and other navigable waters around the United States. The Proposed Action would enable the continued safe navigation of waters that support the nation's economy through maritime commerce throughout the Marine Transportation System.

Similar to the existing inland tender fleet's operations, the Proposed Action would include vessel operations to establish, operate, and maintain the lighted and unlighted buoys and beacons to maintain the United States Visual ATON System. This mission contributes to protecting national interests by ensuring safe and efficient flow of commercial vessel traffic through our nation's waters.

Full operational capability would be achieved when all planned WCCs have been produced and are operational. Coast Guard WCC operations and training would occur after delivery of each WCC from the shipbuilder to the Coast Guard. For example, the first WCC delivery to the Coast Guard is expected in 2024 and the cutter would then be operational in 2025. The last WCC is expected to be delivered and operational approximately by 2030.

The Proposed Action would include WCC operation, maintenance, and commissioning of a planned 11 WCC construction class (WLIC) tenders to replace the existing capabilities of 13 inland construction tenders; a planned 16 River Buoy class (WLR) tenders to replace the capabilities of the river buoy tenders; and a planned three Inland Buoy class (WLI) tenders to replace the capabilities of the inland buoy tenders. Although there are three classes proposed and design specifications are not final, the design would maximize commonality between the three classes to reduce sustainment costs, training needs, and other associated requirements.

The Final PEIS analyzes the potential environmental and socioeconomic impacts associated with the Proposed Action, including direct, indirect, and cumulative effects, and mitigation measure to minimize impacts.

The Coast Guard completed an Endangered Species Act (ESA) Section 7 and Essential Fish Habitat consultation with the National Marine Fisheries Service (NMFS) on U.S. Coast Guard Federal Aids to Navigation Program on

April 19, 2018. The Coast Guard obtained U.S. Fish and Wildlife Service (USFWS) concurrence on the determination that there would be no effect to ESA listed species from vessel design and construction. An ESA Section 7 consultation with the USFWS on U.S. Coast Guard Federal Aids to Navigation Program remains on-going and is inclusive of all WCC operations, which is expected to be completed before the first planned WCC is operational in 2025. The USFWS expects to complete formal consultation and issue their opinion on the USCG ATON Biological Evaluation in December 2022 and before the first new WCC is constructed. The WCC Proposed Action is included in the ESA consultations with NMFS and the USFWS.

The Coast Guard identified three reasonable alternatives that would meet the purpose and need of the Proposed Action; these three Action Alternatives are analyzed in detail in the Final PEIS.

1. *Alternative 1 (Preferred Alternative):* The Coast Guard would acquire a planned 30 WCCs to replace the capabilities of the existing inland tender fleet (consisting of 35 cutters and 27 barges) to fulfill mission requirements in federal waterways, including the vast network of the IW&WR. The proposed WCCs would consist of a planned 16 WLRs, a planned 11 WLICs, and a planned three WLIs. The first WCCs would potentially be operational as soon as 2025, with a planned 30 WCCs delivered and operational approximately by 2030. A planned four WLR and WLIC vessels could be constructed per year, dependent upon industry capability, beginning in 2025 and continuing until 27 total WLRs and WLICs have been received. The first WLI would not be expected until 2027 with a planned two WLIs being delivered in a year, dependent upon industry capability. WCCs are expected to be operational within 3 months of the time of acceptance from the contractor. During construction of the WCCs, Coast Guard would have up to two dozen personnel imbedded in the contractor's workspaces for design and construction review and inspection. This construction schedule would allow for the existing inland tender fleet to remain present with no service interruptions to Coast Guard missions.

2. *Alternative 2:* The Coast Guard would explore hybrid government and contracted options for mission performance. Ship platforms would meet similar technical specifications discussed in Alternative 1. Scenarios include: Contractor-owned vessels that are government-operated (Coast Guard employees or a partner agency provides the crew for third-party, contractor-owned vessels); government-owned vessels that are contractor-operated (a commercial operating company provides the crew for Coast Guard or partner agency owned vessels); or contractor-owned and contractor-operated systems (Coast Guard provides neither the vessels nor personnel).

The logistical costs of contracting a combination of unique hulls to satisfy the requirements to service ATON in the proposed action areas would exceed the corresponding costs of maintaining a class of 30 cutters that would be built specifically to conduct missions in the Coast Guard's proposed action areas. Similarly, one-for-one replacement would cost far more per replacement hull because it eliminates any workforce savings associated with a ship with capabilities designed specifically to conduct Coast Guard missions in the IW&WR. Major challenges to any combined fleet are that the assets would not be able to communicate in real time, they would operate at differing levels of efficiency (resulting in decreased efficiency throughout the ATON system), and they would incur increased maintenance costs.

3. *Alternative 3:* The mixed fleet alternative would involve a combination of cutters and shore-based assets (including Aids to Navigation team units), implementation of electronic ATON, and use of contracted ATON services to achieve Coast Guard ATON missions throughout the IW&WR. To accomplish a mixed fleet solution, additional Coast Guard ATON personnel and teams would be required. To accommodate the additional ATON teams, existing facilities would require expansion and construction of new shore based facilities could be necessary. Use of electronic ATON instead of physical ATON could also prove necessary. Similar to Alternative 2, the logistical costs to satisfy the requirements to service ATON in the proposed action areas would exceed the corresponding costs of maintaining a class of 30 cutters that would be built specifically to conduct missions in the IW&WR. Additionally, similar to Alternative 2, major challenges with this approach are that assets would not be able to communicate in real time, they would operate at differing levels of efficiency (resulting in decreased efficiency throughout the system), and they would incur increased maintenance costs.

The Coast Guard also carried forward the No Action Alternative for detailed analysis in the Final PEIS. While the No Action Alternative would not satisfy the purpose and need for the Proposed Action, this alternative was retained to provide a comparative against which to analyze the effects of the Action Alternatives as required under CEQ's NEPA regulation.

Resource areas analyzed in the Final PEIS include: Air quality, ambient sound, bottom habitat and sediments, water quality, biological resources and critical habitat, and socioeconomic resources.

Stressors analyzed in the Final PEIS include: Acoustic stressors (fathometer and Doppler speed log noise, vessel noise, ATON signal testing noise, tool noise, and pile driving noise) and physical stressors (vessel movement, bottom devices, construction, brushing, pile driving, unrecovered jet cone moorings, ATON retrieval devices, and tow lines).

Based on the analysis presented in the Final PEIS, potentially adverse impacts could occur to biological resources (that is, from disturbance); however, practical mitigation measures presented in the Final PEIS reduce any of these potential adverse effects. As a result, impacts to all resource areas would be less-than-significant (that is, negligible, minor, or moderate) adverse or beneficial, which may result in the Coast Guard making a finding of no significant impact in the ROD. However, these findings are not final until the Coast Guard executes a ROD.

The Coast Guard held two virtual public scoping meetings and on September 24, 2021, the Coast Guard published a Notice of Availability (NOA) and a request for comments on the Draft PEIS (86 FR 53086). The Coast Guard received three letters commenting on the Draft PEIS. The Coast Guard considered and addressed in the Final PEIS comments received on the Draft PEIS during the comment period. Public comments did not result in the addition of substantive revisions to the Draft PEIS. Responses to comments are in Appendix G of the Final PEIS. An electronic copy of the Final PEIS is posted on the following web page: *https://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-Engineering-Logistics-CG-4-/Program-Offices/Environmental-Management/Environmental-Planning-and-Historic-Preservation/.*

After publication of this NOA of the Final PEIS, the Coast Guard will prepare and publish its ROD announcing which Alternative is environmentally preferred and which Alternative it selects for implementation. Publication of the Final ROD will occur no sooner than 30 days after the publication of the Final

PEIS. This notice is issued under authority of NEPA, specifically in compliance with 42 U.S.C. 4332(2)(C) and CEQ implementing regulations in 40 CFR parts 1500 through 1508.

Dated: March 14, 2022.

Aaron Pagnotti,

Waterways Commerce Cutter Program Manager.

[FR Doc. 2022–05703 Filed 3–17–22; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning April 1, 2022, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments will be 4 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of April 1, 2022.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2022–05, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2022, and ending on June 30, 2022. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties are increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning July 1, 2022, and ending on September 30, 2022.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate over-payments (eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate over-payments (eff. 1–1–99) (percent)
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3

Dated: March 11, 2022.

Jeffrey Caine,

Chief Financial Officer, U.S. Customs and Border Protection.

[FR Doc. 2022–05688 Filed 3–17–22; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Streamlining I–94 Issuance at the Land Border

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: To increase efficiency, reduce operating costs, and streamline the admissions process, U.S. Customs and Border Protection (CBP) is now issuing electronic Form I–94s (Arrival/Departure Record) at land ports of entry. The Form I–94 documents nonimmigrants' status in the United States, the approved length of stay, and departure information. CBP has automated the Form I–94 process for the majority of nonimmigrants arriving by air and sea. However, CBP previously issued paper Form I–94s to nonimmigrants arriving by land. For land arrivals, CBP is no longer issuing paper forms to nonimmigrants upon arrival except in limited circumstances and upon nonimmigrant request if feasible. Nonimmigrants can access Form I–94s online or via mobile application.

FOR FURTHER INFORMATION CONTACT: Tricia Kennedy, Office of Field Operations, U.S. Customs and Border Protection at *Tricia.Kennedy@cbp.dhs.gov* or (813) 927–6420.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Form I–94

The Department of Homeland Security (DHS) delegated its authority to issue and process the Form I–94 (Arrival/Departure Record) to U.S. Customs and Border Protection (CBP). *See* DHS Delegation 7010.3 II.B.5 (May 11, 2006). CBP issues a Form I–94 to certain nonimmigrants who are eligible for admission or parole in the United States. Each arriving nonimmigrant who is admitted to the United States, including nonimmigrants arriving by commercial conveyances, must be issued a Form I–94 as evidence of the terms of admission, unless otherwise exempted.[1] *See* section 235.1(h) of title 8 of the Code of Federal Regulations (8 CFR 235.1(h)). CBP generally issues the Form I–94 to nonimmigrants at the time they lawfully enter the United States. The current Form I–94 documents nonimmigrants' arrival and departure information, as well as their biographical information, such as name, birth date, sex, country of citizenship, visa and passport information or Alien Registration Number for certain categories of nonimmigrant, country of residence, address and telephone number while in the United States, and email address. For nonimmigrants admitted to the United States, the Form I–94 becomes the evidence of the terms of their admission. For nonimmigrants paroled into the United States, the Form I–94 reflects the duration and classification of parole. Currently, the Form I–94 process is automated for nonimmigrants arriving by air or sea. For nonimmigrants arriving by land, CBP utilized a paper I–94 process that included a nonautomated electronic

[1] The Form I–94 is not required for nonimmigrants seeking admission to the United States under the Visa Waiver Program (VWP). Rather, the Form I–94W is the form required for nonimmigrants seeking admission into the United States under the VWP. The other categories of nonimmigrants not subject to the I–94 requirement are enumerated in 8 CFR 235.1(h)(1).

submission option. These processes are described below.

B. Previous Paper I–94 Process for Land Arrivals

CBP previously used a paper Form I–94 process for all eligible nonimmigrants arriving at land ports of entry (POEs). The paper Form I–94 consists of two parts: The arrival portion and the departure portion. Each nonimmigrant arriving by land for whom a Form I–94 is required completes both the arrival and departure portions of the form either en route to or upon arrival in the United States when applicable.[2] The information requested on the arrival portion of the I–94 includes: Family name, first (given) name, birth date, country of citizenship, sex, passport number, passport expiration date, passport issue date, airline and flight number (if applicable), country of residence, country of boarding, city where visa was issued, date visa was issued, address and telephone number while in the United States, and email address. The departure portion includes fields for the nonimmigrant's full name, birth date, and country of citizenship.

After the nonimmigrant completes the Form I–94, he or she presents it to a CBP officer at primary inspection, along with his or her travel documents and any other applicable information. Previously, after a successful completion of the inspection process, a CBP officer stamped the nonimmigrant's Form I–94 and passport with either an admission or parole stamp. The CBP officer retained the arrival portion of the Form I–94 and returned the departure portion to the nonimmigrant. The departure portion of the form was provided to the nonimmigrant to retain in his or her possession for the duration of his or her stay and to surrender upon departure. In some circumstances, a nonimmigrant is required to have the Form I–94 in his or her possession at all times while in the United States. The nonimmigrant could present the departure portion to establish, where applicable, eligibility for employment, enrollment in a university, or benefits.

CBP collects the arrival portions of the paper Forms I–94 daily at each POE and boxes and mails them to a centralized data processing center for logging, processing, scanning, and data capture.

[2] Previously all eligible nonimmigrants would complete the paper Form I–94. Now nonimmigrants may continue to submit their information via the paper Form I–94 on arrival, but CBP strongly encourages nonimmigrants to submit their I–94 information via the website or mobile application up to seven days in advance instead.

C. Automation of Form I–94 for Air and Sea Arrivals

Prior to the automation of the Form I–94 for air and sea arrivals, CBP followed the same paper Form I–94 process described above for all air and sea arrivals. In order to transition to an automated process, DHS published an interim final rule (IFR), which amended DHS regulations to specify that the Form I–94 could be created and issued in either paper or electronic format. *See* 78 FR 18457 (Mar. 27, 2013). On December 19, 2016, CBP finalized the changes announced in the IFR with the publication of a Final Rule in the **Federal Register** (81 FR 91646). Although the regulatory changes permitted DHS to automate the Form I–94 process for all modes of travel (air, sea, or land), CBP stated in the IFR that it was transitioning to an automated Form I–94 process for only air and sea arrivals at that time. Pursuant to the automated process, CBP no longer requires nonimmigrants arriving by air and sea to fill out a paper Form I–94 in most circumstances. Instead, an electronic version of the Form I–94 is populated with information available in CBP's databases, including the information electronically transmitted by air and sea carriers, as well as data from the Department of State's Consular Consolidated Databases (CCD). Any data element not available electronically is collected by the CBP officer at the time of inspection and recorded in the relevant electronic system.

After a successful inspection, CBP issues an electronic Form I–94, which the nonimmigrant can access on a CBP website, *https://i94.cbp.dhs.gov,* or via the CBP One™ mobile application, by entering details from his or her passport or Alien Registration Number for certain categories of nonimmigrants. The nonimmigrant can print a paper version of the Form I–94 to present as evidence of admission or parole. The printed version is the functional equivalent of the paper Form I–94. CBP may issue paper Form I–94s in limited circumstances and may provide a paper Form I–94 upon request from a nonimmigrant if feasible.

D. Enhanced Form I–94 Land Border Process

As detailed in the Final Rule, in addition to the automation of the Form I–94 at air and sea POEs started by the 2013 IFR, CBP modified the process by which a nonimmigrant arriving at the land border can provide Form I–94 information and pay the related fee by adding a nonautomated electronic option on September 29, 2016. 81 FR 91646, 91648 (Dec. 19, 2016). Specifically, CBP enhanced the I–94 website to enable nonimmigrants arriving at a land POE to submit the Form I–94 information to CBP and pay the required fee prior to arrival. Using the I–94 website, the nonimmigrant enters all of the required data for I–94 processing that would be collected by CBP at the POE. Upon paying the fee, the nonimmigrant receives an electronic ''provisional I–94''. This ''provisional I–94'' becomes effective after the nonimmigrant appears at a land POE and completes the I–94 issuance process with a CBP officer. If the ''provisional I–94'' is not processed within seven days of submitting the application, it will expire and the fee will be forfeited.

The I–94 website instructs the nonimmigrant to appear at the land POE for an interview and biometric collection. When the nonimmigrant arrives at the POE, the nonimmigrant completes the issuance process with a CBP officer. The CBP officer will locate the nonimmigrant's information in CBP's database using the nonimmigrant's passport or other travel document. This will verify that the fee was paid and pre-populate the data fields from the document and the information provided in advance by the nonimmigrant on the I–94 website. Prior to May 26, 2021, if the CBP officer determined that the nonimmigrant was admissible, the CBP officer would print out a Form I–94 and give it to the nonimmigrant.

However, as of May 26, 2021, CBP is no longer providing a paper form to these nonimmigrants, who may now access their Form I–94 via the website or the CBP One™ mobile application. As of June 11, 2021, in addition to accessing their I–94 via the CBP One™ mobile application, nonimmigrants now also have the option of submitting their Form I–94 information and paying the related fee via the CBP One™ mobile application to receive a ''provisional I–94'' prior to arriving at land POEs.

II. Legal Authority

The IFR added to the regulations a definition of ''Form I–94'' that allows DHS to issue the Form I–94 in either paper or electronic format.[3] The introductory text of 8 CFR 1.4 states that the term ''Form I–94'' includes the collection of arrival/departure and admission or parole information by DHS, whether in paper or electronic format. Additionally, the ''issuance'' of a Form I–94 includes, but is not limited

[3] *See* 8 CFR 1.4. CBP finalized the changes announced in the IFR with the publication of the 2016 Final Rule.

to, the creation of an electronic record of admission or arrival/departure by DHS following an inspection performed by an immigration officer. 8 CFR 1.4(c). Together, these regulations authorize CBP to issue Form I–94 in either a paper or electronic format to any nonimmigrant eligible to receive a Form I–94.

III. Streamlining I–94 Issuance at the Land Border

To increase efficiency, reduce operating costs, and streamline the admissions process, CBP is now issuing Form I–94s electronically and nonimmigrants no longer receive a paper I–94 receipt. Nonimmigrants can access their Form I–94s online through a website or via a mobile application. CBP will no longer provide a paper version of Form I–94 in the majority of circumstances. CBP continues to issue a Form I–94 at land POEs only upon payment of a fee.

A. The Electronic Form I–94

As of May 26, 2021, CBP officers no longer issue most eligible nonimmigrants a paper version of the I–94 at the time of admission or parole. Rather, CBP issues an electronic Form I–94, which the nonimmigrant can access on a CBP website, *https://i94.cbp.dhs.gov,* or via the CBP One™ mobile application. However, CBP may issue a paper Form I–94 in limited circumstances and may provide a paper Form I–94 upon request from a nonimmigrant if feasible.

The printout from the website or mobile application is the functional equivalent of the departure portion of the paper Form I–94 and includes the terms and duration of admission or parole. Nonimmigrants may print out a copy of the Form I–94 from the website or mobile application and present it to third parties to establish, where applicable, eligibility for benefits, enrollment at a university, or eligibility for employment.

The streamlining of Form I–94 for nonimmigrants arriving by land by providing an electronic Form I–94 saves time and money for both the traveling public and CBP. The electronic process eliminates some of the paper Form I–94 processing performed by CBP and will reduce wait times at passenger processing, which will also facilitate inspection of all nonimmigrants. The electronic Form I–94 will save the time and expenses associated with lost Form I–94s, as nonimmigrants will simply be able to print out new copies from the website or mobile application as necessary, as opposed to filing a Form I–102 and paying a fee, as previously required. This will result in cost savings for nonimmigrants, carriers, and CBP.

B. Form I–94 Fee

For land border admissions, CBP issues a Form I–94 only upon payment of a fee. *See* 8 CFR 235.1(h). Nonimmigrants intending to enter the United States at land POEs have the option either to pay the required fee at the border during processing or pay the required fee online or via the CBP One™ mobile application up to seven days in advance of arrival.[4] At this time, CBP is not changing the procedures regarding the payment of the Form I–94 fee. Accordingly, nonimmigrants arriving by land will continue to have the option to either pay the required fee at the POE or pay online or via the mobile application prior to arrival.

CBP strongly encourages nonimmigrants to apply and pay for I–94s via the website or mobile application.

IV. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the streamlining of Form I–94 at land border POEs.

V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. The Form I–94 is covered by OMB control number 1651–0111. There is no change to the information collection associated with this notice.

VI. Signing Authority

Commissioner Chris Magnus, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: March 14, 2022.

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

[FR Doc. 2022–05758 Filed 3–17–22; 8:45 am]

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[4] For more information on the electronic prepayment of the I–94 fee for land border POEs online see 81 FR 91646, 91648. For more information on the CBP One™ mobile application see *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2022–0001]

Notice of Public Hearing on the Use of Forced Labor in the People's Republic of China and Measures To Prevent the Importation of Goods Produced, Mined, or Manufactured, Wholly or in Part, With Forced Labor in the People's Republic of China Into the United States

AGENCY: Department of Homeland Security.

ACTION: Notice of public hearing.

SUMMARY: The Forced Labor Enforcement Task Force (FLETF) will hold a public hearing, as required by the Uyghur Forced Labor Prevention Act, on the use of forced labor in the People's Republic of China and potential measures to prevent the importation of goods mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China into the United States. This hearing will be held remotely via web conference.

DATES: The Forced Labor Enforcement Task Force (FLETF) will hold the hearing on Friday, April 8, 2022, starting at 9 a.m. and ending at 1:30 p.m. EDT. Members of the public interested in providing public testimony must register by Wednesday, March 30, 2022, 11:59 p.m. EDT; instructions on how to register are included in **ADDRESSES**. Please note that the hearing may close early, or run over time, depending on the number of registered speakers. Allocation of time within the event may shift based on participation and registration per topic area, as listed in **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The hearing will be held remotely via web conference. Members of the public interested in providing public testimony at the hearing must register at the following link, *https://forms.office.com/g/fC8AeiDEbQ,* by Wednesday, March 30, 2022, 11:59 p.m. EDT. You must indicate in the registration form that you want to speak by selecting ''provide public testimony'' in question 6 (explaining how you are ''requesting to'' participate). You must register for the public hearing with the same email address that you plan to use to login to attend the public hearing. When registering, identify the topic area on which you would like to speak. More information regarding the list of topics is included in **SUPPLEMENTARY INFORMATION** below.

Members of the public interested in attending in listen-only mode can

register at the same link, *https://forms.office.com/g/fC8AeiDEbQ,* by selecting ''attend (listen only)'' in question 6 (explaining how you are ''requesting to'' participate). You must register for the public hearing by 11:59 p.m. EDT on April 6, 2022 to ensure you will receive the conference link. The conference link will be provided to all registrants by 8:00 a.m. EDT on Friday, April 8, 2022.

Reasonable accommodations are available for people with disabilities. To request a reasonable accommodation, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section below as soon as possible. DHS is considering providing interpretation services for those interested in providing public testimony in the following languages: Spanish, Mandarin, and Uyghur. It is requested that you advise the FLETF accordingly when registering to participate, at the same registration link, *https://forms.office.com/g/fC8AeiDEbQ.*

Written comments related to this public hearing were submitted through the Federal eRulemaking Portal at *https://www.regulations.gov/* and posted. For access to the docket and to read comments received by the FLETF, go to *https://www.regulations.gov/* and search for Docket ID DHS–2022–0001.

FOR FURTHER INFORMATION CONTACT: Cynthia Echeverria, Acting Director of Trade Policy, Trade and Economic Security, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security (DHS) at 202–938–6365 or *FLETF.PUBLIC.COMMENTS@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Uyghur Forced Labor Prevention Act (UFLPA),[1] this notice announces that DHS, on behalf of the FLETF,[2] will hold a public hearing that will allow for public testimony on the use of forced labor in the People's Republic of China (PRC) and potential measures to prevent the importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part with forced labor in the PRC into the United States. The hearing will consider measures that can be taken to trace the origin of goods, offer greater supply chain transparency, and identify third country supply chain routes for goods mined, produced, or manufactured wholly or in part with forced labor in the PRC, as well as other measures for ensuring that such goods do not enter the United States.

The FLETF invites the public to speak during the hearing, and recommends that interested parties review the Notice that requested comments on the measures described by the UFLPA.[3] Members of the public who are interested in speaking during this hearing should register in accordance with the directions in the **ADDRESSES** section of this notice. If you register to provide public testimony, you will be called upon using the name you provide during registration to offer public testimony. If you wish to highlight your affiliation with an association, organization, or corporation, you must provide this information during your remarks. We also request that each speaker limit their comments to three minutes. The hearing will be broken into sections based on topics in the order below. If DHS provides interpretation services for public testimony based on public request, public testimony requiring interpretation services will occur after the remarks to open the hearing. Each speaker will be called on during the section related to the topic that speaker identified during registration. The order of topics is as follows:

- Forced Labor Schemes in Xinjiang and the PRC;
- Risks of Importing Goods Made Wholly or in Part with Forced Labor;
- Measures That Can Be Taken to Trace the Origin of Goods and to Offer Greater Supply Chain Transparency;
- Measures That Can Be Taken to Identify Third Country Supply Chain Routes;
- Factors To Consider in Developing and Maintaining the Required Entities List;
- High Priority Sectors, Including Cotton, Tomato, and/or Polysilicon Supply Chains, for Enforcement;
- Needed Importer Guidance;
- Opportunities for Coordination and Collaboration; and,
- Other General Comments Related to the Uyghur Forced Labor Prevention Act and Comments Covering Multiple Topics.

Speakers may submit supplemental written testimony.[4] Written testimony should be submitted to the email provided in **ADDRESSES** (*FLETF.PUBLIC.COMMENTS@hq.dhs.gov*). Please use the email used to register for the public hearing to submit supplemental written testimony in .doc, .docx or .pdf form by April 8, 2022 at 9 a.m. The public hearing transcript and all written testimony, submitted according to the above guidelines, will be posted in Docket No. DHS–2022–0001 after the public hearing. Confidential information should not be provided through the public hearing process, in either written or oral testimony. The FLETF cannot accept any written testimony that is hand-delivered, couriered, or mailed at this time. This hearing along with all comments will be recorded and transcribed.

Senior officials of the interagency members represented in the FLETF, including the FLETF Chair (DHS Undersecretary for Strategy, Policy, and Plans),[5] will make remarks to open the hearing, and will continue to observe the hearing unless called away for official responsibilities. Staff from each of the FLETF interagency members will be present throughout the entirety of the hearing to take note of the public testimony. As mentioned above, this public hearing will be recorded and transcribed.

On January 24, 2022, DHS, on behalf of the FLETF, published a notice document (Notice) requesting public comments on how best to ensure that goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part with forced labor in the PRC are not imported into the United States. *See* 87 FR 3567. DHS and the FLETF recommend that members of the public that will attend the hearing review the Notice in advance.

The FLETF will use the comments received from the Notice and information gathered from this public hearing to inform the development of the strategy required by the UFLPA.[6] The FLETF will consider all comments and information received during this public hearing.

Robert Silvers,

Under Secretary, Office of Strategy, Policy, and Plans.

[FR Doc. 2022–05738 Filed 3–15–22; 4:15 pm]

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[1] *See* Public Law 117–78, section 2(b).

[2] Section 741 of the United States-Mexico-Canada Agreement Implementation Act (19 U.S.C. 4681) established the FLETF to monitor U. S. enforcement of the prohibition under Section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307).

[3] *See, Notice seeking Public Comments on Methods to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced labor in the People's Republic of China, Especially in the Xinjiang Uyghur Autonomous Region, Into the United States,* 87 FR 3567 (Jan. 24, 2022).

[4] Written testimony will only be accepted from speakers providing oral testimony.

[5] Pursuant to DHS Delegation Order No.23034, the DHS Under Secretary for Strategy, Policy, and Plans serves as the Chair of the FLETF.

[6] *See* Public Law 117–78, section 2(c).

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2022–N220; FXES11130200000–223–FF02ENEH00]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for a permit to conduct activities intended to recover and enhance endangered species survival. With some exceptions, the Endangered Species Act of 1973, as amended (ESA), prohibits certain activities that may impact endangered species unless a Federal permit allows such activity. The ESA also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please submit your written comments by April 18, 2022.

ADDRESSES:

Document availability: Request documents by phone or email: Marty Tuegel 505–248–6651, *marty_tuegel@fws.gov*.

Comment submission: Submit comments by email to *fw2_te_permits@fws.gov*. Please specify the permit application you are interested in by number (*e.g.,* Permit Record No. PER1234567).

FOR FURTHER INFORMATION CONTACT: Marty Tuegel, Supervisor, Environmental Review Division, 505–248–6651. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

With some exceptions, the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes hunting, shooting, harming, wounding, or killing but also such activities as pursuing, harassing, trapping, capturing, or collecting.

The ESA and our implementing regulations in the Code of Federal Regulations (CFR) at title 50, part 17, provide for issuing such permits and require that we invite public comment before issuing permits for activities involving listed species.

A recovery permit we issue under the ESA, section 10(a)(1)(A), authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or enhance the species' propagation or survival. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Documents and other information submitted with these applications are available for review by any party who submits a request as specified in **ADDRESSES**. Releasing documents is subject to Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552) requirements.

Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild. We invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies. Please refer to the permit record number when submitting comments.

Permit record No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER0035043	Deatherage, Jay; Nacogdoches, Texas.	Indiana bat (*Myotis sodalis*)	Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin.	Presence/absence surveys, capture.	Capture, collect, tag.	Renew.
PER0034621	Molano-Flores, Brenda; Champagne, Illinois.	Zapata bladderpod (*Physaria thamnophila*)	Texas	Presence/absence surveys, collection.	Collect	New.
PER0035041	Anderson, Kelsey; San Marcos, Texas.	Austin blind salamander (*Eurycea waterlooensis*), Barton Springs salamander (*Eurycea sosorum*), Texas blind salamander (*Eurycea rathbuni*).	Texas	Presence/absence surveys, capture, tagging.	Harass, harm ..	New.
PER0031454	Gadek, Chauncey; Albuquerque, New Mexico.	Jemez Mountains salamander (*Plethodon neomexicanus*)	New Mexico	Presence/absence surveys, monitoring.	Harass, harm ..	New.
PER0034050	Bureau of Land Management; Phoenix, Arizona.	Sonoran pronghorn (*Antilocapra americana sonoriensis*), Southwestern willow flycatcher (*Empidonax traillii extimus*), Gila chub (*Gila intermedia*), Gila topminnow (*Poeciliopsis occidentalis*), desert pupfish (*Cyprinodon macularius*).	Arizona	Presence/absence surveys.	Harass, harm ..	Renew/Amend.
PER0031587	Sanchez, Audrey; Dixon, New Mexico.	Jemez Mountains salamander (*Plethodon neomexicanus*)	New Mexico	Presence/absence surveys, monitoring.	Harass, harm ..	New.
PER0034599	Bowman Consulting Group; San Marcos, Texas.	Golden-cheeked warbler (*Setophaga chrysoparia*)	Texas	Presence/absence surveys, habitat assessment.	Harass, harm ..	Amend.
PER0035065	Miller, Amanda; Winchester, Tennessee.	Beetle [no common name] (*Rhadine exilis*), beetle [no common name] (*Rhadine infernalis*), Helotes mold beetle (*Batrisodes venyivi*), Cokendolpher Cave harvestman (*Texella cokendolpheri*), Robber Baron Cave meshweaver (*Cicurina baronia*), Madla Cave meshweaver (*Cicurina madla*), Bracken Bat Cave meshweaver (*Cicurina venii*), Government Canyon Bat Cave meshweaver (*Cicurina vespera*), Government Canyon Bat Cave spider (*Tayshaneta microps*).	Texas	Presence/absence surveys.	Harass, harm ..	Renew.
PER0035222	Desert Botanical Garden; Phoenix, Arizona.	Socorro isopod (*Thermosphaeroma thermophilus*), Sacramento prickly poppy (*Argemone pleiacantha* ssp. *pinnatisecta*), Mancos milk-vetch (*Astragalus humillimus*), Sneed pincushion cactus (*Coryphantha sneedii* var. *sneedii*), Knowlton's cactus (*Pediocactus knowltonii*), Todsen's pennyroyal (*Hedeoma todsenii*), Huachuca water-umbel (*Lilaeopsis schaffneriana* var. *recurva*), Holy Ghost ipomopsis (*Ipomopsis sancti-spiritus*), Kearney's blue-star (*Amsonia kearneyana*), Acuña cactus (*Echinomastus erectocentrus* var. *acunensis*), Arizona hedgehog cactus (*Echinocereus arizonicus* ssp. *arizonicus*), Brady pincushion cactus (*Pediocactus bradyi*), Fickeisen plains cactus (*Pediocactus peeblesianus* ssp. *fickeiseniae*), Nichol's Turk's head cactus (*Echinocactus horizonthalonius* var. *nicholii*), Peebles Navajo cactus (*Pediocactus peeblesianus* var. *peeblesianus*), Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*), Arizona cliffrose (*Purshia* (=*Cowania*) *subintegra*), Canelo Hills ladies'-tresses (*Spiranthes delitescens*), Gierisch mallow (*Sphaeralcea gierischii*), Holmgren milk-vetch (*Astragalus holmgreniorum*), sentry milk-vetch (*Astragalus cremnophylax* var. *cremnophylax*), Guadalupe fescue (*Festuca ligulata*).	Arizona, New Mexico, Texas	Collection	Collect	New.
PER0035423	Sonoran Institute; Tucson, Arizona.	Gila topminnow (*Poeciliopsis occidentalis*)	Arizona	Presence/absence surveys, collect.	Capture, harass, harm.	Amend.

Permit record No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER0036203	Arizona Game and Fish Department; Phoenix, Arizona.	Kanab ambersnail (*Oxyloma haydeni kanabensis*), Three Forks springsnail (*Pyrgulopsis trivialis*), Colorado pikeminnow (*Ptychocheilus lucius*), bonytail (*Gila elegans*), razorback sucker (*Xyrauchen texanus*), desert pupfish, (*Cyprinodon macularius*), Yaqui chub (*Gila purpurea*), Gila chub (*Gila intermedia*), Virgin River chub (*Gila robusta seminuda*), woundfin (*Plagopterus argentissimus*), Gila topminnow, including Yaqui (*Poeciliopsis occidentalis*), loach minnow (*Tiaroga cobitis*), spikedace (*Meda fulgida*), Sonoran tiger salamander (*Ambystoma mavortium stebbinsi*), Aplomado falcon (*Falco femoralis septentrionalis*), California condor (*Gymnogyps californianus*), California least tern (*Sterna antillarum browni*), masked bobwhite (*Colinus virginianus ridgwayi*), southwestern willow flycatcher (*Empidonax traillii extimus*), thick-billed parrot (*Rhynchopsitta pachyrhyncha*), Yuma Ridgway's rail (*Rallus obsoletus yumanensis*), black-footed ferret (*Mustela nigripes*), jaguar (*Panthera onca*), Mexican long-nosed bat (*Leptonycteris nivalis*), Mexican wolf (*Canis lupus baileyi*), Mount Graham red squirrel (*Tamiasciurus fremonti grahamensis*), New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), ocelot (*Leopardus pardalis*), Sonoran pronghorn (*Antilocapra americana sonoriensis*).	Arizona	Presence/absence surveys, collect.	Capture, harass, harm.	Renew/Amend.
PER0036279	National Park Service, Valles Caldera National Preserve; Jemez Springs, New Mexico.	Jemez Mountains salamander (*Plethodon neomexicanus*)	New Mexico	Presence/absence surveys, collect.	Capture, harass, harm.	Renew.

Public Availability of Comments

All comments we receive become part of the public record associated with this action. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, National Environmental Policy Act, and Service and Department of the Interior policies and procedures. 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 to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice under section 10 of the ESA (16 U.S.C. 1531 *et seq.*).

Amy L. Lueders,

Regional Director, Southwest Region, U.S. Fish and Wildlife Service.

[FR Doc. 2022–05783 Filed 3–17–22; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–33519; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before March 5, 2022, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by April 4, 2022.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before March 5, 2022. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

GEORGIA

Floyd County

Coosa Country Club Golf Course, 110 Branham Ave SW, Rome, SG100007578

ILLINOIS

Cook County

Altgeld Gardens–Philip Murray Homes Historic District, East 130th, East 133rd, and East 134th Sts., East 130th and East 133rd Pls., South Greenwood and South St. Lawrence Aves., Chicago, SG100007590

Jersey County

Grafton Boat Works, 400 Front St., Grafton, SG100007582

Kane County

Mary A. Todd School, 100 Oak Ave., Aurora, SG100007584

Abraham Lincoln School, 641 South Lake St., Aurora, SG100007585

Winnebago County

Rockford Brass Works, 700 South Main St., Rockford, SG100007583

Christenson-Anderson Farm, 15813 Anderson Rd., Durand vicinity, SG100007586

LOUISIANA

Orleans Parish

Our Lady of Lourdes Parish Complex, 2400 Napoleon Ave., New Orleans, SG100007587

West Baton Rouge Parish

Stone Square Lodge No. 8, 1044 Michigan Ave., Port Allen, SG100007604

MAINE

Franklin County

Morrill Homestead, 17 Lucy Knowles Rd., Chesterville, SG100007580

MICHIGAN

Chippewa County

Garfield School, 510 East Spruce St., Sault Ste. Marie, SG100007579

Kent County

Sisters of the Order of Saint Dominic Motherhouse Complex, 2025 Fulton St., East Grand Rapids, SG100007588

NORTH CAROLINA

Alamance County

Aurora Cotton Mills Finishing Plant-Baker-Cammack Hosiery Mills Plant, 741 East Webb Ave., Burlington, SG100007592

Gaston County

Dallas Historic District (Boundary Increase), All or portions of Balthis, North Cedar, West Church, North Hoffman, Lewis, West Main, North Maple, McSwain, North and South Oakland, South Pine, Puett, West Trade, West Wilkins and Worth Sts., Brookgreen and Queens Drs., Dallas, BC100007593

Iredell County

Watkins Chapel AME Zion Church, 505 Cascade St., Mooresville, SG100007596

Lincoln County

Black Ox-Duplan Corporation Mill, 215 Bonview Ave., Lincolnton, SG100007598

Macon County

Skyline Lodge, 470 Skyline Lodge Rd., Highlands vicinity, SG100007591

Randolph County

Asheboro Downtown Historic District, Portions of Church, Fayetteville, Hoover, North, Salisbury, White Oak, and Worth Sts., Sunset Ave., Asheboro, SG100007595

Rowan County

Southern Railway Passenger Car Number 1211, 1 Samuel Spencer Dr., Spencer, SG100007594

Surry County

Pilot Mountain Downtown Historic District, Portions of 100 and 200 blks. East Main, 100 blk. West Main, 100 blk. Depot, 100 blk. West Marian, and 100 blk. South Stephens Sts., Pilot Mountain, SG100007599

Wake County

Zebulon Historic District, Roughly bounded by North Arendell and East Gannon Aves., North Gill, East Horton, West Judd, East and West Sycamore, West Vance, North Wakefield, and North Whitley Sts., Rotary Dr., and former Raliegh and Pamlico Sound RR tracks, Zebulon, SG100007603

TEXAS

Presidio County

Central Marfa Historic District, Roughly bounded by Washington, Dallas, Dean, Russell, Austin and Abbott Sts., Marfa, SG100007597

VIRGINIA

Fairfax County

Mount Vernon Enterprise Lodge #3488-Pride of Fairfax County Lodge #298, 7809 Fordson Rd., Alexandria vicinity, SG100007613

Manassas Independent City

Annaburg, 9201 Maple St., Manassas, SG100007614

WEST VIRGINIA

Hampshire County

West Virginia Schools for the Deaf and the Blind Dairy Barn, 199 Depot St., Romney, SG100007605

Monongalia County

Richwood Avenue Wall, (New Deal Stone Resources in Morgantown, Monongalia County, WV, 1932–1943 MPS), Richwood Ave. along Whitmore Park, Morgantown, MP100007608

Deckers Creek Wall, (New Deal Stone Resources in Morgantown, Monongalia County, WV, 1932–1943 MPS), Deckers Creek, Morgantown, MP100007609

Eighth Street Stone Retaining Walls, (New Deal Stone Resources in Morgantown, Monongalia County, WV, 1932–1943 MPS), 305 and 321 8th St., Morgantown, MP100007610

Ohio County

Wheeling Warehouse Historic District (Boundary Increase), Roughly bounded by Main, 20th, and east side of Market Sts., and Wheeling Cr., Wheeling, BC100007606

Preston County

Terra Alta First United Methodist Church, 301 West State Ave., Terra Alta, SG100007611

Tucker County

Buxton and Landstreet Company Store, 571 Douglas Rd., Thomas, SG100007612

Additional documentation has been received for the following resource:

WISCONSIN

Kewaunee County

Marquette Historic District (Additional Documentation), Roughly bounded by Lake Michigan and Center, Juneau and Lincoln Sts., Kewaunee, AD93001167

Nomination submitted by Federal Preservation Officer:

The State Historic Preservation Officer reviewed the following nomination and responded to the Federal Preservation Officer within 45 days of receipt of the nomination and supports listing the property in the National Register of Historic Places.

MAINE

Hancock County

Mount Desert Island Hiking Trail System, (Acadia National Park MPS), Acadia NP, P.O. Box 177, Bar Harbor, Bar Harbor vicinity, MP100007602

Mount Desert Island Hiking Trail System, (Acadia National Park MPS), Acadia NP, P.O. Box 177, Bar Harbor, Tremont vicinity, MP100007602

Mount Desert Island Hiking Trail System, (Acadia National Park MPS), Acadia NP, P.O. Box 177, Bar Harbor, Mount Desert, vicinity, MP100007602

Mount Desert Island Hiking Trail System, (Acadia National Park MPS), Acadia NP, P.O. Box 177, Bar Harbor, Southwest Harbor vicinity, MP100007602

Authority: Section 60.13 of 36 CFR part 60.

Dated: March 8, 2022.

Sherry A. Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2022–05697 Filed 3–17–22; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1217]

Certain Blowers and Components Thereof; Notice of a Commission Determination Finding No Violation of the Consent Order; Terminating the Enforcement Proceeding; and Remanding Order No. 36

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to bifurcate its review of Order No. 36 from its review of the EID in the enforcement proceeding. The Commission has determined to affirm the enforcement initial determination (''EID'') issued on December 14, 2021, finding no violation of the consent order issued in the above-referenced section 337 enforcement investigation with the modifications set forth in the accompanying Commission opinion. The enforcement proceeding is terminated. The Commission has determined to remand Order No. 36 to the Administrative Law Judge (''ALJ'') for issuance of a revised order regarding sanctions as set forth in the Commission remand order. The Commission will consider Order No. 36 in the separate sanctions proceeding.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3042. 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: On September 8, 2020, the Commission instituted the original, underlying investigation based on a complaint filed by Regal Beloit America, Inc. of Beloit, Wisconsin (''Regal'' or ''Complainant''). 85 FR 55491–92 (Sept. 8, 2020). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain blowers and components thereof by reason of infringement of one or more of claims 1, 2, 7–10, and 15 of U.S. Patent No. 8,079,834 (''the '834 patent''). *Id.* at 55492. The Commission's notice of investigation named as respondents East West Manufacturing, LLC of Atlanta, Georgia, and East West Industries of Binh Duong, Vietnam (collectively, ''East West'' or ''Respondents''). *Id.* at 55492. The Office of Unfair Import Investigations (''OUII'') did not participate as a party in the original investigation. *Id.*

On November 12, 2020, the Commission terminated the original investigation with respect to Respondents based upon a consent order stipulation and entry of a consent order. 85 FR 73511 (Nov. 18, 2020). The Consent Order directs East West to ''not sell for importation, import or sell after importation the Subject Articles . . . except under consent or license from Complainant.'' Consent Order at ¶ 5. The Consent Order defines ''Subject Articles'' as ''certain blowers and components thereof that infringe claims 1, 2, 7–10, and 15 of the '834 Patent.'' *Id.* at ¶ 3.

On January 15, 2021, Regal filed an enforcement complaint at the Commission alleging that East West's redesigned blower infringes claims 1, 2, 7–10, and 15 of the '834 patent in violation of the Consent Order. On February 19, 2021, the Commission instituted a formal enforcement proceeding, pursuant to Commission

Rule 210.75(a), to determine whether a violation of the consent order issued in the original investigation has occurred and to determine what, if any, enforcement measures are appropriate. 86 FR 10335 (Feb. 19, 2021). The respondents named in the enforcement proceeding are the same as the respondents named in the original investigation, *i.e.,* East West Manufacturing, LLC of Atlanta, Georgia, and East West Industries of Binh Duong, Vietnam. *Id.* OUII was named as a party in the enforcement proceeding. *Id.*

On March 1, 2021, East West filed a motion for monetary and other sanctions alleging that Regal and its attorneys tampered with and misrepresented the accused redesigned blower in the enforcement complaint. Regal and OUII filed responses thereto on March 11, 2021, and March 18, 2021, respectively. Regal opposed the motion and asked for monetary sanctions in its response. The presiding Administrative Law Judge (''ALJ'') further permitted the private parties to file replies and sur-replies to the sanctions briefing. EID at 16.

On June 29, 2021, the ALJ issued a *Markman* Order (Order No. 22), styled ''*Markman* Claim Constructions With Abbreviated Rationales'' (*Markman* Order I). On July 13, 2021, the ALJ issued Order No. 23, clarifying Order No. 22.

The ALJ held an evidentiary hearing from July 20–23, 2021 and received post-hearing briefs thereafter. On September 22, 2021, the ALJ held a supplemental hearing on the sanctions motion. EID at 18.

On October 29, 2021, the ALJ issued Order No. 32 (*Markman* Order II), providing extensive explanations as to the adopted constructions in Order No. 22.

On December 14, 2021, the ALJ issued the subject EID finding no violation of the Consent Order. The EID found that the parties do not contest personal jurisdiction, and that the Commission has *in rem* jurisdiction over the accused products. EID at 19–20. The EID noted that the private parties filed a ''Joint Stipulation on Importation and Sales,'' describing ''the number of units of the Accused or Redesigned Blower that East West imported and sold.'' *Id.* at 20. The EID found that Regal failed to show that East West's redesigned blower infringes asserted claims 1, 2, 7–10, and 15 of the '834 patent, and thus failed to show a violation of the consent order. *See id.* at 9–10. The EID stated that ''in the event the Commission were to find to the contrary, an imposed civil penalty should be *de minimus* and not the maximum civil penalty that Regal has proposed.'' *Id.* at 10. Specifically, the EID recommended that ''East West disgorge its profits plus an additional one-half of its profits from any sales that violated the Consent Order.'' *Id.* at 10–11.

On December 14, 2021, the ALJ also issued Order No. 36 denying East West's motion for monetary sanctions. The ALJ issued a public warning to Regal, citing the Commission's sanctions authority under Commission Rule 210.4(c) and (d), 19 CFR 210.4(c), (d), and ordered Regal to correct potentially misleading portions of the enforcement complaint.

On January 4, 2022, Regal filed a petition for review of the EID, and Respondents filed a contingent petition for review of the EID and a petition for review of Order No. 36. On January 10, 2022, the parties replied to the petitions for review.

On February 11, 2022, the Commission determined to review the EID and Order No. 36. 87 FR 9085–86 (Feb. 17, 2022).

Pursuant to 19 CFR 210.25, the Commission has determined to bifurcate its review of Order No. 36 from its review of the EID. Upon review of the parties' submissions, the EID, and the evidence of record, the Commission has determined to affirm the EID's finding that Regal failed to show that East West violated the Consent Order with the modifications set forth in the accompanying Commission opinion. The enforcement proceeding is terminated. The Commission has determined to remand Order No. 36 to the ALJ for a revised order regarding sanctions as set forth in the Commission remand order. The Commission will consider Order No. 36 in the separate sanctions proceeding.

The Commission's vote on this determination took place on March 14, 2022.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR 210).

By order of the Commission.

Issued: March 14, 2022.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2022–05713 Filed 3–17–22; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On March 15, 2022, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Louisiana in the lawsuit entitled *United States of America* v. *Power Performance Enterprises Inc. and Kory Blaine Willis,* Civil Action No. 22–cv–00693.

In this action, the United States, on behalf of the U.S. Environmental Protection Agency, filed a Complaint alleging that between August 15, 2013 and June 4, 2018, Defendants PPEI and its owner, Mr. Willis, manufactured, sold, or offered to sell aftermarket automotive products that have a principal effect of bypassing, defeating, or rendering inoperative the emission controls on diesel cars and trucks in violation of Section 203(a)(3)(B) of the CAA, 42 U.S.C. 7522(a)(3)(B). The Complaint further alleges that, absent an injunction, Defendants may resume the manufacture or sales of such products. The proposed Complaint seeks appropriate civil penalties and injunctive relief to prohibit Defendants from continuing to manufacture and sell these unlawful products.

Under the proposed settlement, the Defendants agree to pay a civil penalty (based on a finding of limited ability to pay) of $1,550,000 in three installment payments over 2 years. In addition, the settlement imposes various restrictions designed to ensure that Defendants operate in compliance with the law.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States of America* v. *Power Performance Enterprises Inc. and Kory Blaine Willis,* D.J. Ref. No. 90–5–2–1–11865. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be

examined and downloaded at this Justice Department website: *http://www.justice.gov/enrd/consent-decrees*. We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $17.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Thomas Carroll,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2022–05754 Filed 3–17–22; 8:45 am]

BILLING CODE 4410–15–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0039]

Dedication of Commercial-Grade Digital Instrumentation and Control Items for Use in Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–1402, ''Dedication of Commercial-Grade Digital Instrumentation and Control Items for Use in Nuclear Power Plants.'' This DG is a proposed new regulatory guide for the dedication of commercial-grade digital instrumentation and control (I&C) items for use in nuclear power plant safety applications.

DATES: Submit comments by April 18, 2022. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0039. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104, email: *Michael.Eudy@nrc.gov* and Dinesh Taneja, Office of Nuclear Reactor Regulation, telephone: 301–415–0011, email: *Dinesh.Taneja@nrc.gov.* Both are staff members of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC 2022–0039 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC 2022–0039.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC 2022–0039 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, entitled ''Dedication of Commercial-Grade Digital Instrumentation and Control Items for Use in Nuclear Power Plants,'' is temporarily identified by its task number, DG–1402 (ADAMS Accession No. ML22003A180).

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML22003A181) for DG–1402. The staff developed the regulatory analysis to assess the value of issuing DG–1402 as well as alternative courses of action.

The draft guide is a proposed new regulatory guide for the dedication of commercial-grade digital I&C items for use in nuclear power plant safety applications. It endorses, with clarifications, Nuclear Energy Institute 17–06, ''Guidance on Using IEC 61508 SIL Certification to Support the Acceptance of Commercial Grade Digital

Equipment for Nuclear Safety Related Applications,'' Revision 1, issued December 2021 (ADAMS Accession No. ML21337A380), to supplement existing guidance.

III. Backfitting, Forward Fitting, and Issue Finality

The NRC staff may use this regulatory guide as a reference in its regulatory processes, such as licensing, inspection, or enforcement. However, the NRC staff does not intend to use the guidance in this regulatory guide to support NRC staff actions in a manner that would constitute backfitting as that term is defined in Section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,'' nor does the NRC staff intend to use the guidance to affect the issue finality of an approval under 10 CFR part 52. The staff also does not intend to use the guidance to support NRC staff actions in a manner that constitutes forward fitting as that term is defined and described in MD 8.4. If a licensee believes that the NRC is using this regulatory guide in a manner inconsistent with the discussion in this Implementation section, then the licensee may file a backfitting or forward fitting appeal with the NRC in accordance with the process in MD 8.4.

IV. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.htm.* Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: March 14, 2022.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guide and Programs, Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2022–05712 Filed 3–17–22; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of March 21, 28, April 4, 11, 18, 25, 2022. All listed meeting times are local to the meeting location.

PLACE: Multiple (See Additional Information Below).

STATUS: Public.

Week of March 21, 2022

Wednesday, March 23, 2022

9:30 a.m. Affirmation Session (Public Meeting) (Tentative)
(a) Final Rule—Fitness for Duty Drug Testing Requirements (RIN 3150 AI67; NRC–2009–0225) (Tentative)
(b) NextEra Energy Point Beach, LLC (Point Beach Nuclear Plant, Units 1 and 2), Appeal from LBP 21 5 (Tentative)
(Contact: Wesley Held: 301–287–3591)

Additional Information: Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live; via teleconference. Details for joining the teleconference in listen only mode may be found at *https://www.nrc.gov/pmns/mtg.*

Week of March 28, 2022—Tentative

There are no meetings scheduled for the week of March 28, 2022.

Week of April 4, 2022—Tentative

There are no meetings scheduled for the week of April 4, 2022.

Week of April 11, 2022—Tentative

There are no meetings scheduled for the week of April 11, 2022.

Week of April 18, 2022—Tentative

Friday, April 22, 2022

6:00 p.m. Discussion of the Ten-Year Plan to Address Impacts of Uranium Contamination on the Navajo Nation and Lessons Learned from the Remediation of Former Uranium Mill Sites (Public Meeting); (Contact: Wesley Held: 301–287–3591)

Additional Information: The meeting will be held at the Hilton Garden Inn, 1530 W Maloney Ave., Gallup, New Mexico. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://video.nrc.gov/.* For those who would like to attend in person, note that all visitors are required to complete the NRC Self-Health Assessment and Certification of Vaccination forms. Visitors who certify that they are not fully vaccinated or decline to complete the certification must have proof of a negative Food and Drug Administration-approved PCR or Antigen (including rapid tests) COVID–19 test specimen collection from no later than the previous 3 days prior to the meeting date. The protocols are the same as those for entering an NRC facility. The forms and additional information can be found here *https://www.nrc.gov/about-nrc/covid-19/guidance-for-visitors-to-nrc-facilities.pdf.*

Week of April 25, 2022—Tentative

There are no meetings scheduled for the week of April 25, 2022.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at *Wesley.Held@nrc.gov.* The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Wendy.Moore@nrc.gov* or *Betty.Thweatt@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: March 16, 2022.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2022–05951 Filed 3–16–22; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–352 and 50–353; NRC–2022–0061]

Constellation Energy Generation, LLC; Limerick Generation Station, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is correcting a notice that was published in the **Federal Register** on February 22, 2022, as part of the NRC Monthly Notice, regarding the description of a license amendment request to Facility Operating License Nos. NPF–39 and NPF–85, issued to Constellation Energy Generation, LLC for operation of the Limerick Generating Station, Units 1 and 2. The February 22, 2022, notice was a reissue to reflect a change in the scope of the request as part of the NRC Monthly Notice published in the **Federal Register** on August 10, 2021.

DATES: Submit comments by April 18, 2022. Requests for a hearing or petition for leave to intervene must be filed by May 17, 2022.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0061. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: V. Sreenivas, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2597, email: *V.Sreenivas@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0061 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0061.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0061 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Additional Information

The license amendment request was noticed in the **Federal Register** on August 10, 2021 (86 FR 43690). On February 22, 2022 (87 FR 9649), the notice was reissued following receipt of a supplement from the licensee that changed the scope of the license amendment request. The notice is being reissued in its entirety to correct the description of the amendment request stated in the February 22, 2022, notice.

III. Introduction

The NRC is considering issuance of an amendment to Facility Operating License Nos. NPF–39 and NPF–85, issued to Constellation Energy Generation, LLC (the licensee) for operation of Limerick Generating Station, Units 1 and 2 located in Montgomery County, PA.

By letter dated March 11, 2021 (ADAMS Accession No. ML21070A412), as supplemented by letters dated May 5, 2021, December 15, 2021, and February 14, 2022 (ADAMS Accession Nos. ML21140A084, ML21349B364, and ML22045A480, respectively), the licensee submitted a license amendment request that would modify the licensing basis by revising the license condition in Appendix C to allow the use of an alternate defense-in-depth categorization process, an alternate pressure boundary categorization process, and an alternate seismic categorization process to allow the implementation of risk-informed categorization and treatment of structures, systems, and components in accordance with section 50.69 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Risk-informed categorization and treatment of structures, systems and components for nuclear power reactors.''

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously

evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, presented here:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change will permit the use of the alternate defense-in-depth categorization process, the alternate pressure boundary categorization process, and the alternate seismic categorization process for the 10 CFR 50.69 risk-informed categorization process to modify the scope of SSCs subject to NRC special treatment requirements and to implement alternative treatments per the regulations. The process used to evaluate structures, systems, and components (SSCs) for changes to NRC special treatment requirements and the use of alternative requirements ensures the ability of the SSCs to perform their design function. The potential change to special treatment requirements does not change the design and operation of the SSCs. As a result, the proposed change does not significantly affect any initiators to accidents previously evaluated or the ability to mitigate any accidents previously evaluated. The consequences of the accidents previously evaluated are not affected because the mitigation functions performed by the SSCs assumed in the safety analysis are not being modified. The SSCs required to safely shut down the reactor and maintain it in a safe shutdown condition following an accident will continue to perform their design functions. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will permit the use of the alternate defense-in-depth categorization process, the alternate pressure boundary categorization process, and the alternate seismic categorization process for the 10 CFR 50.69 risk-informed categorization process to modify the scope of SSCs subject to NRC special treatment requirements and to implement alternative treatments per the regulations. The proposed change does not change the functional requirements, configuration, or method of operation of any SSC. Under the proposed change, no additional plant equipment will be installed. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change will permit the use of the alternate defense-in-depth categorization process, the alternate pressure boundary categorization process, and the alternate seismic categorization process for the 10 CFR 50.69 risk-informed categorization process to modify the scope of SSCs subject to NRC special treatment requirements and to implement alternative treatments per the regulations. The proposed change does not affect any Safety Limits or operating parameters used to establish a safety margin. The safety margins included in analyses of accidents are not affected by the proposed change. The regulation requires that there be no significant effect on plant risk due to any change to the special treatment requirements for SSCs and that the SSCs continue to be capable of performing their design basis functions, as well as to perform any beyond design basis functions consistent with the categorization process and results. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day notice period if the Commission concludes the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

IV. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 and on the NRC website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

V. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the Guidance for Electronic Submissions to the NRC (ADAMS Accession No. ML13031A056) and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated March 11, 2021 (ADAMS Accession No. ML21070A412), as supplemented by letters dated May 5, 2021, December 15, 2021, and February 14, 2022 (ADAMS Accession Nos. ML21125A215, ML21349B364, and ML22045A480, respectively).

Attorney for licensee: Tamra Domeyer, Associate General Counsel, Constellation Energy Generation, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: James Danna.

Dated: March 15, 2022.

For the Nuclear Regulatory Commission.

Venkataiah Sreenivas,

Project Manager, Plant Licensing Branch I, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2022–05733 Filed 3–17–22; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94406; File No. SR–EMERALD–2022–10]

Self-Regulatory Organizations; MIAX EMERALD, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

March 14, 2022.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on February 28, 2022, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section 1)a)i) of the Fee Schedule to amend the Simple Maker (defined below) rebates in Tier 4 for options transactions in Penny Classes and non-Penny Classes (defined below) for executed Priority Customer [3] orders when the contra is an Affiliated [4] Market Maker.[5]

Background

The Exchange currently assesses transaction rebates and fees to all market participants, which are based upon a threshold tier structure (''Tier''). Tiers are determined on a monthly basis and are based on three alternative calculation methods, as defined in Section 1)a)ii) of the Fee Schedule. The calculation method that results in the highest Tier achieved by the Member [6] shall apply to all Origin types by the Member, except the Priority Customer Origin type. For the Priority Customer Origin calculation, the Tier applied for a Member and its Affiliates' is solely determined by calculation Method 3, as defined in Section 1)a)ii) of the Fee Schedule, titled ''Total Priority Customer, Maker sides volume, based on % of CTCV ('Method 3').'' The monthly volume thresholds for each of the methods, associated with each Tier, are calculated as the total monthly volume executed by the Member in all options classes on MIAX Emerald in the relevant Origins and/or applicable liquidity, not including Excluded Contracts,[7] (as the numerator) expressed as a percentage of (divided by) Customer Total Consolidated Volume (''CTCV'') (as the denominator). CTCV is calculated as the total national volume cleared at The Options Clearing Corporation (''OCC'') in the Customer range in those classes listed on MIAX Emerald for the month for which fees apply, excluding volume cleared at the OCC in the Customer range executed during the period of time in which the Exchange experiences an ''Exchange System Disruption'' [8] (solely in the option classes of the affected Matching Engine).[9] In addition, the per contract transaction rebates and fees shall be applied retroactively to all eligible volume once the Tier has been reached by the Member. Members that place resting liquidity, *i.e.,* orders on the MIAX Emerald System, will be assessed the specified ''maker'' rebate or fee (each a ''Maker'') and Members that execute against resting liquidity will be assessed the specified ''taker'' fee or rebate (each a ''Taker'').[10] Members are also assessed lower transaction fees and smaller rebates for order executions in standard option classes in the Penny Interval Program [11] (''Penny Classes'') than for order executions in standard option classes which are not in the Penny Program (''non-Penny Classes''), for which Members will be assessed a higher transaction fees and larger rebates.

[3] ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Exchange Rule 100, including Interpretation and Policy .01.

[4] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Emerald Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Emerald Market Maker) that has been appointed by a MIAX Emerald Market Maker, pursuant to the following process. A MIAX Emerald Market Maker appoints an EEM and an EEM appoints a MIAX Emerald Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* the Definitions Section of the Fee Schedule.

[5] ''Market Maker'' refers to ''Lead Market Maker'' (''LMM''), ''Primary Lead Market Maker'' (''PLMM'') and ''Registered Market Maker'' (''RMM''), collectively. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[6] ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[7] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[8] The term ''Exchange System Disruption'' means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hour or more, during trading hours. *See* the Definitions Section of the Fee Schedule.

[9] A ''Matching Engine'' is a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. *See* the Definitions Section of the Fee Schedule.

[10] For a Priority Customer complex order taking liquidity in both a Penny class and non-Penny class against Origins other than Priority Customer, the Priority Customer order will receive a rebate based on the Tier achieved.

[11] *See* Securities Exchange Act Release No. 88993 (June 2, 2020), 85 FR 35145 (June 8, 2020) (SR–EMERALD–2020–05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 510, Minimum Price Variations and Minimum Trading Increments, To Conform the Rule to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options) (the ''Penny Program'').

Proposal

The Exchange proposes to amend Section 1)a)i) of the Fee Schedule to amend the Simple Maker rebates in Tier 4 for options transactions in Penny Classes and non-Penny Classes for executed Priority Customer orders when the contra is an Affiliated Market Maker. Currently, the Exchange provides Simple Maker rebates of ($0.53) and ($1.05) for executed Priority Customer orders in Tier 4 in options in Penny Classes and non-Penny Classes, respectively, if the contra is not an Affiliated Market Maker. If the contra is an Affiliated Market Maker, the Exchange provides lower Simple Maker rebates of ($0.49) and ($0.95) for executed Priority Customer orders in Tier 4 in options in Penny Classes and non-Penny Classes, respectively.[12] The lower Simple Maker rebate for an Affiliated Market Maker transaction for executed Priority Customer orders in Tier 4 in options in Penny Classes is denoted by the symbol ''▪'' following the table of fees and rebates in Section 1)a)i) of the Fee Schedule. The lower Simple Maker rebate for an Affiliated Market Maker transaction for executed Priority Customer orders in Tier 4 in options in non-Penny Classes is denoted by the symbol ''▪'' following the table of fees and rebates in Section 1)a)i) of the Fee Schedule.[13]

The Exchange now proposes to lower the Simple Maker rebates in Tier 4 for options transactions in Penny Classes and non-Penny Classes for executed Priority Customer orders when the contra is an Affiliated Market Maker. Specifically, the Exchange proposes to lower the Simple Maker rebate for executed Priority Customer orders in options in Penny Classes in Tier 4 from ($0.49) to ($0.43) when the contra is an Affiliated Market Maker. The Exchange also proposes to lower the Simple Maker rebate for executed Priority Customer orders in options in non-Penny Classes in Tier 4 from ($0.95) to ($0.85) when the contra is an Affiliated Market Maker. The proposed changes would be reflected in current footnotes ''▪'' and ''▪'' for Penny and non-Penny Classes, respectively. Accordingly, the Exchange proposes to update footnote ''▪'' to now read: ''This Maker rebate is for executed Priority Customer Simple Orders when the contra is not an Affiliated Market Maker. When the contra is an Affiliated Market Maker, this Maker rebate for executed Priority Customer Simple Orders will be ($0.43).'' The Exchange also proposes to update footnote ''▪'' to now read: ''This Maker rebate is for executed Priority Customer Simple Orders when the contra is not an Affiliated Market Maker. When the contra is an Affiliated Market Maker, this Maker rebate for executed Priority Customer Simple Orders will be ($0.85).''

The purpose of adjusting the specified Simple Maker rebates is for business and competitive reasons. In order to attract order flow, the Exchange initially set its Maker rebates and Taker fees so that they were meaningfully higher/lower than other options exchanges that operate comparable maker/taker pricing models.[14] The Exchange now believes that it is appropriate to further adjust these specified Maker rebates so that they are more in line with other exchanges, but will still remain highly competitive such that they should enable the Exchange to continue to attract order flow and maintain market share.[15]

Implementation

The proposed changes are effective beginning March 1, 2022.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[16] in general, and furthers the objectives of Section 6(b)(4) of the Act,[17] in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities, and 6(b)(5) of the Act,[18] in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in facilitating transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [19]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has a market share of more than approximately 13–14% of the equity options market.[20] Therefore, no exchange possesses significant pricing power. More specifically, as of February 25, 2022, the Exchange had a market share of approximately 3.68% of executed volume of multiply-listed equity and exchange traded fund (''ETF'') options for the month of February 2022.[21]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products and services, terminate an existing membership or determine to not become a new member, and/or shift order flow, in response to transaction fee changes. For example, on February 28, 2019, the Exchange's affiliate, MIAX PEARL, LLC (''MIAX Pearl''), filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[22] MIAX Pearl experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX Pearl March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction rebates, may have

[12] *See* Fee Schedule, Section 1)a)i), notes ''▪'' and ''▪''. *See also* Securities Exchange Act Release No. 89927 (September 21, 2020), 85 FR 60498 (September 25, 2020) (SR–EMERALD–2020–07) (establishing lower Priority Customer Tier 4 Simple Maker rebates in Penny and non-Penny Classes when the contra is an Affiliated Market Maker).

[13] *See id.*

[14] *See* Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR–EMERALD–2019–15).

[15] *See* Cboe BZX Options Exchange Fee Schedule, under ''Transaction Fees'' (providing Customer rebates for Penny Program Securities ranging from $0.25 to $0.53 and Non-Penny Program Securities ranging from $0.90 to $1.05); *see also* Nasdaq Stock Market, Options 7, Pricing Schedule, Section 2 Nasdaq Options Market—Fees and Rebates, note 2 (providing lower rates when the Participant is both the buyer and seller).

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(1) and (b)(5).

[19] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[20] *See* ''The Market at a Glance,'' (last visited February 25, 2022), *available at https://www.miaxoptions.com/.*

[21] *See id.*

[22] *See* Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR–PEARL–2019–07).

contributed to the decrease in MIAX Pearl's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The Exchange believes its proposal to decrease the Simple Maker rebates in Tier 4 for options transactions in Penny and non-Penny Classes for Priority Customers is reasonable, equitable and not unfairly discriminatory because all similarly situated market participants in the same Origin type are subject to the same tiered Maker rebates and Taker fees and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes it is equitable and not unfairly discriminatory to reduce the Simple Maker rebates to Priority Customer orders in Penny and non-Penny Classes for competitive and business reasons because the Exchange initially set its Simple Maker rebates for such orders higher than certain other options exchanges that operate comparable maker/taker pricing models.[23] The Exchange now believes that it is appropriate to further decrease the specified Simple Maker rebates so that they are more in line with other exchanges, and will still remain highly competitive such that they should enable the Exchange to continue to attract order flow and maintain market share.

Furthermore, the proposed decrease to the Simple Maker rebates for Priority Customers promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, and protects investors and the public interest, because even with the decrease, the Exchange's proposed Simple Maker rebates for such orders still remain highly competitive with certain other options exchanges offering comparable pricing models, and should enable the Exchange to continue to attract order flow and maintain market share.[24] The Exchange believes that the amount of such fees, as proposed to be decreased, will continue to encourage those market participants to send orders to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes that the proposed changes to the specified Simple Maker rebates for the applicable market participants should continue to encourage the provision of liquidity that enhances the quality of the Exchange's market and increases the number of trading opportunities on the Exchange for all participants who will be able to compete for such opportunities. The proposed rule change should enable the Exchange to continue to attract and compete for order flow with other exchanges. However, this competition does not create an undue burden on competition but rather offers all market participants the opportunity to receive the benefit of competitive pricing.

Inter-Market Competition

The Exchange 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. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has a market share of more than approximately 13–14% of the equity options market.[25] Therefore, no exchange possesses significant pricing power. More specifically, as of February 25, 2022, the Exchange had a market share of approximately 3.68% of executed volume of multiply-listed equity and ETF options for the month of February 2022.[26] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. In such an environment, the Exchange must continually adjust its transaction and non-transaction fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because it modifies the Exchange's rebates in a manner that will allow the Exchange to remain competitive.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[27] and Rule 19b–4(f)(2)[28] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2022–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2022–10. 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

[23] *See supra* note 15.

[24] *See id.*

[25] *See supra* note 20.

[26] *See id.*

[27] 15 U.S.C. 78s(b)(3)(A)(ii).

[28] 17 CFR 240.19b–4(f)(2).

Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EMERALD–2022–10, and should be submitted on or before April 8, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–05699 Filed 3–17–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94408; File No. SR–CboeBZX–2022–019]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the External Subscriber Fees Applicable to Cboe One Summary Derived Data API Service

March 14, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 10, 2022, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to modify the External Subscriber fees applicable to Cboe One Summary Derived Data API Service. 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 modify fees charged to External Distributors that distribute Cboe One Summary Derived Data through an Application Programming Interface (''API'')—*i.e.,* the Derived Data API Service, effective March 1, 2022.[3]

Background

By way of background, the Exchange offers a Financial Product Distribution Program (''Program''), under which a Distributor may subscribe to one of three Derived Data Service options, White Label Service,[4] API Service[5] or Platform Service,[6] each of which offers either BZX Top Data, which is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered into the System[7] or Cboe One Summary Data, which is a proprietary data product that provides the top of book quotations and execution information for all listed equity securities traded across the Exchange and its affiliated U.S. equities exchanges (the ''Cboe equity exchanges'').[8] Under the Program, regardless of the Service option selected by a Distributor, the Distributors receive the same real-time Exchange data (*i.e.,* BZX Top or Cboe One Summary) as all other subscribers of such Exchange data. From the Exchange data, a Distributor may create ''Derived Data'', which is pricing data or other data that (i) is created in whole or in part from Exchange data, (ii) is not an index or financial product, and (iii) cannot be readily reverse-engineered to recreate Exchange data or used to create other data that is a reasonable facsimile or substitute for Exchange data. Derived Data may be created by Distributors for a number of different purposes, as determined by the Distributor. The specific use of Exchange data is determined by the Distributor, as applicable fees do not depend on the purpose for placing the Derived Data under the Program.

Cboe One Summary Derived Data API Service External Subscriber Fees

The Derived Data API Service program offers discounted fees for Distributors that make Derived Data available through an API, thereby allowing Distributors to benefit from reduced fees when distributing Derived Data to subscribers that establish their own platforms (rather than relying on a hosted display solution). Instead of the regular flat fee for External Distribution of Exchange data, Distributors of Derived Data under the API Service are charged a tiered External Subscriber Fee based on the number of API Service Platforms (*i.e.,* ''External Subscribers'') that receive Derived Data from the Distributor through a Derived Data API Service and may benefit from

[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on March 1, 2022 (SR–BZX–2022–010). On March 10, 2022, the Exchange withdrew that filing and submitted this proposal.

[4] A ''White Label Service'' is a type of hosted display solution in which a Distributor hosts or maintains a website or platform on behalf of a third-party entity. The service allows Distributors to make Derived Data available on a platform that is branded with a third-party brand, or co-branded with a third party and a Distributor. The Distributor maintains control of the application's data, entitlements and display.

[5] An ''API Service'' is a type of data feed distribution in which a Distributor delivers an API or similar distribution mechanism to a third-party entity for use within one or more platforms. The service allows Distributors to provide Derived Data to a third-party entity for use within one or more downstream platforms that are operated and maintained by the third-party entity. The Distributor maintains control of the entitlements, but does not maintain technical control of the usage or the display.

[6] A ''Platform Service'' is a type of hosted display solution in which a Distributor provides derivative products to Platform Service Data Users within their infrastructure. The service allows Distributors to make Derived Data available as part of a platform, providing users remote access to derivative products based in whole or in part on Exchange Data.

[7] *See* Exchange Rule 13.8(c).

[8] *See* Exchange Rule 13.8(b). The Cboe One Summary external distribution fee is equal to the aggregate EDGX Top, BZX, Top, BYX Top, and EDGA Top fees external distribution fees.

discounted pricing based on the number of subscribers. Currently, Distributors under this program are charged a fee of $5,000 per month for each External Subscriber if the Distributor makes Derived Data available to 1–5 External Subscribers; $4,000 per month for each External Subscriber if the Distributor makes Derived Data available to 6–20 External Subscribers, and further lowered to $3,000 per month for each External Subscriber if the Distributor makes Derived Data available to 21 or more External Subscribers. The Exchange now proposes to further reduce the distribution fees for Distributors of Cboe One Summary Derived Data through a Derived API Service. Particularly, the Exchange proposes to modify the External Subscriber fees as follows:

Number of external subscribers	Current fee	Proposed fee
1–5	$5,000	$3,000
6–20	4,000	2,500
21 and above	3,000	2,000

The Exchange notes that the External Subscriber Fee is non-progressive and based on the number of External Subscribers that receive Derived Data from the Distributor. To illustrate how the discount is applied, the Exchange has codified an example in the Fees Schedule under the notes section of the Derived Data API Service section, which it now proposes to update in connection with the proposed changes to the External Subscriber fees.[9] Currently, the example provides that a Distributor providing Derived Data based on Cboe One Summary to six (6) External Subscribers that are API Service Platforms would be charged a monthly fee of $24,000 (*i.e.,* 6 External Subscribers × $4,000 each). The Exchange proposes to update the example to provide that Distributor providing Derived Data based on Cboe One Summary to six (6) External Subscribers that are API Service Platforms would be charged a monthly fee of $15,000 (*i.e.,* 6 External Subscribers × $2,500 each). The proposal to reduce the External Subscriber fees is designed to provide a price structure that is competitive and attract Distributors for its Cboe One Summary data offering through the Derived Data API Service.

[9] The Exchange notes that it inadvertently omitted appending three asterisks to the External Subscriber Fee in the ''Cboe One Summary Derived Data API Service'' table to reference the corresponding notes section that includes the summary as to how the discount is applied and seeks to update the Fees Schedule now to avoid potential confusion.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[10] in general, and furthers the objectives of Section 6(b)(4),[11] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act.[12] Specifically, the proposed rule change supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets, and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. In addition, the proposed rule change is consistent with Rule 603 of Regulation NMS,[13] which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee change would further broaden the availability of U.S. equity market data to investors, consistent with the principles of Regulation NMS.

The Exchange operates in a highly competitive environment. Indeed, there are 16 registered national securities exchanges that trade U.S. equities and have the capability to offer associated top of book market data products to their customers.[14] Additionally, two other exchange families specifically offer similar consolidated top of book products that compete directly with Cboe One Summary.[15] 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.'' [16] The proposed fee change is a result of the competitive environment, as the Exchange seeks to amend its fees to attract additional Distributors for its Cboe One Summary data offering through the Derived Data API Service.

The Exchange believes that the proposed change is reasonable as it lowers the existing External Subscriber fees and these fee reductions would continue to facilitate cost effective access to market information that is used primarily to create certain derivative instruments rather than to trade U.S. equity securities. As discussed, the Cboe One Summary data offering through the Derived Data API Service allows Distributors to create Derived Data that is based on a more comprehensive view of the U.S. equities market. Because Exchange data in this context is primarily purchased for the creation of Derived Data encompassing certain derivative instruments, Distributors do not require a consolidated view of the market across several exchanges, and will generally purchase such data from a single or select few exchange(s) for their purposes. As noted above, Cboe One Summary includes top of book quotation and transaction data across all four Cboe equity exchanges, which allows Distributors to create more meaningful Derived Data than that available from a single exchange's market data at a potentially reduced price.

The existence of alternatives to the Program therefore ensures that the Exchange cannot set unreasonable or

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78k–1.

[13] *See* 17 CFR 242.603.

[14] Competing top-of-book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BQT, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, IEX TOPS, MIAX PEARL Equities Top of Market Feed, and MEMX MEMOIR Top.

[15] Competing consolidated top of book products include Nasdaq Basic and NYSE BQT. As described on the Nasdaq website, available here: *http://www.nasdaqtrader.com/Trader.aspx?id=nasdaqbasic,* Nasdaq Basic is a ''low cost alternative'' that provides ''Best Bid and Offer and Last Sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center, as well as trades reported to the FINRA Trade Reporting Facility (''TRF'').'' As described on the NYSE website, available here: *https://www.nyse.com/market-data/real-time/nyse-bqt* NYSE Best Quote and Trades (BQT) ''is a cost efficient, consolidated market data feed that provides a unified view of quotes and trades from NYSE, NYSE American, NYSE Arca, NYSE Chicago and NYSE National.''

[16] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

unfairly discriminatory fees, as subscribers are free to elect such alternatives. That is, the Exchange competes with other exchanges that provide similar top of book and/or consolidated top of book products and pricing programs for Derived Data.[17] The availability of diverse competitive products promotes additional competition as it ensures that alternative products from different sources are readily available to Distributors and the broader market. The Exchange therefore believes that the existing Derived Data API Service is not only constrained by competition but also ensures continued competition that acts as a constraint on the pricing of services provided by other national securities exchanges. If a competing exchange were to charge less for a similar product than the Exchange charges under the existing fee structure, even as amended, prospective subscribers may choose not to subscribe to, or cease subscribing to, the Program. The Exchange believes that further lowering the cost of accessing Derived Data may make the Exchange's market information more attractive, and encourage additional Distributors to subscribe to Exchange market data instead of competitor products. While the Exchange has no way of predicting with certainty the impact of the proposed changes, it anticipates up to two Distributors will create Derived Data from Cboe One Summary using the API Service.

Moreover, External Subscriber fees only apply to Distributors that elect to participate in the Program by distributing Derived Data from Cboe One Summary through an API Service. Cboe One Summary Feed is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation purchase this data or to make this data available. Accordingly, Distributors can discontinue distributing at any time and for any reason, including due to an assessment of the reasonableness of fees charged, Cboe One Summary Derived Data under the API Service. Indeed, there are no Distributors who are currently subscribing to the API Service for Cboe One Summary Derived Data. Further, as discussed, firms have a wide variety of alternative market data products from which to choose, such as similar proprietary consolidated top of book data products offered by other national securities exchanges,[18] including those that choose to offer discounted fees for the distribution of Derived Data in an effort to compete for this business.

The proposed rule change also continues to provide an alternate, and as proposed, lower, fee structure for providing Cboe One Summary market data to Distributors that make Derived Data available to External Subscribers via API Services. If a Distributor uses an API Service to distribute Derived Data, the Distributor will still be charged a fee that is tiered based on the number of External Subscribers that are provided access to that data instead of the higher fee normally charged for external distribution. The Exchange believes that this fee is equitable and not unfairly discriminatory because the Exchange will apply the same fees to any similarly situated Distributors that elect to participate in the Program based on the number of External Subscribers provided access to Derived Data through an API Service. Also, all Distributors that make Derived Data available to External Subscribers through an API Service will receive a discount compared to the current pricing applicable for external distribution of Cboe One Summary.[19] The Exchange also believes its equitable and not unfairly discriminatory to provide incrementally higher discounted rates to Distributors that provide access to Derived Data to a greater numbers of Subscribers as the discounted rates are designed to incentivize firms to grow the number of External Subscribers that purchase Derived Data from the Distributor.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by competition among exchanges that offer similar data products, and pricing options, to their customers. Top of book data is broadly disseminated by competing U.S. equities exchanges. There are therefore a number of alternative products available to market participants and investors. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as broker-dealers or vendors look to purchase the lowest priced top of book data product, or quality, as market participants seek to purchase data that represents significant market liquidity. In order to better compete for this segment of the market, the Exchange is proposing to reduce fees charged to Distributors that distribute certain Derived Data through an API Service. The Exchange believes that this would facilitate greater access to Exchange data and Derived Data, ultimately benefiting investors that are provided access to such data.

The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. The proposed fees would apply equally to external distributors of Cboe One Summary that make Derived Data available through the API Service option offered by the Exchange under the Program. The continued difference in fees under the Program as compared to the normal External Distribution fee for Cboe One Summary is appropriate given that External Subscribers and Users receive Derived Data, which by definition cannot be readily reverse-engineered to recreate Cboe One Summary data or used to create other data that is a reasonable facsimile or substitute for Cboe One Summary. The Exchange therefore believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue burden on competition. Moreover, a number of national securities exchanges, including the Exchange and its affiliated Cboe U.S. equities exchanges offer pricing discounts for Derived Data today.[20] These pricing programs reduce the cost of accessing top of book market information that is used, among other things, to create derivative instruments rather than to trade U.S. equity securities. Additionally, the Exchange is proposing to enhance the Program by reducing the fees for Cboe One Summary Derived Data. The Exchange does not believe that the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to lower their prices to better compete with the Exchange's offering. The Exchange believes that the proposed rule change is pro-competitive as it seeks to offer pricing incentives to

[17] *See generally,* the Nasdaq Basic fees at *http://www.nasdaqtrader.com/TraderB.aspx?id=MDDPricingALLN.*

[18] *Supra* note 14.

[19] *See* Cboe BZX U.S. Equities Exchange Fee Schedule.

[20] *Supra* note 16. *See also* Cboe BZX U.S. Equities Exchange Fee Schedule, Financial Product Distribution Program.

customers to better position the Exchange as it competes to attract additional market data subscribers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [21] and paragraph (f) of Rule 19b–4 [22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2022–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2022–019. 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–CboeBZX–2022–019 and should be submitted on or before April 8, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–05698 Filed 3–17–22; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34531; File No. 812–15267]

Panagram Capital, LLC, et al.

March 14, 2022.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

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 entities.

APPLICANTS: Panagram Capital, LLC; Panagram Structured Asset Management, LLC; Panagram Senior Loan Fund I, LP; Panagram Senior Loan Fund II, LP; Panagram Senior Loan Fund III, LP; Panagram Senior Loan Fund IV, LP; Panagram Senior Loan Fund V, LP; Panagram Senior Loan Fund VI, LP; Panagram Senior Loan Fund VII, LP; and Panagram Senior Loan Fund VIII, LP.

FILING DATES: The application was filed on September 24, 2021, and amended on October 15, 2021, and January 7, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on April 8, 2022, and should be accompanied by proof of service on applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Jamie Kim, Esq. Panagram Structured Asset Management, LLC, 51 Astor Place, 12th Floor, New York, NY 10003 and *Philip.Hinkle@dechert.com.*

FOR FURTHER INFORMATION CONTACT: Laura L. Solomon, Senior Counsel, or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated January 7, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–05704 Filed 3–17–22; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

AGENCY: Small Business Administration.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before May 17, 2022.

ADDRESSES: Send all comments to Erick Page-Littleford, Technology Policy Analyst, Office of Innovation & Technology, Small Business Administration, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Erick Page-Littleford, Technology Policy Analyst, Office of Innovation & Technology, *technology@sba.gov,* or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: The Small Business Act, as amended by the Small Business Innovation Research (SBIR) and Small Business Technology Transfer Program (STTR) Reauthorization Act of 2011, requires SBA to collect regarding the SBIR and STTR awards made by the federal agencies that participate in those programs. SBA is required to maintain this information in searchable electronic databases and also to report the information to Congress annually.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

OMB Control Number: 3245–0356.

Title: Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) *SBIR.gov* Database.

Description of Respondents: SBA to collect regarding the SBIR and STTR awards made by the federal agencies.

Form Number: N/A.

Total Estimated Annual Responses: 14,500.

Total Estimated Annual Hour Burden: 49,500.

Curtis Rich,

Management Analyst.

[FR Doc. 2022–05743 Filed 3–17–22; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17370 and #17371; TENNESSEE Disaster Number TN–00135]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Tennessee

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Tennessee (FEMA–4645–DR), dated 03/11/2022.

Incident: Severe Winter Storm.

Incident Period: 02/03/2022 through 02/04/2022.

DATES: Issued on 03/11/2022.

Physical Loan Application Deadline Date: 05/10/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 12/12/2022.

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 03/11/2022, 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: Crockett, Fayette, Haywood, Lauderdale, Shelby, Tipton, Weakley.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	1.875
Non-Profit Organizations without Credit Available Elsewhere	1.875
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	1.875

The number assigned to this disaster for physical damage is 17370 B and for economic injury is 17371 0.

(Catalog of Federal Domestic Assistance Number 59008)

Barbara Carson,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–05732 Filed 3–17–22; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Women Owned Small Business Federal Contracting Program; Identification of Eligible Industries

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: The U.S. Small Business Administration (SBA) identifies eligible industries for the Women-Owned Small Business Federal Contracting Program (WOSB Program), which provides set-aside and sole-source contract opportunities to small business concerns owned and controlled by women. To be an eligible industry for the WOSB Program, SBA must determine through a study that women are either underrepresented or substantially underrepresented in Federal contracting in that industry. This notice identifies the eligible industries for the WOSB Program based on the results of SBA's most recent study.

DATES: The designations of industries contained in this notice apply to all solicitations issued in the WOSB Program on or after March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Roman Ivey, Program Analyst, Office of Government Contracting and Business Development, *roman.ivey@sba.gov,* (202) 401–1420.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 8(m) of the Small Business Act, 15 U.S.C. 637(m), SBA is responsible for implementing and administering the WOSB Program. The purpose of the WOSB Program is to ensure that women-owned small businesses (WOSBs) have an equal opportunity to participate in Federal contracting and to help attain the Federal government's goal of awarding five percent of its prime contract dollars to WOSBs. The WOSB Program authorizes Federal contracting officers to restrict competition for a contract to WOSBs if (1) there is a reasonable expectation that at least two WOSBs will submit offers that meet the requirements of the acquisition at a fair and reasonable price and (2) the acquisition is for a good or service assigned a North American Industry Classification System (NAICS) code in which SBA has determined that WOSBs are ''substantially underrepresented.'' The WOSB Program also authorizes contracting officers to award a sole-source contract assigned a WOSB Program-eligible NAICS code, provided that only one WOSB can be identified that can perform the contract at a fair and reasonable price.

Economically disadvantaged women-owned small businesses (EDWOSBs) can likewise receive set-asides and sole-source contracts similar to those described above for WOSBs. Federal agencies may reserve contract opportunities for EDWOSB set-asides and sole-source awards in industries where SBA has determined that WOSBs are ''underrepresented.'' The WOSB and EDWOSB preferences are set forth in SBA's regulations at 13 CFR 127.500–.509.

The Small Business Reauthorization Act of 2000, Public Law 106–554, 1(a)(9) [title VIII, § 811], required the SBA Administrator to conduct an initial study to identify those industries in which small business concerns owned and controlled by women are underrepresented in Federal contracting, in order to designate those industries as eligible for set-asides and sole-source contracts under the WOSB Program. 15 U.S.C. 637(m)(4). In 2014, Congress amended the Small Business Act to require SBA to conduct a new study every five years and to submit a report to Congress reflecting the results of each new study. Public Law 113–291, § 825(c). SBA last conducted a study in 2016, relying on analysis from the Department of Commerce. 81 FR 11340 (March 3, 2016). An SBA regulation, 13 CFR 127.501, provides that SBA's study will designate NAICS Industry Subsector codes in which WOSBs are underrepresented and substantially underrepresented.

On October 1, 2020, SBA issued a Notice and Request for Comments in the **Federal Register**, 85 FR 62004, announcing that SBA was preparing to conduct a new study. SBA also sought public input on specific questions regarding the study methodology.

SBA recently conducted a new study and discusses the results below.

II. Overview of Study and Results

In Fiscal Year 2020 (FY 2020), SBA contracted with an independent research firm to study the representation of WOSBs in government procurement at the industry level during the previous three fiscal years (FY 2016–FY 2019). The research firm used a methodology similar to that developed by Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND) for the WOSB Program study issued in 2007, *https://www.rand.org/pubs/technical_reports/TR442.html*. As with the RAND study, the firm's study defined industries using 4-digit NAICS codes.

The study methodology compares two WOSB utilization rates to the WOSB availability rate in each industry. The two utilization rates are, first, the percentage of small-business eligible contracts that were awarded to WOSBs, and, second, the percentage of small-business eligible dollars that were obligated to WOSBs, as reported in the Federal Procurement Data System. The availability rate is the percentage of all businesses registered as interested in competing for contracts that identify as WOSBs in the System for Award Management (SAM). From those rates, the study calculates disparity ratios. A disparity ratio of 1 indicates that WOSBs are utilized proportionately to their availability, whereas a ratio less than 1 indicates a discrepancy between WOSBs' utilization rate and their availability. The RAND study had previously set disparity ratio thresholds of 0.5 and 0.8 disparity ratio for finding WOSBs to be substantially underrepresented and underrepresented, respectively. SBA adopted the same thresholds here. SBA designated an industry as eligible based on underrepresentation if either of two disparity ratios for that industry fell below the threshold for finding underrepresentation.

To determine the stability of each disparity ratio, the study applied a statistical power analysis using the number of contracts issued in an industry. The power analysis showed, in some industries, that the number of contracts issued within the study time frame was insufficient to calculate a reliable disparity ratio measuring WOSB representation. Additionally, to confirm the study's findings about existing WOSB Program industries where the study did not find underrepresentation, SBA re-calculated disparity ratios removing WOSB and EDWOSB set-aside and sole-source contracts from utilization ratio calculations. Not doing so would mask underrepresentation that would occur if WOSBs were not provided set-aside opportunities. SBA also replicated the above methodology using FY 2020 data to examine potential impact of the COVID–19 pandemic on government contracting. Results did not provide sufficient evidence to deviate from the study's FY 2016–FY 2019 conclusions.

III. Eligible Industries and Responses to Comments

Based on the above, SBA finds a total of 759 NAICS code industries eligible for Federal contracting under the WOSB Program. This includes 113 NAICS code industries in which WOSBs are underrepresented (meaning contracting officers can make EDWOSB set-aside and sole-source awards in these industries) and 646 NAICS code industries in which WOSBs are substantially underrepresented (meaning contracting officers can make WOSB set-aside and sole-source awards in these industries). EDWOSB concerns are eligible to be considered for both WOSB and EDWOSB set-aside and sole-source awards for all 759 NAICS code industries. These new designations are effectively immediately.

In response to the October 2020 Request for Comments, SBA received 375 comments. From those, 261 commenters recommended that SBA identify all industry NAICS codes as being part of the WOSB program. The remaining comments were either out of scope or identified specific industries in which SBA should closely investigate disparities among WOSB firms.

Although neither the statute nor SBA's regulations permit SBA to designate all industries as eligible, the results of this most recent study designate 759 of 891 procurement NAICS codes as eligible for either WOSB or EDWOSB procurement procedures. This is over 85% of the procurement NAICS codes. Using Fiscal Year 2021 data, these NAICS codes account for 92% of the Federal government's small-business spending. Only 2% of the Federal government's small-business spending came in current NAICS codes that are not eligible for either WOSB or EDWOSB procedures under these designations

(the remainder was spent in NAICS codes that are no longer active). Prior to these changes, fewer than 50% of procurement NAICS codes were eligible for the WOSB Program, and those industries accounted for 75% of small-business spending. Thus, given the requirements of the statute and regulations, the new list of eligible industries addresses the commenters' desire to expand the NAICS codes eligible for the WOSB Program.

As noted in Section II above, SBA determined WOSB and EDWOSB eligibility at the 4-digit NAICS industry group level. For practical reasons, SBA is reporting the results at the 6-digit NAICS industry level. However, only those 6-digit NAICS codes for which SBA has Federal contracting data are included because those are the only industries in which it is possible to determine underrepresentation. Please also note that any sub-industry activities (commonly known as ''exceptions'' in SBA's table of size standards) that fall under one of the listed NAICS codes below also qualify for WOSB or EDWOSB set-asides or sole-source awards.

The 113 NAICS codes in which WOSBs are underrepresented are set forth in Table 1, NAICS Codes in Which WOSBs are Underrepresented.

TABLE 1—NAICS CODES IN WHICH WOSBS ARE UNDERREPRESENTED

[EDWOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
111411	Mushroom Production.
111419	Other Food Crops Grown Under Cover.
111421	Nursery and Tree Production.
111422	Floriculture Production.
112310	Chicken Egg Production.
112320	Broilers and Other Meat Type Chicken Production.
112330	Turkey Production.
112340	Poultry Hatcheries.
112390	Other Poultry Production.
115310	Support Activities for Forestry.
212311	Dimension Stone Mining and Quarrying.
212312	Crushed and Broken Limestone Mining and Quarrying.
212313	Crushed and Broken Granite Mining and Quarrying.
212319	Other Crushed and Broken Stone Mining and Quarrying.
212321	Construction Sand and Gravel Mining.
212322	Industrial Sand Mining.
212324	Kaolin and Ball Clay Mining.
212325	Clay and Ceramic and Refractory Minerals Mining.
212391	Potash, Soda, and Borate Mineral Mining.
212392	Phosphate Rock Mining.
212393	Other Chemical and Fertilizer Mineral Mining.
212399	All Other Nonmetallic Mineral Mining.
238310	Drywall and Insulation Contractors.
238320	Painting and Wall Covering Contractors.
238330	Flooring Contractors.
238340	Tile and Terrazzo Contractors.
238350	Finish Carpentry Contractors.
238390	Other Building Finishing Contractors.
238910	Site Preparation Contractors.
238990	All Other Specialty Trade Contractors.
311111	Dog and Cat Food Manufacturing.
311119	Other Animal Food Manufacturing.
311611	Animal (except Poultry) Slaughtering.
311612	Meat Processed from Carcasses.
311613	Rendering and Meat Byproduct Processing.
311615	Poultry Processing.
314110	Carpet and Rug Mills.
314120	Curtain and Linen Mills.
321113	Sawmills.
321114	Wood Preservation.
327410	Lime Manufacturing.
327420	Gypsum Product Manufacturing.
331210	Iron and Steel Pipe and Tube Manufacturing from Purchased Steel.
331221	Rolled Steel Shape Manufacturing.
331222	Steel Wire Drawing.
332613	Spring Manufacturing.
332618	Other Fabricated Wire Product Manufacturing.
332710	Machine Shops.
332721	Precision Turned Product Manufacturing.
332722	Bolt, Nut, Screw, Rivet, and Washer Manufacturing.
332811	Metal Heat Treating.
332812	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers.
332813	Electroplating, Plating, Polishing, Anodizing, and Coloring.
333241	Food Product Machinery Manufacturing.
333242	Semiconductor Machinery Manufacturing.
333243	Sawmill, Woodworking, and Paper Machinery Manufacturing.
333244	Printing Machinery and Equipment Manufacturing.

TABLE 1—NAICS CODES IN WHICH WOSBS ARE UNDERREPRESENTED—Continued

[EDWOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
333249	Other Industrial Machinery Manufacturing.
334310	Audio and Video Equipment Manufacturing.
335110	Electric Lamp Bulb and Part Manufacturing.
335121	Residential Electric Lighting Fixture Manufacturing.
335122	Commercial, Industrial, and Institutional Electric Lighting Fixture Manufacturing.
335129	Other Lighting Equipment Manufacturing.
335311	Power, Distribution, and Specialty Transformer Manufacturing.
335312	Motor and Generator Manufacturing.
335313	Switchgear and Switchboard Apparatus Manufacturing.
335314	Relay and Industrial Control Manufacturing.
337910	Mattress Manufacturing.
337920	Blind and Shade Manufacturing.
485510	Charter Bus Industry.
488210	Support Activities for Rail Transportation.
512110	Motion Picture and Video Production.
512120	Motion Picture and Video Distribution.
512131	Motion Picture Theaters (except Drive-Ins).
512132	Drive-In Motion Picture Theaters.
512191	Teleproduction and Other Postproduction Services.
512199	Other Motion Picture and Video Industries.
561710	Exterminating and Pest Control Services.
561720	Janitorial Services.
561730	Landscaping Services.
561740	Carpet and Upholstery Cleaning Services.
561790	Other Services to Buildings and Dwellings.
562111	Solid Waste Collection.
562112	Hazardous Waste Collection.
562119	Other Waste Collection.
621310	Offices of Chiropractors.
621320	Offices of Optometrists.
621330	Offices of Mental Health Practitioners (except Physicians).
621340	Offices of Physical, Occupational and Speech Therapists, and Audiologists.
621391	Offices of Podiatrists.
621399	Offices of All Other Miscellaneous Health Practitioners.
624410	Child Day Care Services.
712110	Museums.
712120	Historical Sites.
712130	Zoos and Botanical Gardens.
712190	Nature Parks and Other Similar Institutions.
721110	Hotels (except Casino Hotels) and Motels.
721120	Casino Hotels.
721191	Bed-and-Breakfast Inns.
721199	All Other Traveler Accommodation.
721211	RV (Recreational Vehicle) Parks and Campgrounds.
721214	Recreational and Vacation Camps (except Campgrounds).
811411	Home and Garden Equipment Repair and Maintenance.
811412	Appliance Repair and Maintenance.
811420	Reupholstery and Furniture Repair.
811430	Footwear and Leather Goods Repair.
811490	Other Personal and Household Goods Repair and Maintenance.
812111	Barber Shops.
812112	Beauty Salons.
812113	Nail Salons.
812191	Diet and Weight Reducing Centers.
812199	Other Personal Care Services.
813110	Religious Organizations.

The 646 NAICS codes in which WOSBs are substantially underrepresented are set forth in Table 2, NAICS Codes in Which WOSBs are Substantially Underrepresented.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
111110	Soybean Farming.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
111120	Oilseed (except Soybean) Farming.
111130	Dry Pea and Bean Farming.
111140	Wheat Farming.
111150	Corn Farming.
111160	Rice Farming.
111191	Oilseed and Grain Combination Farming.
111199	All Other Grain Farming.
111910	Tobacco Farming.
111920	Cotton Farming.
111930	Sugarcane Farming.
111940	Hay Farming.
111991	Sugar Beet Farming.
111992	Peanut Farming.
111998	All Other Miscellaneous Crop Farming.
112210	Hog and Pig Farming.
112910	Apiculture.
112920	Horses and Other Equine Production.
112930	Fur-Bearing Animal and Rabbit Production.
112990	All Other Animal Production.
113210	Forest Nurseries and Gathering of Forest Products.
114210	Hunting and Trapping.
115111	Cotton Ginning.
115112	Soil Preparation, Planting, and Cultivating.
115113	Crop Harvesting, Primarily by Machine.
115114	Postharvest Crop Activities (except Cotton Ginning).
115115	Farm Labor Contractors and Crew Leaders.
115116	Farm Management Services.
115210	Support Activities for Animal Production.
211120	Crude Petroleum Extraction.
211130	Natural Gas Extraction.
213111	Drilling Oil and Gas Wells.
213112	Support Activities for Oil and Gas Operations.
213113	Support Activities for Coal Mining.
213114	Support Activities for Metal Mining.
213115	Support Activities for Nonmetallic Minerals (except Fuels) Mining.
221111	Hydroelectric Power Generation.
221112	Fossil Fuel Electric Power Generation.
221113	Nuclear Electric Power Generation.
221114	Solar Electric Power Generation.
221115	Wind Electric Power Generation.
221116	Geothermal Electric Power Generation.
221117	Biomass Electric Power Generation.
221118	Other Electric Power Generation.
221121	Electric Bulk Power Transmission and Control.
221122	Electric Power Distribution.
221210	Natural Gas Distribution.
221310	Water Supply and Irrigation Systems.
221320	Sewage Treatment Facilities.
221330	Steam and Air-Conditioning Supply.
236115	New Single-Family Housing Construction (except For-Sale Builders).
236116	New Multifamily Housing Construction (except For-Sale Builders).
236117	New Housing For-Sale Builders.
236118	Residential Remodelers.
236210	Industrial Building Construction.
236220	Commercial and Institutional Building Construction.
237110	Water and Sewer Line and Related Structures Construction.
237120	Oil and Gas Pipeline and Related Structures Construction.
237130	Power and Communication Line and Related Structures Construction.
237310	Highway, Street, and Bridge Construction.
237990	Other Heavy and Civil Engineering Construction.
311211	Flour Milling.
311212	Rice Milling.
311213	Malt Manufacturing.
311221	Wet Corn Milling.
311224	Soybean and Other Oilseed Processing.
311225	Fats and Oils Refining and Blending.
311230	Breakfast Cereal Manufacturing.
311313	Beet Sugar Manufacturing.
311314	Cane Sugar Manufacturing.
311340	Nonchocolate Confectionery Manufacturing.
311351	Chocolate and Confectionery Manufacturing from Cacao Beans.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
311352	Confectionery Manufacturing from Purchased Chocolate.
311411	Frozen Fruit, Juice, and Vegetable Manufacturing.
311412	Frozen Specialty Food Manufacturing.
311421	Fruit and Vegetable Canning.
311422	Specialty Canning.
311423	Dried and Dehydrated Food Manufacturing.
311511	Fluid Milk Manufacturing.
311512	Creamery Butter Manufacturing.
311513	Cheese Manufacturing.
311514	Dry, Condensed, and Evaporated Dairy Product Manufacturing.
311520	Ice Cream and Frozen Dessert Manufacturing.
311710	Seafood Product Preparation and Packaging.
311811	Retail Bakeries.
311812	Commercial Bakeries.
311813	Frozen Cakes, Pies, and Other Pastries Manufacturing.
311821	Cookie and Cracker Manufacturing.
311824	Dry Pasta, Dough, and Flour Mixes Manufacturing from Purchased Flour.
311830	Tortilla Manufacturing.
311911	Roasted Nuts and Peanut Butter Manufacturing.
311919	Other Snack Food Manufacturing.
311920	Coffee and Tea Manufacturing.
311930	Flavoring Syrup and Concentrate Manufacturing.
311941	Mayonnaise, Dressing, and Other Prepared Sauce Manufacturing.
311942	Spice and Extract Manufacturing.
311991	Perishable Prepared Food Manufacturing.
311999	All Other Miscellaneous Food Manufacturing.
312111	Soft Drink Manufacturing.
312112	Bottled Water Manufacturing.
312113	Ice Manufacturing.
312120	Breweries.
312130	Wineries.
312140	Distilleries.
313110	Fiber, Yarn, and Thread Mills.
313210	Broadwoven Fabric Mills.
313220	Narrow Fabric Mills and Schiffli Machine Embroidery.
313230	Nonwoven Fabric Mills.
313240	Knit Fabric Mills.
313310	Textile and Fabric Finishing Mills.
313320	Fabric Coating Mills.
314910	Textile Bag and Canvas Mills.
314994	Rope, Cordage, Twine, Tire Cord, and Tire Fabric Mills.
314999	All Other Miscellaneous Textile Product Mills.
315110	Hosiery and Sock Mills.
315190	Other Apparel Knitting Mills.
315210	Cut and Sew Apparel Contractors.
315220	Men's and Boys' Cut and Sew Apparel Manufacturing.
315240	Women's, Girls', and Infants' Cut and Sew Apparel Manufacturing.
315280	Other Cut and Sew Apparel Manufacturing.
315990	Apparel Accessories and Other Apparel Manufacturing.
316110	Leather and Hide Tanning and Finishing.
316210	Footwear Manufacturing.
316992	Women's Handbag and Purse Manufacturing.
316998	All Other Leather Good and Allied Product Manufacturing.
321211	Hardwood Veneer and Plywood Manufacturing.
321212	Softwood Veneer and Plywood Manufacturing.
321213	Engineered Wood Member (except Truss) Manufacturing.
321214	Truss Manufacturing.
321219	Reconstituted Wood Product Manufacturing.
321911	Wood Window and Door Manufacturing.
321912	Cut Stock, Resawing Lumber, and Planing.
321918	Other Millwork (including Flooring).
321920	Wood Container and Pallet Manufacturing.
321991	Manufactured Home (Mobile Home) Manufacturing.
321992	Prefabricated Wood Building Manufacturing.
321999	All Other Miscellaneous Wood Product Manufacturing.
322110	Pulp Mills.
322121	Paper (except Newsprint) Mills.
322122	Newsprint Mills.
322130	Paperboard Mills.
322211	Corrugated and Solid Fiber Box Manufacturing.
322212	Folding Paperboard Box Manufacturing.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
322219	Other Paperboard Container Manufacturing.
322220	Paper Bag and Coated and Treated Paper Manufacturing.
322230	Stationery Product Manufacturing.
322291	Sanitary Paper Product Manufacturing.
322299	All Other Converted Paper Product Manufacturing.
323111	Commercial Printing (except Screen and Books).
323113	Commercial Screen Printing.
323117	Books Printing.
323120	Support Activities for Printing.
324110	Petroleum Refineries.
324121	Asphalt Paving Mixture and Block Manufacturing.
324122	Asphalt Shingle and Coating Materials Manufacturing.
324191	Petroleum Lubricating Oil and Grease Manufacturing.
324199	All Other Petroleum and Coal Products Manufacturing.
325110	Petrochemical Manufacturing.
325120	Industrial Gas Manufacturing.
325130	Synthetic Dye and Pigment Manufacturing.
325180	Other Basic Inorganic Chemical Manufacturing.
325193	Ethyl Alcohol Manufacturing.
325194	Cyclic Crude, Intermediate, and Gum and Wood Chemical Manufacturing.
325199	All Other Basic Organic Chemical Manufacturing.
325211	Plastics Material and Resin Manufacturing.
325212	Synthetic Rubber Manufacturing.
325220	Artificial and Synthetic Fibers and Filaments Manufacturing.
325311	Nitrogenous Fertilizer Manufacturing.
325312	Phosphatic Fertilizer Manufacturing.
325314	Fertilizer (Mixing Only) Manufacturing.
325320	Pesticide and Other Agricultural Chemical Manufacturing.
325411	Medicinal and Botanical Manufacturing.
325412	Pharmaceutical Preparation Manufacturing.
325413	In-Vitro Diagnostic Substance Manufacturing.
325414	Biological Product (except Diagnostic) Manufacturing.
325510	Paint and Coating Manufacturing.
325520	Adhesive Manufacturing.
325611	Soap and Other Detergent Manufacturing.
325612	Polish and Other Sanitation Good Manufacturing.
325613	Surface Active Agent Manufacturing.
325620	Toilet Preparation Manufacturing.
325910	Printing Ink Manufacturing.
325920	Explosives Manufacturing.
325991	Custom Compounding of Purchased Resins.
325992	Photographic Film, Paper, Plate, and Chemical Manufacturing.
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing.
326211	Tire Manufacturing (except Retreading).
326212	Tire Retreading.
326220	Rubber and Plastics Hoses and Belting Manufacturing.
326291	Rubber Product Manufacturing for Mechanical Use.
326299	All Other Rubber Product Manufacturing.
327110	Pottery, Ceramics, and Plumbing Fixture Manufacturing.
327120	Clay Building Material and Refractories Manufacturing.
327211	Flat Glass Manufacturing.
327212	Other Pressed and Blown Glass and Glassware Manufacturing.
327213	Glass Container Manufacturing.
327215	Glass Product Manufacturing Made of Purchased Glass.
327310	Cement Manufacturing.
327320	Ready-Mix Concrete Manufacturing.
327331	Concrete Block and Brick Manufacturing.
327332	Concrete Pipe Manufacturing.
327390	Other Concrete Product Manufacturing.
327910	Abrasive Product Manufacturing.
327991	Cut Stone and Stone Product Manufacturing.
327992	Ground or Treated Mineral and Earth Manufacturing.
327993	Mineral Wool Manufacturing.
327999	All Other Miscellaneous Nonmetallic Mineral Product Manufacturing.
331110	Iron and Steel Mills and Ferroalloy Manufacturing.
331313	Alumina Refining and Primary Aluminum Production.
331314	Secondary Smelting and Alloying of Aluminum.
331315	Aluminum Sheet, Plate, and Foil Manufacturing.
331318	Other Aluminum Rolling, Drawing, and Extruding.
331410	Nonferrous Metal (except Aluminum) Smelting and Refining.
331420	Copper Rolling, Drawing, Extruding, and Alloying.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
331491	Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing, and Extruding.
331492	Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum).
331511	Iron Foundries.
331512	Steel Investment Foundries.
331513	Steel Foundries (except Investment).
331523	Nonferrous Metal Die-Casting Foundries.
331524	Aluminum Foundries (except Die-Casting).
331529	Other Nonferrous Metal Foundries (except Die-Casting).
332111	Iron and Steel Forging.
332112	Nonferrous Forging.
332114	Custom Roll Forming.
332117	Powder Metallurgy Part Manufacturing.
332119	Metal Crown, Closure, and Other Metal Stamping (except Automotive).
332215	Metal Kitchen Cookware, Utensil, Cutlery, and Flatware (except Precious) Manufacturing.
332216	Saw Blade and Handtool Manufacturing.
332311	Prefabricated Metal Building and Component Manufacturing.
332312	Fabricated Structural Metal Manufacturing.
332313	Plate Work Manufacturing.
332321	Metal Window and Door Manufacturing.
332322	Sheet Metal Work Manufacturing.
332323	Ornamental and Architectural Metal Work Manufacturing.
332410	Power Boiler and Heat Exchanger Manufacturing.
332420	Metal Tank (Heavy Gauge) Manufacturing.
332431	Metal Can Manufacturing.
332439	Other Metal Container Manufacturing.
332510	Hardware Manufacturing.
332911	Industrial Valve Manufacturing.
332912	Fluid Power Valve and Hose Fitting Manufacturing.
332913	Plumbing Fixture Fitting and Trim Manufacturing.
332919	Other Metal Valve and Pipe Fitting Manufacturing.
332991	Ball and Roller Bearing Manufacturing.
332992	Small Arms Ammunition Manufacturing.
332993	Ammunition (except Small Arms) Manufacturing.
332994	Small Arms, Ordnance, and Ordnance Accessories Manufacturing.
332996	Fabricated Pipe and Pipe Fitting Manufacturing.
332999	All Other Miscellaneous Fabricated Metal Product Manufacturing.
333111	Farm Machinery and Equipment Manufacturing.
333112	Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing.
333120	Construction Machinery Manufacturing.
333131	Mining Machinery and Equipment Manufacturing.
333132	Oil and Gas Field Machinery and Equipment Manufacturing.
333314	Optical Instrument and Lens Manufacturing.
333316	Photographic and Photocopying Equipment Manufacturing.
333318	Other Commercial and Service Industry Machinery Manufacturing.
333413	Industrial and Commercial Fan and Blower and Air Purification Equipment Manufacturing.
333414	Heating Equipment (except Warm Air Furnaces) Manufacturing.
333415	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.
333511	Industrial Mold Manufacturing.
333514	Special Die and Tool, Die Set, Jig, and Fixture Manufacturing.
333515	Cutting Tool and Machine Tool Accessory Manufacturing.
333517	Machine Tool Manufacturing.
333519	Rolling Mill and Other Metalworking Machinery Manufacturing.
333611	Turbine and Turbine Generator Set Units Manufacturing.
333612	Speed Changer, Industrial High-Speed Drive, and Gear Manufacturing.
333613	Mechanical Power Transmission Equipment Manufacturing.
333618	Other Engine Equipment Manufacturing.
333912	Air and Gas Compressor Manufacturing.
333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing.
333921	Elevator and Moving Stairway Manufacturing.
333922	Conveyor and Conveying Equipment Manufacturing.
333923	Overhead Traveling Crane, Hoist, and Monorail System Manufacturing.
333924	Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing.
333991	Power-Driven Handtool Manufacturing.
333992	Welding and Soldering Equipment Manufacturing.
333993	Packaging Machinery Manufacturing.
333994	Industrial Process Furnace and Oven Manufacturing.
333995	Fluid Power Cylinder and Actuator Manufacturing.
333996	Fluid Power Pump and Motor Manufacturing.
333997	Scale and Balance Manufacturing.
333999	All Other Miscellaneous General Purpose Machinery Manufacturing.
334111	Electronic Computer Manufacturing.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
334112	Computer Storage Device Manufacturing.
334118	Computer Terminal and Other Computer Peripheral Equipment Manufacturing.
334210	Telephone Apparatus Manufacturing.
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.
334290	Other Communications Equipment Manufacturing.
334412	Bare Printed Circuit Board Manufacturing.
334413	Semiconductor and Related Device Manufacturing.
334416	Capacitor, Resistor, Coil, Transformer, and Other Inductor Manufacturing.
334417	Electronic Connector Manufacturing.
334418	Printed Circuit Assembly (Electronic Assembly) Manufacturing.
334419	Other Electronic Component Manufacturing.
334510	Electromedical and Electrotherapeutic Apparatus Manufacturing.
334511	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing.
334512	Automatic Environmental Control Manufacturing for Residential, Commercial, and Appliance Use.
334513	Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables.
334514	Totalizing Fluid Meter and Counting Device Manufacturing.
334515	Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals.
334516	Analytical Laboratory Instrument Manufacturing.
334517	Irradiation Apparatus Manufacturing.
334519	Other Measuring and Controlling Device Manufacturing.
334613	Blank Magnetic and Optical Recording Media Manufacturing.
334614	Software and Other Prerecorded Compact Disc, Tape, and Record Reproducing.
335911	Storage Battery Manufacturing.
335912	Primary Battery Manufacturing.
335921	Fiber Optic Cable Manufacturing.
335929	Other Communication and Energy Wire Manufacturing.
335931	Current-Carrying Wiring Device Manufacturing.
335932	Noncurrent-Carrying Wiring Device Manufacturing.
335991	Carbon and Graphite Product Manufacturing.
335999	All Other Miscellaneous Electrical Equipment and Component Manufacturing.
336111	Automobile Manufacturing.
336112	Light Truck and Utility Vehicle Manufacturing.
336120	Heavy Duty Truck Manufacturing.
336211	Motor Vehicle Body Manufacturing.
336212	Truck Trailer Manufacturing.
336213	Motor Home Manufacturing.
336214	Travel Trailer and Camper Manufacturing.
336310	Motor Vehicle Gasoline Engine and Engine Parts Manufacturing.
336320	Motor Vehicle Electrical and Electronic Equipment Manufacturing.
336330	Motor Vehicle Steering and Suspension Components (except Spring) Manufacturing.
336340	Motor Vehicle Brake System Manufacturing.
336350	Motor Vehicle Transmission and Power Train Parts Manufacturing.
336360	Motor Vehicle Seating and Interior Trim Manufacturing.
336370	Motor Vehicle Metal Stamping.
336390	Other Motor Vehicle Parts Manufacturing.
336411	Aircraft Manufacturing.
336412	Aircraft Engine and Engine Parts Manufacturing.
336413	Other Aircraft Parts and Auxiliary Equipment Manufacturing.
336414	Guided Missile and Space Vehicle Manufacturing.
336415	Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing.
336419	Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing.
336611	Ship Building and Repairing.
336612	Boat Building.
336991	Motorcycle, Bicycle, and Parts Manufacturing.
336992	Military Armored Vehicle, Tank, and Tank Component Manufacturing.
336999	All Other Transportation Equipment Manufacturing.
337110	Wood Kitchen Cabinet and Countertop Manufacturing.
337121	Upholstered Household Furniture Manufacturing.
337122	Nonupholstered Wood Household Furniture Manufacturing.
337124	Metal Household Furniture Manufacturing.
337125	Household Furniture (except Wood and Metal) Manufacturing.
337127	Institutional Furniture Manufacturing.
337211	Wood Office Furniture Manufacturing.
337212	Custom Architectural Woodwork and Millwork Manufacturing.
337214	Office Furniture (except Wood) Manufacturing.
337215	Showcase, Partition, Shelving, and Locker Manufacturing.
339112	Surgical and Medical Instrument Manufacturing.
339113	Surgical Appliance and Supplies Manufacturing.
339114	Dental Equipment and Supplies Manufacturing.
339115	Ophthalmic Goods Manufacturing.
339116	Dental Laboratories.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
339910	Jewelry and Silverware Manufacturing.
339920	Sporting and Athletic Goods Manufacturing.
339930	Doll, Toy, and Game Manufacturing.
339940	Office Supplies (except Paper) Manufacturing.
339950	Sign Manufacturing.
339991	Gasket, Packing, and Sealing Device Manufacturing.
339992	Musical Instrument Manufacturing.
339993	Fastener, Button, Needle, and Pin Manufacturing.
339994	Broom, Brush, and Mop Manufacturing.
339995	Burial Casket Manufacturing.
339999	All Other Miscellaneous Manufacturing.
481111	Scheduled Passenger Air Transportation.
481112	Scheduled Freight Air Transportation.
481211	Nonscheduled Chartered Passenger Air Transportation.
481212	Nonscheduled Chartered Freight Air Transportation.
481219	Other Nonscheduled Air Transportation.
483111	Deep Sea Freight Transportation.
483112	Deep Sea Passenger Transportation.
483113	Coastal and Great Lakes Freight Transportation.
483114	Coastal and Great Lakes Passenger Transportation.
483211	Inland Water Freight Transportation.
483212	Inland Water Passenger Transportation.
484110	General Freight Trucking, Local.
484121	General Freight Trucking, Long-Distance, Truckload.
484122	General Freight Trucking, Long-Distance, Less Than Truckload.
484210	Used Household and Office Goods Moving.
484220	Specialized Freight (except Used Goods) Trucking, Local.
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance.
485111	Mixed Mode Transit Systems.
485112	Commuter Rail Systems.
485113	Bus and Other Motor Vehicle Transit Systems.
485119	Other Urban Transit Systems.
485210	Interurban and Rural Bus Transportation.
485310	Taxi Service.
485320	Limousine Service.
485991	Special Needs Transportation.
485999	All Other Transit and Ground Passenger Transportation.
488111	Air Traffic Control.
488119	Other Airport Operations.
488190	Other Support Activities for Air Transportation.
488310	Port and Harbor Operations.
488320	Marine Cargo Handling.
488330	Navigational Services to Shipping.
488390	Other Support Activities for Water Transportation.
488410	Motor Vehicle Towing.
488490	Other Support Activities for Road Transportation.
488510	Freight Transportation Arrangement.
488991	Packing and Crating.
488999	All Other Support Activities for Transportation.
491110	Postal Service.
492110	Couriers and Express Delivery Services.
492210	Local Messengers and Local Delivery.
493110	General Warehousing and Storage.
493120	Refrigerated Warehousing and Storage.
493130	Farm Product Warehousing and Storage.
493190	Other Warehousing and Storage.
511110	Newspaper Publishers.
511120	Periodical Publishers.
511130	Book Publishers.
511140	Directory and Mailing List Publishers.
511191	Greeting Card Publishers.
511199	All Other Publishers.
511210	Software Publishers.
512230	Music Publishers.
512240	Sound Recording Studios.
512250	Record Production and Distribution.
512290	Other Sound Recording Industries.
515111	Radio Networks.
515112	Radio Stations.
515120	Television Broadcasting.
515210	Cable and Other Subscription Programming.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
517311	Wired Telecommunications Carriers.
517312	Wireless Telecommunications Carriers (except Satellite).
517410	Satellite Telecommunications.
517911	Telecommunications Resellers.
517919	All Other Telecommunications.
518210	Data Processing, Hosting, and Related Services.
519110	News Syndicates.
519120	Libraries and Archives.
519130	Internet Publishing and Broadcasting and Web Search Portals.
519190	All Other Information Services.
522310	Mortgage and Nonmortgage Loan Brokers.
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities.
522390	Other Activities Related to Credit Intermediation.
523110	Investment Banking and Securities Dealing.
523120	Securities Brokerage.
523130	Commodity Contracts Dealing.
523140	Commodity Contracts Brokerage.
523910	Miscellaneous Intermediation.
523920	Portfolio Management.
523930	Investment Advice.
523991	Trust, Fiduciary, and Custody Activities.
523999	Miscellaneous Financial Investment Activities.
524113	Direct Life Insurance Carriers.
524114	Direct Health and Medical Insurance Carriers.
524126	Direct Property and Casualty Insurance Carriers.
524127	Direct Title Insurance Carriers.
524128	Other Direct Insurance (except Life, Health, and Medical) Carriers.
524130	Reinsurance Carriers.
524210	Insurance Agencies and Brokerages.
524291	Claims Adjusting.
524292	Third Party Administration of Insurance and Pension Funds.
524298	All Other Insurance Related Activities.
525110	Pension Funds.
525120	Health and Welfare Funds.
525190	Other Insurance Funds.
531210	Offices of Real Estate Agents and Brokers.
531311	Residential Property Managers.
531312	Nonresidential Property Managers.
531320	Offices of Real Estate Appraisers.
531390	Other Activities Related to Real Estate.
532111	Passenger Car Rental.
532112	Passenger Car Leasing.
532120	Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing.
532210	Consumer Electronics and Appliances Rental.
532281	Formal Wear and Costume Rental.
532282	Video Tape and Disc Rental.
532283	Home Health Equipment Rental.
532284	Recreational Goods Rental.
532289	All Other Consumer Goods Rental.
532310	General Rental Centers.
532411	Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing.
532412	Construction, Mining, and Forestry Machinery and Equipment Rental and Leasing.
532420	Office Machinery and Equipment Rental and Leasing.
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing.
541110	Offices of Lawyers.
541120	Offices of Notaries.
541191	Title Abstract and Settlement Offices.
541199	All Other Legal Services.
541211	Offices of Certified Public Accountants.
541213	Tax Preparation Services.
541214	Payroll Services.
541219	Other Accounting Services.
541310	Architectural Services.
541320	Landscape Architectural Services.
541330	Engineering Services.
541340	Drafting Services.
541350	Building Inspection Services.
541360	Geophysical Surveying and Mapping Services.
541370	Surveying and Mapping (except Geophysical) Services.
541380	Testing Laboratories.
541511	Custom Computer Programming Services.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
541512	Computer Systems Design Services.
541513	Computer Facilities Management Services.
541519	Other Computer Related Services.
541611	Administrative Management and General Management Consulting Services.
541612	Human Resources Consulting Services.
541613	Marketing Consulting Services.
541614	Process, Physical Distribution, and Logistics Consulting Services.
541618	Other Management Consulting Services.
541620	Environmental Consulting Services.
541690	Other Scientific and Technical Consulting Services.
541713	Research and Development in Nanotechnology.
541714	Research and Development in Biotechnology (except Nanobiotechnology).
541715	Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology).
541720	Research and Development in the Social Sciences and Humanities.
541810	Advertising Agencies.
541820	Public Relations Agencies.
541830	Media Buying Agencies.
541840	Media Representatives.
541850	Outdoor Advertising.
541860	Direct Mail Advertising.
541870	Advertising Material Distribution Services.
541890	Other Services Related to Advertising.
541910	Marketing Research and Public Opinion Polling.
541921	Photography Studios, Portrait.
541922	Commercial Photography.
541930	Translation and Interpretation Services.
541940	Veterinary Services.
541990	All Other Professional, Scientific, and Technical Services.
561110	Office Administrative Services.
561210	Facilities Support Services.
561311	Employment Placement Agencies.
561312	Executive Search Services.
561320	Temporary Help Services.
561330	Professional Employer Organizations.
561410	Document Preparation Services.
561421	Telephone Answering Services.
561422	Telemarketing Bureaus and Other Contact Centers.
561431	Private Mail Centers.
561439	Other Business Service Centers (including Copy Shops).
561440	Collection Agencies.
561450	Credit Bureaus.
561491	Repossession Services.
561492	Court Reporting and Stenotype Services.
561499	All Other Business Support Services.
561510	Travel Agencies.
561520	Tour Operators.
561591	Convention and Visitors Bureaus.
561599	All Other Travel Arrangement and Reservation Services.
561611	Investigation Services.
561612	Security Guards and Patrol Services.
561613	Armored Car Services.
561621	Security Systems Services (except Locksmiths).
561622	Locksmiths.
561910	Packaging and Labeling Services.
561920	Convention and Trade Show Organizers.
561990	All Other Support Services.
562910	Remediation Services.
562920	Materials Recovery Facilities.
562991	Septic Tank and Related Services.
562998	All Other Miscellaneous Waste Management Services.
611110	Elementary and Secondary Schools.
611210	Junior Colleges.
611310	Colleges, Universities, and Professional Schools.
611410	Business and Secretarial Schools.
611420	Computer Training.
611430	Professional and Management Development Training.
611511	Cosmetology and Barber Schools.
611512	Flight Training.
611513	Apprenticeship Training.
611519	Other Technical and Trade Schools.
611710	Educational Support Services.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
621111	Offices of Physicians (except Mental Health Specialists).
621112	Offices of Physicians, Mental Health Specialists.
621410	Family Planning Centers.
621420	Outpatient Mental Health and Substance Abuse Centers.
621491	HMO Medical Centers.
621492	Kidney Dialysis Centers.
621493	Freestanding Ambulatory Surgical and Emergency Centers.
621498	All Other Outpatient Care Centers.
621511	Medical Laboratories.
621512	Diagnostic Imaging Centers.
621610	Home Health Care Services.
621910	Ambulance Services.
621991	Blood and Organ Banks.
621999	All Other Miscellaneous Ambulatory Health Care Services.
622110	General Medical and Surgical Hospitals.
623110	Nursing Care Facilities (Skilled Nursing Facilities).
623210	Residential Intellectual and Developmental Disability Facilities.
623220	Residential Mental Health and Substance Abuse Facilities.
623990	Other Residential Care Facilities.
624110	Child and Youth Services.
624120	Services for the Elderly and Persons with Disabilities.
624190	Other Individual and Family Services.
624210	Community Food Services.
624221	Temporary Shelters.
624229	Other Community Housing Services.
624230	Emergency and Other Relief Services.
624310	Vocational Rehabilitation Services.
711211	Sports Teams and Clubs.
711212	Racetracks.
711219	Other Spectator Sports.
711310	Promoters of Performing Arts, Sports, and Similar Events with Facilities.
711320	Promoters of Performing Arts, Sports, and Similar Events without Facilities.
711410	Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures.
711510	Independent Artists, Writers, and Performers.
713110	Amusement and Theme Parks.
713120	Amusement Arcades.
713910	Golf Courses and Country Clubs.
713920	Skiing Facilities.
713930	Marinas.
713940	Fitness and Recreational Sports Centers.
713950	Bowling Centers.
713990	All Other Amusement and Recreation Industries.
722310	Food Service Contractors.
722320	Caterers.
722330	Mobile Food Services.
722511	Full-Service Restaurants.
722513	Limited-Service Restaurants.
722514	Cafeterias, Grill Buffets, and Buffets.
722515	Snack and Nonalcoholic Beverage Bars.
811211	Consumer Electronics Repair and Maintenance.
811212	Computer and Office Machine Repair and Maintenance.
811213	Communication Equipment Repair and Maintenance.
811219	Other Electronic and Precision Equipment Repair and Maintenance.
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance.
812210	Funeral Homes and Funeral Services.
812220	Cemeteries and Crematories.
812310	Coin-Operated Laundries and Drycleaners.
812320	Drycleaning and Laundry Services (except Coin-Operated).
812331	Linen Supply.
812332	Industrial Launderers.
812910	Pet Care (except Veterinary) Services.
812921	Photofinishing Laboratories (except One-Hour).
812922	One-Hour Photofinishing.
812930	Parking Lots and Garages.
812990	All Other Personal Services.
813211	Grantmaking Foundations.
813212	Voluntary Health Organizations.
813219	Other Grantmaking and Giving Services.
813311	Human Rights Organizations.
813312	Environment, Conservation and Wildlife Organizations.
813319	Other Social Advocacy Organizations.

TABLE 2—NAICS CODES IN WHICH WOSBS ARE SUBSTANTIALLY UNDERREPRESENTED—Continued

[WOSB set-aside/sole-source qualified]

NAICS code	NAICS U.S. industry title
813410	Civic and Social Organizations.
813910	Business Associations.
813920	Professional Organizations.
813930	Labor Unions and Similar Labor Organizations.
813940	Political Organizations.
813990	Other Similar Organizations (except Business, Professional, Labor, and Political Organizations).

Beatrice Hidalgo,

Associate Administrator, Office of Government Contracting and Business Development.

[FR Doc. 2022–05788 Filed 3–17–22; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17372 and #17373; ALASKA Disaster Number AK–00049]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Alaska

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 ALASKA (FEMA–4646–DR), dated 03/14/2022.

Incident: Severe Winter Storm and Straight-line Winds.

Incident Period: 01/01/2022 through 01/04/2022.

DATES: Issued on 03/14/2022.

Physical Loan Application Deadline Date: 05/13/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 12/14/2022.

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 03/14/2022, 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 Areas: Matanuska-Susitna Borough.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	1.875
Non-Profit Organizations without Credit Available Elsewhere	1.875
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	1.875

The number assigned to this disaster for physical damage is 17372 B and for economic injury is 17373 0.

(Catalog of Federal Domestic Assistance Number 59008)

Barbara Carson,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–05780 Filed 3–17–22; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17368 and #17369; VIRGINIA Disaster Number VA–00099]

Presidential Declaration of a Major Disaster for Public Assistance Only for the Commonwealth of Virginia

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 Commonwealth of Virginia (FEMA–4644–DR), dated 03/11/2022.

Incident: Severe Winter Storm and Snowstorm.

Incident Period: 01/02/2022 through 01/03/2022.

DATES: Issued on 03/11/2022.

Physical Loan Application Deadline Date: 05/10/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 12/12/2022.

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 03/11/2022, 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: Albemarle, Amelia, Appomattox, Bedford, Buckingham, Caroline, Charlotte, Culpeper, Cumberland, Essex, Fauquier, Fluvanna, Fredericksburg City, Goochland, Greene, Hanover, King George, King William, Louisa, Madison, Nelson, Orange, Powhatan, Prince Edward, Rappahannock, Spotsylvania, Stafford, Westmoreland.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	1.875
Non-Profit Organizations without Credit Available Elsewhere	1.875
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	1.875

The number assigned to this disaster for physical damage is 17368 B and for economic injury is 17369 0.

(Catalog of Federal Domestic Assistance Number 59008)

Barbara Carson,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–05729 Filed 3–17–22; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

AGENCY: Small Business Administration.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before May 17, 2022.

ADDRESSES: Send all comments to Jermaine Perry, Management Analyst, Office of Surety Guarantee, Small Business Administration, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Jermaine Perry, Management Analyst, Office of Surety Guarantee, *jermaine.perry@sba.gov* 202–401–8275, or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: Under its Surety Bond Guarantee Program (SBG Program), the U.S. Small Business Administration is authorized to guarantee a bid bond, payment bond, performance bond, as well as any required related ancillary bonds, on a contract issued to a small business contractor up to $6.5 million or up to $10 million if a Federal contracting officer certifies that SBA's guarantee is necessary. *See* Title IV of the Small Business Investment Act (SBIA), part B, 15 U.S.C. 694a *et seq.* The SBG Program was created to encourage surety companies to issue bonds for small business contractors. The SBIA authorizes SBA to establish the terms and conditions for providing surety bond guarantee assistance and for paying claims resulting from any contractor defaults.

This information collection consists of forms relating to the application process for an SBA-guaranteed bond and claims for the reimbursement of losses, including SBA Forms 990, 991, 994, 994B, 994F, and 994H. Except in the case of SBA Form 994H, SBA uses the information to evaluate whether the small business applicant meets the eligibility requirements for a surety bond, as well as the likelihood that the small business will successfully complete the bonded contract. The information collected for this purpose includes: Demographics on all owners of the bond applicant, which has no bearing on the credit decision; the status of any current or past SBA financial assistance provided to the applicant; NAICS code for applicant's industry; financial statements; contract amount and nature of contract performance; and in the event performance has begun, evidence that applicant has paid all suppliers and subcontractors. With respect to SBA Form 994H, SBA uses the information collected to evaluate the surety's claim for reimbursement of losses. Surety is required to provide information regarding the date the small business defaulted on the contract; the reason for the default, the amount of any recoveries, and any additional information that would support the surety's claim for reimbursement.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

OMB Control Number: 3245–0007.

Title: Surety Bond Guarantee Assistance.

Description of Respondents: Surety Companies.

Form Number: SBA Form 990, 991, 994B, 994H.

Total Estimated Annual Responses: 21,046.

Total Estimated Annual Hour Burden: 3,065.

Curtis Rich,

Management Analyst.

[FR Doc. 2022–05739 Filed 3–17–22; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice 11675]

60-Day Notice of Proposed Information Collection: Affidavit of Relationship for Minors Who Are Nationals of El Salvador, Guatemala, or Honduras

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to May 17, 2022.

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

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2022–0006'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: SiramS@state.gov.*
- *Regular Mail:* Send written comments to Sumitra Siram, PRM/A, 2025 E St. NW, Washington, DC 20006.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Affidavit of Relationship for Minors who are Nationals of El Salvador, Guatemala, or Honduras.
- *OMB Control Number:* 1405–0217.
- *Type of Request:* Notice of request for public comment.
- *Originating Office:* PRM/A.
- *Form Number:* DS–7699.
- *Respondents:* Those seeking qualified family members to access the U.S. Refugee Admissions Program.
- *Estimated Number of Respondents:* 2,000.
- *Estimated Number of Responses:* 2,000.
- *Average Time Per Response:* One hour.
- *Total Estimated Burden Time:* 2,000 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

To obtain biographical information about children overseas who intend to seek access to the USRAP, as well as other eligible family members or caregivers, for verification by the U.S. government. This form also assists DHS's U.S. Citizenship and Immigration Services to verify parent-child relationships during refugee case adjudication. This form is necessary for implementation of this program.

Methodology

Working with a State Department contracted Resettlement Agencies (RA), qualifying individuals in the United States must complete the AOR and submit supporting documentation to: (a) Establish that they meet the requirements for being a qualifying individual who currently falls into one of the aforementioned categories; (b) provide a list of qualifying family members who may seek access to refugee resettlement in the United States. Once completed, the form is sent by the RA to the Refugee Processing Center (RPC) for case creation and processing. The information is used by the RPC for case management; by USCIS to determine that the qualifying individual falls into one of the aforementioned categories; and by the Resettlement Support Center (RSC) for case prescreening and further processing after DHS interview. The International Organization for Migration (IOM) administers the RSC in Latin America under a Memorandum of Understanding with the Department to conduct case prescreening and assist in the processing of refugee applicants.

Kevin E. Bryant,

Deputy Director, Office of Directives Management, Department of State.

[FR Doc. 2022–05695 Filed 3–17–22; 8:45 am]

BILLING CODE 4710–33–P

DEPARTMENT OF STATE

[Public Notice 11677]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Portable Universe/El Universo en Tus Manos: Thought and Splendor of Indigenous Colombia'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Portable Universe/El Universo en Tus Manos: Thought and Splendor of Indigenous Colombia'' at the Los Angeles County Museum of Art, Los Angeles, California; at the Museum of Fine Arts, Houston, in Houston, Texas, under the title ''Golden Worlds: The Portable Universe of Indigenous Colombia''; and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Stacy E. White,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2022–05710 Filed 3–17–22; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 11679]

Notice of Determinations; Culturally Significant Object Being Imported for Exhibition—Determinations: ''Mel Bochner Drawings: A Retrospective'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that a certain object being imported from abroad pursuant to an agreement with its foreign owner or custodian for temporary display in the exhibition ''Mel Bochner Drawings: A Retrospective'' at the Art Institute of Chicago, in Chicago, Illinois, and at possible additional exhibitions or venues yet to be determined, is of cultural significance, and, further, that its temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Stacy E. White,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2022–05711 Filed 3–17–22; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1070 (Sub-No. 4X)]

Central Midland Railway Company—Discontinuance of Service Exemption—in Franklin County, Mo.

Central Midland Railway Company (CMRC) has filed a verified notice of exemption under 49 CFR. part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 9.71-mile rail line in Franklin County, Mo., between milepost 61.89 at Union and milepost 71.6 at Beaufort (the Line). The Line traverses U.S. Postal Service Zip Codes 63013 and 63084.

CMRC has certified that: (1) No local traffic has moved over the Line for at least two years; [1] (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) [2] to subsidize continued rail service has been received, this exemption will be effective on April 17, 2022, unless stayed pending reconsideration.[3] Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2) [4] must be filed by March 28, 2022.[5] Petitions for reconsideration must be filed by April 7, 2022.

All pleadings, referring to Docket No. AB 1070 (Sub-No. 4X), should be filed with the Surface Transportation Board via e-filing on the Board's website. Additionally, a copy of each pleading filed with Board must be sent to CMRC's representative, Audrey E. Lane, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available at *www.stb.gov.*

Decided: March 15, 2022.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Raina White,

Clearance Clerk.

[FR Doc. 2022–05741 Filed 3–17–22; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 670 (Sub-No. 1)]

Notice of Rail Energy Transportation Advisory Committee Meeting

AGENCY: Surface Transportation Board.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given of a meeting of the Rail Energy Transportation Advisory Committee (RETAC), pursuant to the Federal Advisory Committee Act.

DATES: The meeting will be held on Wednesday, April 20, 2022, at 9:00 a.m. E.D.T.

ADDRESSES: The meeting will be held at the Surface Transportation Board headquarters at 395 E St. SW, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Kristen Nunnally at (202) 245–0312 or *Kristen.Nunnally@stb.gov.* Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: RETAC was formed in 2007 to provide advice and guidance to the Board, and to serve as a forum for discussion of emerging issues related to the transportation of energy resources by rail. *Establishment of a Rail Energy Transp. Advisory Comm.,* EP 670 (STB served July 17, 2007). The purpose of this meeting is to facilitate discussions regarding issues including rail service, infrastructure planning and development, and effective coordination among suppliers, rail carriers, and users of energy resources. Potential agenda items for this meeting include a rail performance measures review, industry segment updates by RETAC members, and a roundtable discussion.

The meeting, which is open to the public, will be conducted in accordance with the Federal Advisory Committee Act, 5 U.S.C app. 2; Federal Advisory Committee Management regulations, 41 CFR part 102–3; RETAC's charter; and Board procedures. Further communications about this meeting may be announced through the Board's website at *www.stb.gov.*

Written Comments: Members of the public may submit written comments to RETAC at any time. Comments should be addressed to RETAC, c/o Kristen Nunnally, at *Kristen.Nunnally@stb.gov.*

Authority: 49 U.S.C. 1321, 49 U.S.C. 11101; 49 U.S.C. 11121.

Decided: March 15, 2022.

By the Board, Scott Zimmerman, Acting Director, Office of Proceedings.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2022–05747 Filed 3–17–22; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. DOT–OST–2022–0020]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Information Collection(s): Airport Concession Disadvantaged Business Enterprise (ACDBE) Program Requirements

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of

[1] CMRC states that, although it has used the Line within the past two years for car storage for off-line shippers, such usage does not constitute traffic for purposes of qualification for the class exemption under 49 CFR 1152.50(b), citing *Union Pacific Railroad—Abandonment Exemption—in Ada County, Idaho,* Docket No. AB 33 (Sub-No. 137X), slip op. at 3 (STB served Aug. 6, 1999) (''It is well settled that use of a rail line to store rail cars for the convenience of off-line shippers or the railroad is not traffic originating or terminating on the line within the meaning of 49 CFR 1152.50(b).'').

[2] Persons interested in submitting an OFA to subsidize continued rail service must first file a formal expression of intent to file an offer, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(2)(i).

[3] CMRC states that it intends to consummate the discontinuance of the Line after April 19, 2022.

[4] The filing fee for OFAs can be found at 49 CFR 1002.2(f)(25).

[5] Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require environmental review.

Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 25, 2021. The deadline for submission of public comments expired on December 27, 2021. No public comments were provided. The Department of Transportation (DOT or Department) further invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for an information collection for the Department's Airport Concession Disadvantaged Business Enterprise (ACDBE) program. The DOT has the important responsibility of ensuring that firms competing for concession opportunities are not disadvantaged by unlawful discrimination. The DOT's most important tool for meeting this requirement has been its ACDBE program which is regulated by 49 CFR part 23 (ACDBE regulation) and is mandated by 49 U.S.C. 47107(e), originally enacted in 1987 and amended in 1992. The information collections described in this notice are necessary to maintain successful implementation of the ACDBE program, as it helps ensure recipients that receive Federal financial assistance from the Airport Improvement Program (AIP) of the Federal Aviation Administration (FAA) do not discriminate in the provision of opportunities for disadvantaged business enterprises in airport concessions. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13 (PRA).

DATES: Written comments should be submitted by April 18, 2022.

ADDRESSES: You may submit comments [identified by Docket No. DOT–OST–2022–0020 through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Marcus England, (202) 267–0487, *marcus.england@faa.gov,* Nicholas Giles, (202) 267–0201, *nicholas.giles@faa.gov*/Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, or Aarathi Haig, (202–366–5990), *aarathi.haig@dot.gov*/Departmental Office of Civil Rights (OST–S–33), U. S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including the accuracy of the estimated burden. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

In preparing this notice, the Department identified various aspects of the ACDBE program that have existed as requirements for a long period of time, several decades in some cases, that include information collections that have not been appropriately accounted for in the current collection. To assist in estimating the potential paperwork burden of these collections, the Department reached out to a small number of stakeholders to obtain estimates of how much time they spend each year responding to these collections.

To help commenters provide information that will better allow the Department to include the appropriate paperwork burden within this collection, we offer the following clarifications: A ''collection of information,'' is defined as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons.'' 5 CFR part 1320. The activities that constitute the ''burden'' associated with a collection are defined in 5 CFR part 1320 as ''the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.'' Importantly, this burden is not necessarily the same as the entire regulatory burden for a program or an aspect of a program. For example, if a regulation requires an inspection and the completion of a form documenting the inspection, the full regulatory burden would likely include both actions, while the paperwork burden would only include the time and other resources needed to complete the form.

In addition, the Department believes certain recordkeeping requirements have not been adequately accounted for in the current collection. As stated in 5 CFR part 1320, ''Recordkeeping requirement means a requirement imposed by or for an agency on persons to maintain specified records, including a requirement to: (1) Retain such records; (2) Notify third parties, the Federal government, or the public of the existence of such records; (3) Disclose such records to third parties, the Federal government, or the public; or (4) Report to third parties, the Federal government, or the public regarding such records.'' Thus, recordkeeping requirements can attach to records that are not necessarily covered by the PRA itself if, as in the ACDBE program, a requirement exists to maintain a complete case file. In that case, as the case file itself is not standardized, it would not be considered an information collection and the burden associated with developing the file would not be a paperwork burden. However, the requirement to keep that case file and, upon request, submit it to the Department, would be part of the paperwork burden.

For purposes of this 30-day notice, we have included the burden estimates we received from the small number of stakeholders we contacted. As noted above, the Department is concerned that at least several of these estimates contain burdens associated with aspects of the program that are not paperwork burdens. To the extent feasible, the Department requests that commenters who provide burden estimates for aspects of the program identified below be as specific as possible, including what amount of time each task takes and what, if any, additional costs beyond labor costs (*e.g.,* copying, mailing, storage, or other technology costs) are associated with each aspect of the collection.

OMB Control Number: N/A.

Title: Airport Concession Disadvantaged Business Enterprise (ACDBE) Program Requirements.

Form Numbers: N/A.

Type of Review: Initial Approval of Existing Information Collection.

1. Submission of ACDBE Program to the FAA

Section 23.21 requires recipients to submit an ACDBE program to the FAA for approval. The FAA evaluates submitted ACDBE programs to determine whether they include all the provisions and measures required by the regulation. Timely submission and FAA approval of a recipient's ACDBE program are conditions of eligibility for FAA financial assistance.

Paragraph (d) of section 23.21 requires recipients that make any significant changes to their ACDBE programs to provide an amended program to the

FAA for approval before implementing the changes.

The FAA received total annual burden hours from eight recipients, two of each hub size (nonhub, small, medium and large), ranging from 19 to 40 hours. The total annual cost burden was calculated based on the average of two recipients (small and medium hub size) responses ranging from $1,600–$15,000.

Respondents: Recipients of FAA grants for Airport Development.

Number of Respondents: 396.

Frequency: Once, unless the recipient makes a significant change to its ACDBE program and is required to submit an amended program to the FAA for approval.

Number of Responses: 396.

Total Annual Burden: 11,088 hours and $8,300 per respondent.

2. Annual Report on ACBE Participation

Section 23.27 requires recipients with approved ACDBE programs to submit a ''Uniform Report of ACDBE Participation'' (Uniform Report). The Uniform Report is collected electronically by the FAA from recipients annually and assists the FAA in conducting program oversight of recipients' ACDBE programs, identifying trends or problem areas in the program, and ensuring that the ACDBE program is achieving its goal of encouraging ACDBE participation in concession-related opportunities.

The reporting requirements of the Uniform Report include the following information:

- Overall percentage goals of ACDBE participation and their race-conscious (RC) and race-neutral (RN) components;
- new and continuing car rental concession opportunities and activity under the ACDBE program during the reporting period;
- total concession gross revenues for concessionaires (prime and sub) and purchases of goods and services at the airport;
- number of lease agreements, contracts, etc., in effect or taking place during the reporting period in each participation category for all concessionaires and purchases of goods and services;
- total gross revenues in each participation category for ACDBEs;
- total gross revenues attributable to race-conscious and race-neutral measures, respectively;
- overall car rental percentage goal and the race-conscious (RC) and race-neutral (RN) components of it; and
- The following information for each ACDBE firm participating in the ACDBE program during the period: (1) Firm name; (2) Type of business; (3) Beginning and expiration dates of the agreement, including options to renew; (4) Dates that material amendments have been or will be made to the agreement (if known); and (5) Estimated gross receipts for the firm during the reporting period.

The FAA received total annual burden hours from eight recipients, two of each hub size (nonhub, small, medium and large), ranging from 15 to 96 hours. The total annual cost burden was calculated based on the average of two recipients (small and medium hub size) responses ranging from $5,000–$10,000.

Respondents: Recipients of FAA grants for Airport Development.

Number of Respondents: 396.

Frequency: Once per year.

Number of Responses: 396.

Total Annual Burden: 22,176 hours and $7,500 per respondent.

3. Monitoring and Compliance Procedures

Section 23.29 requires recipients to implement appropriate mechanisms to ensure that all ACDBE program participants comply with the regulation's requirements. Recipients must include in their ACDBE programs specific provisions to be inserted into concession agreements and management contracts setting forth the enforcement mechanisms and other means the recipient uses to ensure compliance. These provisions must include a written certification that recipients reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements, and monitored the work on-site at their airport for this purpose. If the FAA, as the Operating Administration, conducts a compliance review or investigation, it verifies whether the recipient has the written certifications and has monitored the work performed by ACDBEs; recipients do not otherwise submit the information. Recipients collect the information during on-site reviews of concession workplaces to determine whether ACDBEs are actually performing the work for which credit is being claimed.

The FAA received total annual burden hours from eight recipients, two of each hub size (nonhub, small, medium and large), ranging from 0 to 416 hours. The total annual cost burden was calculated based on the average of two recipients (small and medium hub size) responses ranging from $20,000–$25,000.

Respondents: Recipients of FAA grants for Airport Development.

Number of Respondents: 396.

Frequency: 36 times per year (3 times per month).

Number of Responses: 14,256.

Total Annual Burden: 60,588 hours and $22,500 per respondent.

4. Requirements for Submitting Overall Goal Information to the FAA

Congress carefully considered and concluded that race-neutral means alone are insufficient to remedy the effects of discrimination in concession opportunities. To meet Constitutional strict scrutiny requirements, ACDBE programs' race-conscious means must be narrowly tailored. Section 23.45 requires that recipients set and submit to the FAA an overall goal for ACDBE participation in concession opportunities every three years. The goal represents the ACDBE participation that would be expected in the relevant market area given the availability of ACDBEs. Subparagraph (d)(5) of section 23.51 requires recipients to include with their overall goal submission a description of the methodology they used to establish the goal. Recipients must also include a projection of the portions of the overall goal that they expect to meet through race-neutral and race-conscious means, respectively, and the basis for the projection. Paragraph (d) of section 23.25 requires recipients to maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures.

The FAA received total annual burden hours from eight recipients, two of each hub size (nonhub, small, medium and large), ranging from 0 to 120 hours. The total annual cost burden was calculated based on the average of two recipients (small and medium hub size) responses ranging from $5,000–$10,000.

Respondents: Recipients of FAA grants for Airport Development.

Number of Respondents: 396.

Frequency: Annually.

Number of Responses: 396.

Total Annual Burden: 20,988 hours and $7,500 per respondent.

5. Requirements Relating to Shortfalls in Meeting Overall ACDBE Goals

Section 23.57 requires recipients that do not meet their overall goal for ACDBE awards and commitments shown on their Uniform Report of ACDBE Participation (found in Appendix A to Part 23) at the end of any fiscal year to take the following steps in order to be regarded by the Department as implementing their ACDBE programs in good faith: (1) Analyze in detail the

reasons for the difference between the overall goal and the recipient's awards and commitments in that fiscal year; and (2) establish specific steps and milestones to correct the problems the recipient identified in its analysis and to enable the recipient to meet fully its goal for the new fiscal year. CORE 30 airports or other airports designated by the FAA must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under section 23.57 to the FAA for approval and must retain the analysis and corrective actions for three years. Recipients that are not a CORE 30 airport must retain the analysis and corrective actions in their records for three years and make them available to the FAA, on request, for their review.

The FAA received total annual burden hours from two recipients, one small hub airport and another medium hub size airport, ranging from 2 to 40 hours. The total annual cost burden was calculated based on the average of these two recipients (small and medium hub size) responses, ranging from $80–$2,800.

Respondents: Recipients of FAA grants for Airport Development.

Number of Respondents: 90.

Frequency: Annually depending on if the awards and commitments shown on a recipient's Uniform Report of ACDBE Participation at the end of any fiscal year are less than the overall goal applicable to that fiscal year.

Number of Responses: 90.

Total Annual Burden: 1,890 hours and $1,440 per respondent.

6. Requirements Relating to Approval of Long-Term, Exclusive (LTE) Agreements.

Paragraph (a) of section 23.75 prohibits recipients from entering into ''long-term, exclusive agreements'' (LTE) for concessions without prior FAA approval, based on very limited conditions which are outlined in the regulation. This general prohibition is designed to limit the situation where an entire category of business activity is not subject to competition for an extended period of time through the use of an LTE agreement. Paragraph (c) of section 23.75 requires recipients to submit to the FAA various documents and information to obtain approval from the FAA of a long-term exclusive (LTE) agreement. The required information includes the following items:

- A description of the special local circumstances that warrant a long-term, exclusive agreement;
- A copy of the draft and final leasing and subleasing or other agreements with specific provisions;
- Assurances that any ACDBE participant will be in an acceptable form, such as a sublease, joint venture, or partnership;
- Documentation that ACDBE participants are properly certified;
- A description of the type of business or businesses to be operated *e.g.,* location, storage and delivery space, ''back-of-the-house facilities'' such as kitchens, window display space, advertising space, and other amenities that will increase the ACDBE's chance to succeed;
- Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE; and
- Information on the estimated gross receipts and net profit to be earned by the ACDBE.

The collection of information under this section is necessary for FAA to carry out oversight responsibilities in determining whether special local circumstances warrant approval of an LTE agreement.

The FAA received total annual burden hours from eight recipients, two of each hub size (nonhub, small, medium and large), ranging from 0 to 20 hours. The total annual cost burden was calculated based on the average of two recipients (small and medium hub size) responses ranging from $2,000–$5,000.

Respondents: Recipients of FAA grants for Airport Development.

Number of Respondents: 7.

Frequency: Annually depending on the number of leases and/or contracts with prime concessionaires that are long-term, exclusive agreements and require FAA approval.

Number of Responses: 7.

Total Annual Burden: 2,376 hours and $3,500 per respondent.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC, on March 15, 2022.

Marc D. Pentino,

Associate Director, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation.

[FR Doc. 2022–05760 Filed 3–17–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2022–0357]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The collection requires responses to questions regarding an individual's identity in order to gain access to U.S. Federal Government web applications. The information to be collected will be used to verify the requestor's identity and create a user account.

DATES: Written comments should be submitted by May 17, 2022.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Christopher K. Brimage, 6500 S MacArthur Boulevard, ARB–115, Oklahoma City, OK 73169.

By fax: 405–954–5798.

FOR FURTHER INFORMATION CONTACT: Christopher K. Brimage by email at: *kyle.brimage@faa.gov;* phone: 405–596–9143.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–XXXX.

Title: MyAccess Non-credentialed User Access Requests.

Form Numbers: No forms.

Type of Review: New Collection.

Background: Uncredentialed users requesting access to web-based applications published by the Federal

Aviation Administration or other United States Federal Government entities are required to identify themselves. The proposed collection of information will be used to positively identify the user requesting access and create a user account.

The identification of the requesting user is based on answers provided via a web interface that are matched against sources such as public records, mobile accounts, credit reporting bureaus and other available data. If a positive identification is made some of the collected information is used to create a user account to allow the user access to the requested web application.

Respondents: Any un-credentialed individual who requests a user account to access web applications published by the FAA or other U.S. Federal Government entity that is integrated with the MyAccess program.

Frequency: The collection is done one time for each new account request.

Estimated Average Burden per Response: ~0.07 hours (~4 minutes).

Estimated Total Annual Burden: ~0.07 hours (~4 minutes).

Issued in Oklahoma City, OK, March 15th, 2022.

Christopher K. Brimage,

Information Technology Specialist, Enterprise Search & Integration Services Branch (ADE–330)—Solution Delivery Directorate, AIT, AFN, FAA, USDOT.

[FR Doc. 2022–05742 Filed 3–17–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2021–0189]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Hours of Service (HOS) of Drivers Regulations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Federal Motor Carrier Safety Administration (FMCSA) announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. The FMCSA requests approval to renew an ICR titled, ''Hours of Service (HOS) of Drivers Regulations.'' The HOS regulations require a motor carrier to install, and requires each of its drivers subject to the record of duty status (RODS) rule to use, an electronic logging device (ELD) to report the driver's RODS. The RODS is critical to FMCSA's safety mission because it helps enforcement officials determine if commercial motor vehicle (CMV) drivers are complying with the HOS rules limiting driver on-duty and driving time and requiring periodic off-duty time.

DATES: Comments on this notice must be received on or before May 18, 2022.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2021–0189 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, 20590–0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and follow the online instructions for accessing the dockets, or go to the street address listed above. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''FAQ'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Ms. Pearlie Robinson, FMCSA Driver and Carrier Operations Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–4225. Email: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 16, 2015, the final rule titled ''Electronic Logging Devices and Hours of Service Supporting Documents'' was published (80 FR 78292). It became effective February 16, 2016. The FMCSA established minimum performance and design standards for ELDs and mandated use of these devices by drivers who are subject to the HOS reporting requirements. Drivers using compliant automatic on-board recorders had until December 16, 2019, to replace the devices with ELDs. As a condition of receiving certain federal grants, States agree to adopt and enforce the Federal Motor Carrier Safety Regulations, including the HOS rules, as State law. As a result, State enforcement inspectors use the RODS and supporting documents to determine whether CMV drivers are complying with the HOS rules. In addition, FMCSA uses the RODS during on-site and offsite investigations of motor carriers. And, Federal and State courts rely upon the RODS as evidence of driver and motor carrier violations of the HOS regulations. This information collection supports the DOT's Strategic Goal of Safety because the information helps the agency ensure the safe operation of CMVs in interstate commerce on our Nation's highways.

Renewal of This Information Collection (IC)

The current IC burden estimate of the HOS rules, approved by OMB on July 31, 2019, is 41.04 million hours. The expiration date of the current ICR is July 31, 2022. Through this ICR renewal, FMCSA requests a revision of the paperwork burden of 2126–0001. The agency requests an increase in the

burden hours from 41.04 million hours to 50.37 million hours. The increase is the result of the increase in estimated driver population as well as the increase in expected industry growth rate for drivers from 2020 to 2030. Two types of information are collected under this IC: (1) Drivers' RODS commonly referred to as a logbook, and (2) supporting documents, such as gasoline and toll receipts, that motor carriers use to verify accuracy of RODS and document expense deductions for income tax filing purposes. The use of ELDs reduces the driver's time to input duty status from 6.5 minutes to 2 minutes. This IC includes only the estimate of 2 minutes for drivers and motor carriers.

Title: Hours of Service (HOS) of Drivers Regulations.

OMB Control Number: 2126–0001.

Type of Request: Renewal of an information collection.

Respondents: Motor Carriers of Property and Passengers, Drivers of CMVs.

Estimated Number of Respondents: 4.24 million CMV drivers; 602,542 Motor Carriers.

Estimated Time per Response: CMV drivers using technology: 2 minutes. Motor Carriers: 2 minutes.

Expiration Date: July 31, 2022.

Frequency of Response: Drivers: 240 days per year; Motor carriers 240 days per year.

Estimated Total Annual Burden: 50.37 million hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the information collected. The agency will summarize or include your comments in the request for OMB's clearance of this ICR.

Issued under the authority of 49 CFR 1.87 on:

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2022–05728 Filed 3–17–22; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Announcement of Fiscal Year 2021 Grants for Buses and Bus Facilities Program Project Selections

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice; announcement of project selections. Grants for Buses and Bus Facilities Program.

SUMMARY: The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the allocation of $409,274,220 to projects under the Fiscal Year (FY) 2021 Grants for Buses and Bus Facilities Program (Buses and Bus Facilities Program) and provides administrative guidance on project implementation.

FOR FURTHER INFORMATION CONTACT: Successful applicants should contact the appropriate FTA Regional Office for information regarding applying for the funds or program-specific information. A list of Regional Offices can be found at *www.transit.dot.gov/.* Unsuccessful applicants may contact Tom Wilson, Office of Program Management at (202) 366–5279, email: *Thomas.Wilson@dot.gov* within 30 days of this announcement to arrange a proposal debriefing. A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION: Federal public transportation law (49 U.S.C. 5339(b)) authorizes FTA to make competitive grants for buses and bus facilities. Federal public law (49 U.S.C. 5338(a)(2)(M)) authorized $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 oversight takedown of $4,455,331, FTA is announcing the availability of $409,588,848 for the Grants for Buses and Bus Facilities Program.

On September 20, 2021, FTA published a Notice of Funding Opportunity (NOFO) (86 FR 52291) announcing the availability of $409,588,848 in competitive funding under the Buses and Bus Facilities Program. These funds will provide financial assistance to states and eligible public agencies to replace, rehabilitate, purchase, or lease buses, vans, and related equipment, and for capital projects to rehabilitate, purchase, construct, or lease bus-related facilities. In response to the NOFO, FTA received 303 eligible project proposals totaling approximately $2.56 billion in Federal funds. Project proposals were evaluated based on each applicant's responsiveness to the program evaluation criteria outlined in the NOFO.

Based on the criteria in the NOFO, FTA is funding 70 projects, as shown in Table 1, for a total of $409,274,220. Recipients selected for competitive funding are required to work with their FTA Regional Office to submit a grant application in FTA's Transit Award Management System (TrAMS) for the projects identified in the attached table to quickly obligate funds. Grant applications must only include eligible activities applied for in the original project application. Funds must be used consistent with the competitive proposal and for the eligible capital purposes described in the NOFO.

In cases where the allocation amount is less than the proposer's total requested amount, recipients are required to fund the scalable project option as described in the application. If the award amount does not correspond to the scalable option, the recipient should work with the Regional Office to reduce scope or scale the project such that a complete phase or project is accomplished. Recipients may also provide additional local funds to complete a proposed project. A discretionary project identification number has been assigned to each project for tracking purposes and must be used in the TrAMS application.

Selected projects are eligible to incur costs under pre-award authority no earlier than the date projects were publicly announced. Pre-award authority does not guarantee that project expenses incurred prior to the award of a grant will be eligible for reimbursement, as eligibility for reimbursement is contingent upon other requirements, such as planning and environmental requirements, having been met. For more about FTA's policy on pre-award authority, please see the current FTA Apportionments, Allocations, and Program Information and Interim Guidance at *https://www.transit.dot.gov/funding/apportionments.* Post-award reporting requirements include submission of Federal Financial Reports and Milestone Progress Reports in TrAMS (see FTA Circular 5010.1E). Recipients must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal requirements in carrying out the project supported by the FTA grant. FTA emphasizes that recipients must follow all third-party procurement requirements set forth in Federal public

transportation law (49 U.S.C. 5325(a)) and described in the FTA Third Party Contracting Guidance Circular (FTA Circular 4220.1). Funds allocated in this announcement must be obligated in a grant by September 30, 2025.

Technical Review and Evaluation Summary: The FTA assessed all project proposals that were submitted under the FY 2021 Buses and Bus Facilities Program competition according to the following evaluation criteria. The specific metrics for each criterion were described in the September 20, 2021, NOFO:

1. Demonstration of Need
2. Demonstration of Benefits
3. Planning/Local Prioritization
4. Local Financial Commitment
5. Project Implementation Strategy
6. Technical, Legal, and Financial Capacity

For each project, a technical review panel assigned a rating of Highly Recommended, Recommended, or Not Recommended for each of the six criteria. The technical review panel then assigned an overall rating of Highly Recommended, Recommended, Not Recommended, or Ineligible to the project proposal.

Projects were assigned a final overall rating of Highly Recommended if they were rated Highly Recommended in at least four categories overall, with no Not Recommended ratings. Projects were assigned a final overall rating of Recommended if the projects had three or more Recommended ratings and no Not Recommended ratings. Projects were assigned a rating of Not Recommended if they received a Not Recommended rating in any criteria. A summary of the final overall ratings for all 303 eligible project proposals is shown in the table below.

OVERALL PROJECT RATINGS

[Eligible submissions]

Highly Recommended	166
Recommended	95
Not Recommended	42
Total	303

As outlined in the NOFO, FTA made the final selections based on the technical ratings as well as geographic diversity, diversity in the size of transit systems receiving funding, Administration priorities including climate change, and/or receipt of other recent competitive awards.

As further outlined in the NOFO, in some cases, due to funding limitations, proposers that were selected for funding received less than the amount originally requested.

Nuria I. Fernandez,

Administrator.

TABLE 1—FY 2021 GRANTS FOR BUSES AND BUS FACILITIES PROJECT SELECTIONS

State	Recipient	Project ID	Project description	Allocation
AK	City and Borough of Juneau, Capital Transit	D2022–BUSC–001	On-route electric bus charging infrastructure	$1,446,827
AL	City of Mobile	D2022–BUSC–002	Bus replacement	4,850,535
AR	City of Jonesboro	D2022–BUSC–003	Bus stop technology upgrades	752,000
AZ	Northern Arizona Intergovernmental Transportation Authority.	D2022–BUSC–004	Electric buses and charging equipment procurement; bus storage facility construction.	1,292,118
CA	Eastern Contra Costa Transit Authority	D2022–BUSC–005	Zero-emission bus infrastructure	3,998,543
CA	Sacramento Regional Transit District	D2022–BUSC–006	Bus replacement	5,250,000
CA	City of Torrance Transit Department	D2022–BUSC–007	Transit fleet modernization	6,280,000
CA	Napa Valley Transportation Authority	D2022–BUSC–008	Zero-emission bus electrification	8,455,856
CA	Riverside Transit Agency	D2022–BUSC–009	Construction of hydrogen fueling stations and workforce training.	8,787,846
CA	San Luis Obispo Regional Transit Authority	D2022–BUSC–010	Zero-emission bus replacement	8,799,979
CA	SunLine Transit Agency	D2022–BUSC–011	Zero-emission bus procurement and bus refurbishment for the Coachella Valley.	8,409,070
CA	City of Norwalk: Norwalk Transit System	D2022–BUSC–012	Zero-emission battery electric bus replacement	3,530,822
CA	City of Santa Rosa	D2022–BUSC–013	Replacing diesel buses with battery electric and supporting infrastructure.	4,288,300
CA	North County Transit District (NCTD)	D2022–BUSC–014	Hydrogen electric bus replacement	4,800,000
CA	City of Cerritos	D2022–BUSC–015	Electric bus procurement and fleet replacement	4,378,140
CA	Foothill Transit	D2022–BUSC–016	Zero-emission double deck bus procurement	7,942,200
CA	California DOT on behalf of the City of Arvin	D2022–BUSC–017	Rural battery electric bus replacement	2,922,550
CA	California DOT on behalf of Yosemite Area Regional Transportation System (YARTS).	D2022–BUSC–018	Improving bus system inter-modal connectivity to Yosemite National Park.	4,600,625
CO	State of Colorado, Department of Transportation (CDOT).	D2022–BUSC–019	Snowmass Multimodal Transit Station	13,500,000
CO	State of Colorado, Department of Transportation (CDOT).	D2022–BUSC–020	Rural regional transit center renovations and expansion.	9,350,000
CT	Connecticut Department of Transportation	D2022–BUSC–021	Zero-emission bus procurement	11,446,538
DE	Delaware Transit Corporation	D2022–BUSC–022	Rehoboth Transit Center modernization	5,400,000
FL	City of Gainesville Dept of Transportation & Mobility, Regional Transit System.	D2022–BUSC–023	Bus replacement and East Gainesville transfer station construction.	10,660,817
FL	Pinellas Suncoast Transit Authority	D2022–BUSC–024	Electric bus and charging expansion	18,399,000
GA	Metropolitan Atlanta Rapid Transit Authority (MARTA).	D2022–BUSC–025	Clayton County Multipurpose Operations and Maintenance Facility.	15,000,000
HI	Honolulu, City and County of	D2022–BUSC–026	Battery electric bus acquisition and service expansion.	4,711,900
IA	Ames Transit Agency, d/b/a CyRide	D2022–BUSC–027	Articulated electric bus procurement	3,185,374
ID	Valley Regional Transit	D2022–BUSC–028	Transit vehicle replacement and electrification	1,920,000
IL	Madison County Mass Transit District	D2022–BUSC–029	Bus replacement	2,700,000
IN	South Bend Public Transportation Corporation	D2022–BUSC–030	Bus replacement	4,327,304
IN	Indianapolis Public Transportation Corporation	D2022–BUSC–031	Enhanced bus stops	2,346,658
KS	Prairie Band Potawatomi Nation	D2022–BUSC–032	Rural accessible van procurement	52,972
KY	Transit Authority of the Lexington-Fayette Urban County Government.	D2022–BUSC–033	Bus replacement	4,107,642
LA	City of Shreveport	D2022–BUSC–034	City-wide bus shelter improvements	1,948,000
MA	Massachusetts Bay Transportation Authority	D2022–BUSC–035	Maintenance facility replacement and electrification.	5,000,000
MD	MDOT—MTA on Behalf of Harford County	D2022–BUSC–036	Bus replacement	1,498,000
ME	Greater Portland Transit District	D2022–BUSC–037	Bus replacement	1,887,000

TABLE 1—FY 2021 GRANTS FOR BUSES AND BUS FACILITIES PROJECT SELECTIONS—Continued

State	Recipient	Project ID	Project description	Allocation
MI	Michigan Department of Transportation	D2022–BUSC–038	Bus replacement and fleet expansion in the State of Michigan.	6,199,631
MI	Michigan Department of Transportation	D2022–BUSC–039	Bus facility replacement, expansion, and rehabilitation for four rural transit systems.	7,391,200
MN	Minnesota Valley Transit Authority	D2022–BUSC–040	Burnsville bus garage modernization	4,960,000
MN	City of Rochester	D2022–BUSC–041	Bus Stop improvement and 75th St. Park and Ride construction.	4,339,344
MO	Bi-State Development Agency of the Missouri-Illinois Metropolitan District.	D2022–BUSC–042	Battery electric bus deployment in DeBaliviere	4,098,410
MT	City of Billings, MET Transit Division	D2022–BUSC–043	Bus replacement and facility refurbishment	3,028,000
NC	City of Greensboro	D2022–BUSC–044	Replacing diesel buses with zero-emission buses and infrastructure in the City of Greensboro.	3,008,800
NC	City of Concord	D2022–BUSC–045	Bus replacement	3,966,318
NC	City of Durham	D2022–BUSC–046	Durham Station renovation	10,800,000
NM	City of Albuquerque	D2022–BUSC–047	Bus wash system	1,161,100
NV	Regional Transportation Commission of Southern Nevada.	D2022–BUSC–048	Hydrogen fuel cell bus procurement and solar lighting for bus stops.	4,870,000
NY	Niagara Frontier Transportation Authority	D2022–BUSC–049	Battery electric bus deployment	4,844,000
NY	Metropolitan Transportation Authority	D2022–BUSC–050	Bus depot renovation	12,337,280
OH	Laketran	D2022–BUSC–051 & D2022–BUSC–052.	Bus facility renovation and expansion	7,233,149 & 7,448,832
OH	Portage Area Regional Transportation Authority	D2022–BUSC–053	Bus replacement	1,514,888
OH	Toledo Area Regional Transit Authority	D2022–BUSC–054	Bus facility renovation and safety improvements	2,307,200
OH	Southwest Ohio Regional Transit Authority (SORTA).	D2022–BUSC–055	Bus replacement with new green diesel and electric buses.	10,134,960
OH	Greater Cleveland Regional Transit Authority (GCRTA).	D2022–BUSC–056	Bus facility roofing improvement	4,000,000
OK	Oklahoma Department of Transportation	D2022–BUSC–057	Rural bus facility rehabilitation	914,725
OR	Rogue Valley Transportation District	D2022–BUSC–058	Bus facility expansion	12,552,523
OR	Lane Transit District	D2022–BUSC–059	Zero-emission bus replacement	4,891,676
OR	Oregon Department of Transportation, Public Transportation Division.	D2022–BUSC–060	Bus fleet expansion	244,800
PA	Southeastern Pennsylvania Transportation Authority.	D2022–BUSC–061	South Philadelphia Transportation Center	9,800,000
SC	City of Rock Hill	D2022–BUSC–062	Transit fleet and facilities expansion	2,832,848
TX	Galveston, City of	D2022–BUSC–063	Low-emission fleet replacement	1,060,000
TX	Fort Worth Transportation Authority	D2022–BUSC–064	Bus facility improvements	6,484,320
TX	Texas Department of Transportation	D2022–BUSC–065	Rural transit asset replacement & modernization	22,850,000
UT	Utah Department of Transportation	D2022–BUSC–066	Rural bus transit expansion project	2,389,699
VA	Central Shenandoah Planning District Commission.	D2022–BUSC–067	Bus transit hub rehabilitation	916,500
WA	Clark County Public Transportation Benefit Area	D2022–BUSC–068	Bus replacement	2,742,600
WA	Kitsap Transit	D2022–BUSC–069	Battery-electric buses and charging infrastructure procurement.	10,400,000
WA	Central Puget Sound Regional Transit Authority	D2022–BUSC–070	Bus procurement and station construction for I–405 Bus Rapid Transit Service.	12,924,801
WI	City of Madison	D2022–BUSC–071	Bus maintenance and administrative facility improvements.	6,400,000
Total				409,274,220

[FR Doc. 2022–05734 Filed 3–17–22; 8:45 am]
BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2420; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On March 11, 2022, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. GAYEVOY, Aleksandr Andreyevich (a.k.a. GAEVOI, Aleksandr Andreevich; a.k.a. GAEVOY, Aleksandr), Vladivostok, Russia; DOB 16 Jun 1986; POB Artem, Primorkiy Kray, Russia; nationality Russia; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and

510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214 (individual) [DPRK2] (Linked To: APOLLON OOO).

Designated pursuant to Section 1(a)(v) of Executive Order 13687 of January 6, 2015, ''Imposing Additional Sanctions With Respect To North Korea'' (E.O. 13687) for having acted or purported to act for or on behalf of, directly or indirectly, Apollon OOO, a person whose property and interests in property are blocked pursuant to E.O. 13687.

2. CHASOVNIKOV, Aleksandr Aleksandrovich, Vladivostok, Russia; DOB 09 May 1969; nationality Russia; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214 (individual) [DPRK2].

Designated pursuant to Section 1(a)(iv) of E.O. 13687 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the Government of North Korea.

Entities

1. APOLLON OOO (a.k.a. APOLLON LLC; a.k.a. ''APOLLON''), Ul. Semenovskaya D., 8B, Kv. 28, Vladivostok 690091, Russia; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 29 Jun 2015; Organization Type: Wholesale of food, beverages and tobacco; Tax ID No. 2540211930 (Russia); Registration Number 1152540004253 (Russia) [DPRK2] (Linked To: PAK, Kwang Hun).

Designated pursuant to Section 1(a)(iv) of E.O. 13687 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Pak Kwang Hun, a person whose property and interests in property are blocked pursuant to E.O. 13687.

2. RK BRIZ, OOO (a.k.a. RK BREEZE; a.k.a. RK BRIZ; a.k.a. RK BRIZ LLC), Ul. Partizanskaya D. 2, Pom. 1, Putyatin 692815, Russia; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 18 Jul 2016; Organization Type: Processing and preserving of fish, crustaceans and molluscs; Tax ID No. 2503033077 (Russia); Government Gazette Number 03561816 (Russia); Registration Number 1162503050654 (Russia) [DPRK2] (Linked To: CHASOVNIKOV, Aleksandr Aleksandrovich).

Designated pursuant to Section 1(a)(v) of E.O. 13687 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Aleksandr Aleksandrovich Chasovnikov, a person whose property and interests in property are blocked pursuant to E.O. 13687.

3. ZEEL–M CO., LTD. (a.k.a. ZIL–M LLC; a.k.a. ''ZEELM''; a.k.a. ''ZIL–M''), Ul. Russkaya D. 19, V, Vladivostok 690039, Russia; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 08 Dec 1998; Organization Type: Sale of motor vehicles; Tax ID No. 2539039058 (Russia); Government Gazette Number 49852298 (Russia); Registration Number 1022502123995 (Russia) [DPRK2] (Linked To: CHASOVNIKOV, Aleksandr Aleksandrovich).

Designated pursuant to Section 1(a)(v) of E.O. 13687 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Aleksandr Aleksandrovich Chasovnikov, a person whose property and interests in property are blocked pursuant to E.O. 13687.

Authority: E.O. 13687, 80 FR 819, 3 CFR, 2015 Comp., p. 259.

Dated: March 10, 2022.

Bradley T. Smith,

Deputy Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2022–05706 Filed 3–17–22; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0822]

Agency Information Collection Activity: Camp Lejeune Family Members Program—Reimbursement of Certain Medical Expenses

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health Administration (VHA), 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 May 17, 2022.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Janel Keyes, Office of Regulations, Appeals, and Policy (10BRAP), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Janel.Keyes@va.gov.* Please refer to ''OMB Control No. 2900–0822'' 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. 2900–0822'' 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, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA'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: Camp Lejeune Family Members Program—Reimbursement of Certain Medical Expenses, VA Forms 10–10068, 10–10068a, 10–10068b, 10–10068c.

OMB Control Number: 2900–0822.

Type of Review: Reinstatement of a previously approved collection.

Abstract: Under 38 U.S.C. 1787, VA is required to furnish hospital care and medical services to the family members of certain veterans who were stationed at Camp Lejeune between 1953 and 1987 and have specified medical conditions. In order to furnish such care, VA must collect necessary information from the family members to ensure that they meet the requirements of the law. The specific hospital care and medical services that VA must provide are for a number of illnesses and conditions connected to exposure to contaminated drinking water while at Camp Lejeune. The forms in this

collection will be used to determine eligibility and reimbursement for this medical care.

VA Form 10–10068: Application Form

Affected Public: Individuals or households.

Estimated Annual Burden: 815 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 1,629.

VA Form 10–10068a: Claim Form

Affected Public: Individuals or households.

Estimated Annual Burden: 4,480 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: 11 times per year.

Estimated Number of Respondents: 1,629.

VA Form 10–10068b: Treating Physician Form

Affected Public: Individuals or households.

Estimated Annual Burden: 407 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 1,629.

VA Form 10–10068c: Information Update Form

Affected Public: Individuals or households.

Estimated Annual Burden: 136 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 543.

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. 2022–05662 Filed 3–17–22; 8:45 am]

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Part II

Securities and Exchange Commission

17 CFR Parts 232, 240, 242, et al.

Amendments Regarding the Definition of ''Exchange'' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 240, 242, and 249

[Release No. 34–94062; File No. S7–02–22]

RIN 3235–AM45

Amendments Regarding the Definition of ''Exchange'' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing to amend Rule 3b–16 under Securities Exchange Act of 1934 (''Exchange Act''), which defines certain terms used in the statutory definition of ''exchange'' under Section 3(a)(1) of the Exchange Act to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities. In addition, the Commission is re-proposing amendments to its regulations under the Exchange Act that were initially proposed in September 2020 for ATSs to take into consideration systems that may fall within the definition of exchange because of the proposed amendments and operate as an ATS. The Commission is re-proposing, with certain revisions, amendments to its regulations for ATSs that trade government securities as defined under Section 3(a)(42) of the Exchange Act (''government securities'') or repurchase and reverse repurchase agreements on government securities (''Government Securities ATSs''). The Commission is also proposing to amend Form ATS–N for NMS Stock ATSs, which would require existing NMS Stock ATSs to amend their existing disclosures. In addition, the Commission is proposing to amend the fair access rule for ATSs. The Commission is also proposing to require electronic filing of and to modernize Form ATS–R and Form ATS, which would require existing Form ATS filers to amend their existing disclosures. Further, the Commission is re-proposing amendments to its regulations regarding systems compliance and integrity to apply to ATSs that meet certain volume thresholds in U.S. Treasury Securities or in a debt security issued or guaranteed by a U.S. executive agency, or government-sponsored enterprise (''Agency Securities'').

DATES: Comments should be received on or before April 18, 2022.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/regulatory-actions/how-to-submit-comments*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–02–22 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–02–22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Regulation ATS: Tyler Raimo, Assistant Director, at (202) 551–6227; Matthew Cursio, Special Counsel, at (202) 551–5748; David Garcia, Special Counsel, at (202) 551–5681; Megan Mitchell, Special Counsel, at (202) 551–4887; Amir Katz, Special Counsel, at (202) 551–7653; and Joanne Kim, Attorney Advisor, at (202) 551–4393, and for Regulation SCI: David Liu, Special Counsel, at (312) 353–6265 and Sara Hawkins, Special Counsel, at (202) 551–5523, Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to the following rules under the Exchange Act: (1) 17 CFR 232.101 (Rule 101 of Regulation S–T); (2) 17 CFR 240.3b–16 (Rule 3b–16); (3) 17 CFR 242.300 (Rule 300 of Regulation ATS); [1] (4) 17 CFR 242.301 (Rule 301 of Regulation ATS); (5) 17 CFR 242.302 (Rule 302 of Regulation ATS); (6) 17 CFR 242.304 (Rule 304 of Regulation ATS); [2] and (7) 17 CFR 242.1000 (Rule 1000 of Regulation SCI).[3]

I. Introduction

In September 2020, the Commission issued a proposal to amend Regulation ATS and Regulation SCI for Government Securities ATSs (''2020 Proposal'').[4] The Commission recognized the critical role of government securities in the U.S. and global economy, the significant volume in government securities transacted on systems currently operating as ATSs, and these ATSs' growing importance to investors and overall securities market structure. Notwithstanding their importance for government securities, the investor protection and fair and orderly market principles of Regulation ATS have limited application to Government Securities ATSs.[5] For

[1] ''Regulation ATS'' consists of 17 CFR 242.300 through 242.304 (Rules 300 through 304 under the Exchange Act). *See also* Regulation ATS Adopting Release, *infra* note 31.

[2] The Commission adopted Rule 304 on July 18, 2018. *See* Securities Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768 (August 7, 2018) (''NMS Stock ATS Adopting Release'').

[3] The Commission adopted 12 CFR 242.1000 through 242.1007 (Regulation SCI) on November 19, 2014. *See* Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014) (''Regulation SCI Adopting Release'').

[4] *See* Securities Exchange Act Release No. 90019 (September 28, 2020), 85 FR 87106 (December 31, 2020).

[5] For the purposes of this re-proposal, the term ''Government Securities ATS'' refers to an ATS that trades government securities or repos and includes ATSs that would be subject to Regulation ATS after the effective date of any final rule. This term includes three categories of ATSs. First, a ''Currently Exempted Government Securities ATS'' means an ATS that trades government securities or repos, is operating as of the effective date of any final rule, and was formerly not required to comply with Regulation ATS under 17 CFR 240.3a1–1(a)(3) (Exchange Act Rule 3a1–1(a)(3)) exemption prior to the effective date of any final rule. Second, a ''Current Government Securities ATS'' means an ATS that trades government securities or repos and is operating pursuant to an initial operation report on Form ATS on file with the Commission as of the effective date of any final rule. Finally, when referring to regulatory requirements after the effective date of any final rule, the term ''Government Securities ATS'' also includes a Communication Protocol System that trades U.S.

example, an ATS that limits its securities activities to government securities or reverse repurchase agreements on government securities (''repos'') and registers as a broker-dealer or is a bank (*i.e.,* a Currently Exempted Government Securities ATS) is exempt from exchange registration and is not required to comply with Regulation ATS. Further, ATSs that trade *both* government securities and non-government securities (*e.g.,* corporate bonds) are subject to Regulation ATS but are not required to comply with many of its investor protection and fair and orderly markets provisions, including public transparency rules and the obligation to provide fair access to investors if the ATS has significant trading volume. In addition, ATSs that trade government securities are not subject to the systems integrity provisions of Regulation SCI.

To promote operational transparency, investor protection, system integrity, fair and orderly markets, and regulatory oversight for Government Securities ATSs, the Commission proposed in the 2020 Proposal to: Eliminate the exemption from compliance with Regulation ATS for Currently Exempted Government Securities ATSs; require all Government Securities ATSs to publicly file Form ATS–G, on which they would disclose information about their operations and potential conflicts of interest; provide a process for the Commission to review Form ATS–G disclosures for clarity, completeness, and potential violations of law and, if necessary, declare ineffective Form ATS–G filings; and require an ATS that has significant volume for U.S. Treasury Securities or Agency Securities to: (1) Establish reasonable standards for access to the ATS and apply those standards to all prospective and current subscribers in a fair and non-discriminatory manner pursuant Rule 301(b)(5) of Regulation ATS (''Fair Access Rule''); and (2) comply with the operational capability, security, business continuity planning, incident reporting, and related requirements under Regulation SCI.[6] The Commission issued a concept release (''Concept Release'') in addition to the 2020 Proposal on the regulation of fixed income electronic trading platforms.[7] The Concept Release requested comments on a wide range of topics, including the different regulatory treatment among fixed income electronic trading platforms that use diverse trading protocols or business models and various aspects of government securities, corporate bonds, and municipal securities trading, including their operations, services, fees, market data, and participants.

The Commission received comments in response to the 2020 Proposal and Concept Release.[8] Commenters expressed broad support for the 2020 Proposal. In general, commenters supported the proposed requirements to remove the exemption for Currently Exempted Government Securities ATSs and to require public disclosures on Form ATS–G.[9] However, some commenters expressed concern regarding aspects of the 2020 Proposal, including the proposed enhanced disclosure requirements and effectiveness regime[10] and the proposal to require Government Securities ATSs that meet certain volume thresholds to register as national securities exchanges.[11] In addition, commenters who opined on the Fair Access Rule and Regulation SCI had differing views about whether and how to apply them to Government Securities ATSs.[12]

In addition, the Commission received substantial comment on the Concept Release, in particular concerning the regulatory framework for fixed income electronic trading platforms. Many commenters recognized that certain electronic trading platforms for fixed income securities are not regulated as registered exchanges or ATSs despite performing the same market function as those regulated markets.[13] Several commenters expressed support for the Commission to expand the scope of its exchange regulation to encompass more fixed income platforms,[14] while several other commenters believed that such action is not necessary or appropriate.[15]

Advances in technology and innovation since Regulation ATS was adopted in 1998[16] have changed the methods by which securities markets bring together buyers and sellers of

Government securities or repos on U.S. Government securities and that chooses to operate as an ATS after the effective date of any final rule. A ''Communication Protocol System'' would include a system that offers protocols and the use of non-firm trading interest to bring together buyers and sellers of securities. The re-proposal also uses the term ''Legacy Government Securities ATS,'' which includes all ATSs that trade government securities or repos and are operating as of the effective date of any final rule, regardless of whether the ATSs are operating pursuant to an initial operation report on Form ATS on file with the Commission (*i.e.,* all Current Government Securities ATSs and Currently Exempted Government Securities ATSs).

[6] The Commission also had proposed to amend Regulation ATS to: Require that Form ATS and Form ATS–R be filed with the Commission electronically through the Electronic Data Gathering, Analysis and Retrieval (EDGAR) system and modernize both forms; eliminate confidential treatment of the types of securities that an ATS trades as disclosed on the ATS's Form ATS and Form ATS–R; update and correct Form ATS–N; change the reasons for which the Commission could extend the initial Form ATS–N review period; require NMS Stock ATSs to post on their websites the most recently disseminated Form ATS–N, except for any amendment that the Commission has declared ineffective or that has been withdrawn; and remove the exclusion from compliance with the Fair Access Rule and Rule 301(b)(6) under Regulation ATS for an ATS that matches non-displayed customer orders using prices disseminated by an effective transaction reporting plan.

[7] *See* 2020 Proposal, *supra* note 4.

[8] These comment letters are available at *https://www.sec.gov/comments/s7-12-20/s71220.htm* and discussed throughout this proposal.

[9] *See, e.g.,* letter from Marcia E. Asquith, Executive Vice President & Corporate Secretary, Financial Industry Regulatory Authority, Inc., dated March 1, 2021 (''FINRA Letter'') at 2; letter from Rob Toomey, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, Chris Killian, Managing Director, Securitization and Credit, Securities Industry and Financial Markets Association, and Leslie Norwood, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated March 1, 2021 (''SIFMA Letter'') at 2; letter from Elisabeth Kirby, Head of U.S. Market Structure, Tradeweb Markets Inc., dated March 1, 2021 (''Tradeweb Letter'') at 2; letter from Jennifer W. Han, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association, dated March 1, 2021 (''MFA Letter'') at 2–3; and Tyler Gellasch, Executive Director, Healthy Markets Association, dated March 22, 2021 (''Healthy Markets Letter'') at 7.

[10] *See* letter from Robert Laorno, General Counsel, ICE Bonds Securities Corporation, dated March 8, 2021 (''ICE Bonds Letter I'') at 5.

[11] *See* letter from Kathleen M. Cronin, Senior Managing Director, General Counsel and Corporate Secretary, CME Group Inc., dated February 26, 2021 (''BrokerTec Letter'') at 3–4.

[12] *See, e.g.,* SIFMA Letter at 5 (supporting the proposed volume thresholds); Americans for Financial Reform Education Fund, dated March 1, 2021 (''AFREF Letter'') at 3 (supporting the proposed threshold with respect to Regulation SCI and stating that they believe the proposed threshold for the Fair Access Rule is too low); Healthy Markets Letter at 10–11 (recommending a lower threshold for Regulation SCI); letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated March 1, 2021 (''Bloomberg Letter'') at 5–6 (stating that the proposed thresholds are too high); ICE Bonds Letter I at 5 (suggesting a 20 percent threshold for application of Regulation SCI); Tradeweb Letter at 3, 11 (recommending a ''more material'' threshold for applying Regulation SCI). *See also infra* Sections III.B.4 and III.C.

[13] *See, e.g.,* letter from Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel, dated March 1, 2021 (''Citadel Letter''); letter from Joanna Mallers, Secretary, FIA Principal Traders Group, dated March 1, 2021 (''FIA PTG Letter'') at 2; letter from Robert Laorno, General Counsel, ICE Bonds Securities Corporation, dated March 15, 2021 (''ICE Bonds Letter II'') at 2–4; FINRA Letter at 6; MFA Letter at 8; Tradeweb Letter at 4.

[14] *See, e.g.,* Citadel Letter; FIA PTG Letter; ICE Bonds Letter II.

[15] *See, e.g.,* letter from Sarah A. Bessin, Associate General Counsel, Investment Company Institute and Nhan Nguyen, Counsel, Investment Company Institute, dated March 1, 2021 (''ICI Letter'') at 2, 7; letter from Scott Pintoff, General Counsel, MarketAxess, dated March 1, 2021 (''MarketAxess Letter'') at 2–4; Bloomberg Letter at 17–20.

[16] *See* Regulation ATS Adopting Release, *infra* note 31.

securities. As discussed further below, innovations in trading protocols have increased efficiencies and access to discover liquidity and prices, search for a counterparty, and agree upon the terms of a trade. Instead of using exchange markets that offer only the use of firm orders and provide matching algorithms, market participants are able to connect to numerous Communication Protocol Systems, which offer the use of protocols and non-firm trading interest to bring together buyers and sellers of securities. Communication Protocol Systems today perform similar market place functions of bringing together buyers and sellers as registered exchanges and ATSs and have become an increasingly preferred choice of trading venue, particularly for fixed income securities. However, as a function of how Exchange Act Rule 3b–16 currently defines the terms in Section 3(a)(1) of the Exchange Act, Communication Protocol Systems do not fall within the definition of exchange. As a result, Communication Protocol Systems are not subject to the same regulatory requirements as registered exchanges and ATSs and the investors using them do not receive the investor protection, fair and orderly markets, transparency, and oversight benefits stemming from exchange regulation. Further, by Communication Protocol Systems falling outside the definition of exchange, a disparity has developed among similar markets that bring together buyers and sellers of securities, in which some are regulated as exchanges and others are not. This regulatory disparity can create a competitive imbalance and a lack of investor protections.[17]

Given the changing conditions among markets to bring together buyers and sellers of securities, and taking into consideration comment letters submitted in response to the 2020 Proposal and the Concept Release, the Commission is proposing to amend Exchange Act Rule 3b–16 regarding what ''shall be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange' as those terms are used'' in the statutory definition of ''exchange'' under Exchange Act Section 3(a)(1).[18] The proposed amendments to Exchange Act Rule 3b–16(a) would include Communication Protocol Systems that make available for trading any type of security, including, among others, government securities, corporate bonds, municipal securities, NMS stocks, equity securities that are not NMS stocks, private restricted securities, repurchase agreements and reverse repurchase agreements, foreign sovereign debt, and options. Including Communication Protocol Systems within the definition of ''exchange'' would appropriately regulate a market place that brings together buyers and sellers of securities, extend the benefits of the exchange regulatory framework to investors that use such systems, and reduce regulatory disparities among like markets.

In addition, because the Commission is proposing to amend Exchange Act Rule 3b–16 to include Communication Protocol Systems within the definition of exchange and taking into consideration comments received in response to the 2020 Proposal and the Concept Release, the Commission is re-proposing and revising previously proposed amendments to Regulation ATS and Regulation SCI for Government Securities ATSs that include the following: [19] (1) Re-proposing to eliminate the exemption from compliance with Regulation ATS for an ATS that trades only government securities or repos and is operated by a broker-dealer or is a bank; (2) re-proposing, with certain revisions, to require a Government Securities ATS that has significant volume for U.S. Treasury Securities or Agency Securities to comply with the Fair Access Rule under Regulation ATS and Regulation SCI; [20] (3) re-proposing to apply the enhanced disclosure and filing requirements of Rule 304 of Regulation ATS, which are currently applicable to NMS Stock ATSs, to all Government Securities ATSs; (4) proposing to require Government Securities ATSs to file Form ATS–N, as revised, instead of previously proposed Form ATS–G; [21] (5) proposing several changes to Form ATS–N that would be applicable to both Government Securities ATSs and NMS Stock ATSs, including questions about the ATS's interaction with related markets, liquidity providers, and activities the ATS undertakes to surveil and monitor its market; (6) proposing amendments to Form ATS–N that would require existing NMS Stock ATSs to file an amendment to their existing disclosures on Form ATS–N; (7) proposing to add a new type of amendment to Form ATS–N to report changes to fee disclosures; (8) proposing to amend the Form ATS–N review and effectiveness process to permit the Commission to extend the review period for Form ATS–N amendments; [22] (9) proposing to make certain changes to the Fair Access Rule that would apply to all ATSs that are subject to the rule; [23] and (10) re-proposing electronic filing of Form ATS–R and Form ATS and proposing certain changes to the categories of securities reported on Form ATS–R.[24]

II. Proposed Amendments Regarding the Definition of Exchange

A. Exchange Regulatory Framework

Exchange Act Section 3(a)(1) states that the term ''exchange'' means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.[25]

Section 5 of the Exchange Act [26] requires an organization, association, or

[17] *See infra* Section VIII.C.3.a.

[18] 17 CFR 240.3b–16(a).

[19] U.S. Treasury Securities and Agency Securities are not classes of securities for purposes of Exchange Act Rule 3a1–1(b).

[20] The Commission is re-proposing to amend Regulation ATS to require that Form ATS and Form ATS–R be filed with the Commission electronically through EDGAR and to modernize both forms; eliminate confidential treatment of the types of securities that an ATS trades as disclosed on the ATS's Form ATS and Form ATS–R; and remove the exclusion from compliance with the Fair Access Rule and Rule 301(b)(6) under Regulation ATS for an ATS that matches non-displayed customer orders using prices disseminated by an effective transaction reporting plan. Covered ATSs would not be required to post on their websites the most recently disseminated Form ATS–N, but would be required to provide pursuant to Rule 304(b)(3)(i) a direct URL hyperlink to the Commission's website that contains the documents made public by the Commission under Rule 304(b)(2).

[21] In the 2020 Proposal, the Commission proposed that Government Securities ATSs file proposed Form ATS–G. Given the significant overlap between proposed Form ATS–G and existing Form ATS–N, the Commission is now proposing that Government Securities ATSs file Form ATS–N, which is currently filed by NMS Stock ATSs, and proposing to revise Form ATS–N to apply disclosures for Government Securities ATSs that would fall under the proposed definition of ''exchange.'' *See* Appendix A for the proposed revisions to Form ATS–N. The Commission believes that this would limit the number of unique forms and simplify filing requirements.

[22] The Commission is also re-proposing to change the reasons for which the Commission could extend the initial Form ATS–N review period. *See infra* Section IV.A.

[23] *See infra* Section V.A.

[24] *See infra* Section V.B.

[25] *See* 15 U.S.C. 78c(a)(1).

[26] 15 U.S.C. 78e.

group of persons that meets the definition of ''exchange'' under Section 3(a)(1) of the Exchange Act,[27] unless otherwise exempt, to register with the Commission as a national securities exchange pursuant to Section 6 of the Exchange Act.[28] As discussed further below, registered national securities exchanges are self-regulatory organizations (''SROs''),[29] and must comply with regulatory requirements applicable to both national securities exchanges and SROs.[30]

In the Exchange Act, Congress provided a broad definition of the term ''exchange,'' permitting the Commission to apply the definition flexibly as the securities markets evolve over time.[31] In 1998, the Commission adopted Regulation ATS.[32] At that time, the Commission recognized that advances in technology had increasingly blurred the line between exchange and broker-dealer activities [33] and that ATSs that existed then were used by market participants as functional equivalents of exchanges.[34] To more accurately describe the range of markets that performed exchange functions at that time, the Commission concurrently adopted Exchange Act Rule 3b–16 to define terms [35] used in the statutory definition of ''exchange'' under Exchange Act Section 3(a)(1).

In Exchange Act Rule 3b–16(a), the Commission defined these terms, in light of the markets that existed at that time, to include any organization, association, or group of persons that: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.[36] Rule 3b–16(b) explicitly excluded certain systems that the Commission believed were not exchanges.[37] Accordingly, a system is not included in the Commission's interpretation of ''exchange'' if: (1) The system fails to meet the two-part test in paragraph (a) of Rule 3b–16; (2) the system falls within one of the exclusions in paragraph (b) of Rule 3b–16; or (3) the Commission otherwise conditionally or unconditionally exempts [38] the system from the definition.

When the Commission adopted Exchange Act Rule 3b–16, the Commission also adopted Exchange Act Rule 3a1–1(a) to exempt ATSs from the definition of ''exchange'' under Section 3(a)(1) of the Exchange Act. Exchange Act Rule 3a1–1(a)(2) [39] exempts from the Exchange Act Section 3(a)(1) definition of ''exchange'' an organization, association, or group of persons that complies with Regulation ATS,[40] which requires, among other things, meeting the definition of an ATS and registering as a broker-dealer.[41] Rule 300(a) of Regulation ATS defines an ATS as any organization, association, person, group of persons, or system: (1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b–16; and (2) that does not: (i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) discipline subscribers other than by exclusion from trading.[42] Governing the conduct of or disciplining subscribers are functions performed by an SRO that the Commission believed should be regulated as such.[43] Accordingly, pursuant to Rule 300(a), a trading system that performs SRO functions or functions common to national securities exchanges, such as establishing listing standards, is precluded from the definition of ATS and would be required to register as a national securities exchange, be operated by a national securities association, or seek another exemption.[44]

As a result of the exemption, an ATS that complies with Regulation ATS is not required by Section 5 of the Exchange Act to register as a national securities exchange, is not an SRO, and, therefore, is not required to comply with regulatory requirements applicable to national securities exchanges and SROs.[45] An ATS that fails to comply with the requirements of Regulation ATS would no longer qualify for the exemption provided under Rule 3a1–1(a)(2), and thus, risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act.[46]

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[27] *See infra* note 31.

[28] 15 U.S.C. 78f. A ''national securities exchange'' is an exchange registered as such under Section 6 of the Exchange Act.

[29] Section 3(a)(26) of the Exchange Act defines a self-regulatory organization as any national securities exchange, registered securities association, registered clearing agency, or (with limitations) the Municipal Securities Rulemaking Board (''MSRB''). *See* 15 U.S.C. 78c(a)(26). *See also* Securities Exchange Act Release No. 76474 (November 18, 2015), 80 FR 80998, 81025 (December 28, 2015) (''NMS Stock ATS Proposing Release'') at 81000–01 nn.20–26 and accompanying text (discussing certain differences between certain obligations and benefits applicable to national securities exchanges and those applicable to ATSs).

[30] *See, e.g.,* 15 U.S.C. 78f and 78s.

[31] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70850 and 70898 (December 22, 1998) (''Regulation ATS Adopting Release''). *See also* 15 U.S.C. 78e and 78f. The Commission noted that it was recognized at the time the Exchange Act was enacted that a regulatory structure for securities exchanges would ''be of little value tomorrow if it is not flexible enough to meet new conditions immediately as they arise and demand attention in the public interest.'' *See* Regulation ATS Adopting Release at 70898, n.520 (citing Commission, Report of the Special Study of the Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess. Pt. 1 (1963) at 6 and S. Rep. No. 792, 73rd Cong., 2d Sess. (1934) at 5 (noting that ''exchanges cannot be regulated efficiently under a rigid statutory program,'' and that ''considerable latitude is allowed for the exercise of administrative discretion in the regulation of both'')).

[32] *See* Regulation ATS Adopting Release, *supra* note 31, at 70850.

[33] *See id.* at 70847.

[34] *See id.*

[35] The Commission adopted Exchange Act Rule 3b–16 under Section 3(b) of the Exchange Act (power to define terms). 15 U.S.C. 78c(b).

[36] *See* 17 CFR 240.3b–16(a).

[37] *See* Regulation ATS Adopting Release, *supra* note 31, at 70852. Specifically, Rule 3b–16(b) excludes from the definition of exchange systems that perform only traditional broker-dealer activities, including: Systems that route orders to a national securities exchange, a market operated by a national securities association, a broker-dealer for execution, or systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met.

[38] *See* 17 CFR 240.3b–16(e).

[39] *See* 17 CFR 240.3a1–1(a)(2).

[40] *See id.* Rule 3a1–1 also provides two other exemptions from the definition of ''exchange'' for any ATS operated by a national securities association and any ATS not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS. *See* 17 CFR 240.3a1–1(a)(1) and (3).

Rule 3a1–1(b) provides an exception to the Rule 3a1–1(a) exemptions pursuant to which the Commission may require a trading system that is a substantial market to register as a national securities exchange, if the Commission finds doing so is necessary or appropriate in the public interest or consistent with the protection of investors. *See* 17 CFR 240.3a1–1(b). *See also* Regulation ATS Adopting Release, *supra* note 31, at 70857–58.

[41] *See* 17 CFR 242.300(a); 17 CFR 242.301(a); and 17 CFR 242.301(b)(1). In addition to the other requirements of Regulation ATS, to qualify for the Rule 3a1–1(a) exemption, an organization, association, or group of persons must otherwise meet the definition of ''exchange.''

[42] *See* 17 CFR 242.300(a).

[43] *See* Regulation ATS Adopting Release, *supra* note 31, at 70859.

[44] *See id.*

[45] *See generally* Sections 5, 6, and 19 of the Exchange Act, 15 U.S.C. 78e, 78f, and 78s.

[46] *See* 15 U.S.C. 78e.

B. Adopting the Definition of Exchange for Evolving Market Places

1. Orders-Focused Markets Under Current Rule 3b–16

When the Commission adopted Exchange Act Rule 3b–16(a), the Commission sought to more accurately describe the range of markets that performed exchange functions as those were understood at that time.[47] In the Regulation ATS Adopting Release, the Commission observed that ATSs at that time provided services more akin to exchange functions than broker-dealer functions, such as matching counterparties' orders, executing trades, operating limit order books, and facilitating active price discovery.[48]

In the Regulation ATS Adopting Release, the Commission identified two elements of Exchange Act Rule 3b–16 that most accurately reflected the functions and uses of exchange markets at that time. These elements were the bringing together of orders of multiple buyers and sellers of securities and that trading takes place according to established, non-discretionary rules or procedures.[49] When considering what constituted an exchange at that time, the Commission focused on the expectations of the participants regarding how an execution would occur without the discretion of the operator. Because orders instruct a trading system to carry out the intention of participants in accordance with programmed trading procedures, orders, along with established, non-discretionary methods, contribute to how trading system participants could understand and expect to receive an execution.[50] In addition, the Commission stated that ''an essential indication of the non-discretionary status of rules and procedures is that those rules and procedures are communicated to the systems users'' and ''[t]hus, participants have an expectation regarding the manner of execution—that is, if an order is entered, it will be executed in accordance with those procedures and not at the discretion of a counterparty or intermediary.'' [51]

Further, at the time Exchange Act Rule 3b–16(a) was adopted, most ATSs operating met the criteria of the rule in that they offered the use of orders and algorithms that matched orders.[52] ATSs at that time allowed broker-dealers to place and execute orders on the system and the systems functioned as limit order books where orders are executed according to time, price, and size priority.[53] Accordingly, orders and established, non-discretionary methods undergirded Exchange Act Rule 3b–16 to reflect functions of exchange markets at that time. When discussing orders in the Regulation ATS Adopting Release, however, the Commission stated that systems that displayed bona fide, non-firm trading interest [54] or did not establish rules or operate a trading facility [55] would not fall within Rule 3b–16(a).

2. Prevalence of Systems Offering Non-Firm Trading Interest and Structured Protocols

Advances in technology have facilitated innovations and more efficient or diverse methods to bring together buyers and sellers of securities.[56] In the Commission's experience, Communication Protocol Systems, which can use various technologies and connectivity, generally offer the use of non-firm trading interest and establish protocols to prompt and guide buyers and sellers to communicate, negotiate, and agree to the terms of the trade without relying solely on the use of orders. Below is a non-exhaustive list of some Communication Protocol Systems.

One example of a Communication Protocol System is a ''Request-for-Quote'' (''RFQ'') system. RFQ systems are designed to allow market participants to obtain quotes for a particular security by sending messages to one or multiple potential respondents on the system simultaneously. RFQ systems may be ''disclosed,'' in which case the participants with established relationships interact only with each other, or anonymous, in which case the parties may not have established relationships. The system provider requires a participant to enter information in a message, which may include the name of the initiator, Committee on Uniform Securities Identificalion Procedures (CUSIP) number, side, and size. The system provider also provides protocols for participants to communicate with each other and negotiate a price or size of a trade. For example, participants receiving an RFQ message can choose to interact with the initiator by responding within a time period designated by the system provider with a priced quote. These methods can serve the same function as auctions where the respondents compete to offer the best price. The initiator can then select among the quote responses that it wishes to interact with through the system by either accepting one of multiple responses or rejecting all responses within a period of time set by the system provider. The match of the request and response results in an agreement to the terms of the trade between a buyer and a seller, which then proceeds to post-trade processing.[57] An RFQ list protocol (''RFQ List''), which is a form of RFQ protocol used commonly to trade U.S. Treasury Securities, may include a collection of RFQ inquiries that are submitted as a group but priced as individual items.[58] The RFQ List (defined by each system provider but generally more than two listed items) may be executed in its entirety, in pieces, or not at all. A liquidity provider that is responding to the list request may apply a ''good for'' time that is associated with the executable prices provided.

A Communication Protocol System could also include a system that electronically displays continuous firm or non-firm trading interest, or ''stream axes,'' in a security or type of security to participants on the system. Axes typically represent an indication of

[47] *See* Regulation ATS Adopting Release, *supra* note 31, at 70900.

[48] *See id.* at 70848.

[49] *See id.* at 70900.

[50] For example, the Commission stated in the Regulation ATS Adopting Release that ''an alternative trading system that posts firm orders to buy and sell a security does raise a certain expectation of execution at those quoted prices'' and that ''[t]he expectation is based on the life of the outstanding orders in the system, rather than continuous two sided quotations published by specialist and market makers.'' *See id.* at 70899, n.532.

[51] *See id.* at 70900.

[52] *See id.* at 70899–900, n.536.

[53] *See id.* at 70899, n.525.

[54] *See id.* at 70850. In the Regulation ATS Adopting Release, the Commission stated, ''[g]enerally, however, a system that displays *bona fide,* non-firm indications of interest—including, but not limited to indications of interest to buy or sell a particular security without either prices or quantities associated with those indications—will not be displaying ''orders'' and, therefore, not fall within Rule 3b–16.'' *See id.*

[55] *See id.* The Commission also stated that ''[u]nless a system also establishes rules or operates a trading facility under which subscribers can agree to the terms of their trades, the system will not be included within Rule 3b–16, even if it brings together 'orders.' '' *See id.*

[56] *See id.* at 70848.

[57] Communication Protocol Systems also may offer a workup functionality or blotter scraping functionality to gather non-firm trading interest and facilitate the negotiation and execution of trades. In a workup, a system may have a private phase, where the two original contra-parties submitting orders can negotiate, and a public phase where all subscribers can submit orders at the workup price.

[58] An RFQ List may be referred to as a Bid Wanted in Competition (''BWIC'') or Offer Wanted in Competition (''OWIC'') in the corporate bond market. Both serve a similar purpose to the RFQ List in allowing the submitter to solicit bids and offers on a number of securities at one time.

interest to sell or buy a bond (but can include firm quotes), and can either serve as a starting point for negotiation between participants or be executed immediately. Systems that stream axes take many forms. Some system providers provide connectivity and protocols for participants to electronically communicate and negotiate the terms of a trade. Other system providers offer participants more automated processes, whereby participants auto-execute against a streamed quote and agree upon the terms of a trade without negotiation. Typically, the system is programmed with permission options to allow participants to decide who can or cannot receive their axes. In such a case, the trading interest exchanged between the parties is typically firm and functions as orders.

Conditional order systems may be Communication Protocol Systems that offer the use of trading interest that may not be executable until after a user takes subsequent action. For example, a system provider may require conditional orders to contain a symbol, side, and size and provide protocols for participants to send and receive invitation messages to trade. The system would be designed for conditional orders to match with other trading interest, which can either be a firm order or another non-firm conditional order.[59] Upon a match, the system may send a firm-up invitation messages to both participants. The system protocols may permit a participant using a conditional order to either decline the firm-up invite, accept the firm-up invite, or counter the response to firm up.[60] During the time that the parties' trading interest is matched until the invitation to firm-up expires, is canceled, is executed, or is declined, the system protocols may require that the non-firm trading interest be committed and the shares cannot trade elsewhere.[61] Using the system protocols, the matched parties can modify the attributes of the non-firm trading interest (*i.e.,* price, size) before accepting the firm-up invitation. To the extent either a seller or buyer changes the attributes, an execution will only occur if each contra-party's corresponding attributes will still be met. If both matching parties accept the firm-up invite, the parties would agree upon the terms of the trade and an execution would occur.

Other systems have developed to bring together buyers and sellers of securities through the use of bilateral negotiation protocols and non-firm trading interest. Negotiation systems focus on providing a forum for buyers and sellers to see displayed non-firm trading interest, access liquidity, find a counterparty, and negotiate a trade through the use of their communication technology. The system may allow participants to select certain pre-approved participants and then exchange messages for purposes of agreeing to the terms of a trade. Negotiation systems may have fewer parameters for communicating trading interest than RFQ protocols; for example, negotiation systems provide features that are designed to prompt participants to interact with each other and provide parameters around that interaction, such as time for responses or requirements on the content of the message. A system may ''scrape'' or obtain the symbol of trading interest that a participant is seeking from the participant's order management or execution management system and use that to alert other participants on its system about potential contra-side interest in seeking to initiate a negotiation. The market participants using negotiation systems may complete a transaction outside of the system.

As trading in securities has become more electronic, Communication Protocol Systems perform the function of a market place and have become a preferred method for market participants to discover prices, find a counterparty, and execute a trade, particularly for government securities and other fixed income markets. One commenter on the 2020 Proposal and Concept Release, for example, stated that multilateral trading venues using RFQ protocols are some of the most significant multilateral trading venues operating in fixed income markets regulated by the Commission, including the U.S. Treasury market.[62] This commenter stated that RFQ trading venues dominate the dealer-to-customer segment of the U.S. Treasury market and in the aggregate account for approximately 50 percent of total electronic trading volume on multilateral U.S. Treasury trading venues.[63] Another large electronic trading venue for fixed income products estimated that its average daily volume using an RFQ protocol increased from $223 million in the second quarter of 2017 to $1.17 billion in the second quarter of 2021.[64] Systems offering conditional order protocols have increased over the past several years, particularly for trading NMS stocks. Today, 26 NMS Stock ATSs have disclosed on their public Form ATS–N that they send or receive messages indicating trading interest, such as conditional orders.

Communication Protocol Systems, like registered exchanges and ATSs, offer their participants several benefits, including reducing counterparty search costs, bringing together diverse market participants, and making it efficient and simple to find a counterparty and agree upon the terms of a trade. These systems improve price discovery from the voice protocols that were used more widely in the fixed income market in the past by offering participants systems and protocols that are specifically designed to allow participants to contact, and receive responses from, multiple potential counterparties at one time, as opposed to the more time-consuming process of calling each potential counterparty individually. RFQ protocols, for example, allow an initiator to share and attempt to trade its entire trading interest all at once. In contrast, under a limit order book model, for example, the seeker of liquidity may find it can only execute its trading interest in a piecemeal fashion. RFQs also allow initiators to more easily demonstrate that they attempted to achieve best execution by showing that the initiator sent requests for quotes to multiple dealers for a security. In addition, participants may find conditional orders attractive when seeking to trade at size or to avoid information leakage.

While Communication Protocol Systems may bring together buyers and sellers for all types of securities and allow participants to negotiate a trade,

[59] Based on Commission staff experience, some NMS Stock ATSs disclose protocols to allow conditional orders to interact with the ATS's limit order book, thereby increasing the interaction among potential buyers and sellers and access to liquidity.

[60] An order resting on an ATS limit order book that can interact with a conditional order does not receive a firm-up invite and therefore does not send firm-up responses.

[61] Many conditional order and RFQ systems monitor their participants' firm-up rates and may limit or deny the use of the system by a participant if the participant's firm-up rate falls below a certain percentage. While the system provider typically monitors these firm-up rates to help ensure that participants do not abuse the system, such monitoring and actions taken against participants for not firming-up may incentivize participants to not back away. Thus, conditional orders or RFQs can be firm in practice and in this way may meet the definition of order under current Regulation ATS. *See* 17 CFR 242.300(e) (''any firm indication of a willingness to buy or sell a security'').

[62] *See* Citadel Letter at 1–2.

[63] *See id.* This commenter noted that multilateral RFQ trading venues are formally registered in other asset classes and jurisdictions, and that there are ''well-established precedents'' to delineate the scope of multilateral trading venues subject to regulation.

[64] Tradeweb Investor Presentation, July 2021, *available at: https://investors.tradeweb.com/static-files/e63caabf-d71d-46c0-9589-353fb8b93388.*

they are particularly useful to market participants to trade less liquid securities, find counterparties for large size trades, and minimize information leakage and adverse impact of large size trades. For example, market participants can use Communication Protocol Systems to post and see non-firm trading interest on several trading venues simultaneously, thereby increasing their ability to find a counterparty and reduce search costs. When resting non-firm trading interest on a trading venue, market participants can use non-firm trading interest as a tool to avoid the risk of double-execution.[65] Participants that use conditional orders, for example, may place the same trading interest at various trading centers in search of liquidity because it would allow them to accept or decline responses if they receive more than one. Participants may find locating a counterparty on a limit order book system for less liquid securities more difficult and choose instead to use a Communication Protocol System, such as an RFQ system, because such system allows the initiating participant to use non-firm trading interest to solicit quotes from multiple market participants for less liquid securities and negotiate a size or price for such securities.

3. Lack of Investor Protections and Disparate Regulation Among Market Places

Given the changes in methods for bringing buyers and sellers together over the past couple of decades, the contrast between market place functions of exchanges that offer the use of orders and trading facilities and systems that offer the use of trading interest and protocols has become increasingly blurred. Both types of systems share the same business objectives and engage in similar market activities; however, one type of system is subject to the exchange regulatory framework while the other is not.[66] Today, Communication Protocol Systems perform similar market place functions as registered exchanges and ATSs and have become venues for investors to discover prices, find a counterparty, and agree upon the terms of a trade. Because Communication Protocol Systems do not fall within the definition of ''exchange'' and are thus not required to register as national securities exchanges, they are not required to comply with the same Federal securities laws and regulations applicable to registered exchanges[67] or ATSs.[68] Market participants use Communication Protocol Systems for certain advantages that these market places offer for trading securities; however, when doing so, market participants cannot avail themselves of the same investor protections, fair and orderly market principles, and Commission oversight that apply to today's registered exchanges or ATSs.[69] This regulatory gap also creates disparities that affect competitive balances among like market places for securities.[70] Consistent with the statutory definition of ''exchange'' in Exchange Act Section 3(a)(1), and as discussed above, today Communication Protocol Systems provide a ''market place'' for bringing together purchasers and sellers of securities.[71] The current proposal will use the flexibility granted to the Commission by Congress to update Exchange Act Rule 3b–16 to address these developments in the markets for securities, the corresponding lack of investor protections, and disparate regulation among these markets.[72]

Including Communication Protocol Systems within the definition of ''exchange'' would provide market participants that use these market places with the investor protections, fair and orderly market principles, and Commission oversight provided by the exchange regulatory framework.[73] A Communication Protocol System that chooses to register as an exchange would be an SRO and be subject to the requirements of Section 6 of the Exchange Act, as discussed further below.[74] However, the Commission expects that many Communication Protocol Systems would choose instead to comply with the conditions of the Regulation ATS exemption, which includes registering as a broker-dealer.[75] As discussed further below, Communication Protocol Systems complying with Regulation ATS would also be subject to the Regulation ATS investor protection provisions, including the requirement to establish written safeguards and procedures to protect confidential subscriber trading information[76] and operational transparency requirements of Form ATS–N for ATSs that trade NMS stocks or government securities or repos.[77] They would also be subject to fair and orderly markets provisions under the Fair Access Rule.[78] Registering as a broker-dealer would subject a Communication Protocol System to Commission and Financial Industry Regulatory Authority (''FINRA'') oversight.[79] As a FINRA member, the Communication Protocol System would be subject to FINRA's investor protection and examination and market surveillance programs and would be required to comply with FINRA's trade reporting rules.

The proposal to include Communication Protocol Systems within the definition of exchange would promote competition by reducing cost disparities and creating a more level competitive landscape.[80] Several commenters in response to the Concept

[65] For example, a market participant that rests the same non-firm trading interest on two trading venues has the ability to back away from one if both are lifted (*i.e.,* preliminarily matched). In such case, the market participant is able to complete one trade and cancel or back away from the other.

[66] *See* U.S. Securities and Exchange Commission Fixed Income Market Structure Advisory Committee (''FIMSAC''), Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds (July 16, 2018), *available at https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-electronic-trading-platforms-recommendation.pdf* (expressing concern about regulatory harmonization among fixed income trading platforms, recognizing that some firms were regulated as ATSs, while some were regulated as broker-dealers or not regulated at all).

[67] *See infra* Section II.D.1.

[68] *See infra* Section II.D.2.

[69] *See infra* Section II.D.

[70] *See infra* Section VIII.C.3.a.

[71] *See supra* Section II.A.

[72] The Commission is not proposing to amend Exchange Act Rule 3b–16(b), which excludes from the definition of ''exchange'' systems that perform only traditional broker-dealer activities, including: Systems that route orders to a national securities exchange, a market operated by a national securities association, a broker-dealer for execution, or systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met. These systems would continue to not fall within the definition of ''exchange.'' As discussed below, and consistent with the Commission's views expressed in the Regulation ATS Adopting Release, a broker-dealer's exercise of discretion and judgment over its customers' orders or trading interest does not make the broker-dealer an exchange. *See* Regulation ATS Adopting Release, *supra* note 31, at 70851. *See also infra* Section II.C.3. The Commission is proposing to add an exclusion to Rule 3b–16(a) for systems that allow issuers to sell their own securities to investors. *See infra* Section II.C.2. Further, as explained below, the Commission is not proposing to include within the definition of ''exchange'' a system that unilaterally displays trading interest without offering a trading facility or communication protocols to bring together buyers and sellers. Also, systems that provide general connectivity for persons to communicate without protocols, such as utilities or electronic web chat providers, would not fall within the definition of exchange. *See id.*

[73] *See infra* Section II.D.

[74] *See infra* Section II.D.1.

[75] *See infra* Section II.D.2.

[76] *See infra* note 170 and accompanying text.

[77] *See infra* notes 139–142 and accompanying text. A Communication Protocol System that operates as an ATS but trades securities other than NMS stocks or government securities would file Form ATS.

[78] *See infra* notes 154–155 and accompanying text.

[79] *See infra* notes 131–133 and accompanying text.

[80] *See infra* Section VIII.C.3.a.

Release expressed concerns regarding the disparity in regulatory treatment between exchanges, ATSs, and other fixed income platforms.[81] In addition, FIMSAC expressed concern about the lack of regulatory harmonization among fixed income electronic trading platforms, recognizing that some firms are regulated as ATSs, while others are regulated as broker-dealers or not at all, and stated that these distinctions in regulatory oversight complicate efforts to improve the efficiency and resiliency of the fixed income electronic trading markets.[82] In response to the Concept Release, one commenter stated that the current regulatory framework puts ATSs at a competitive disadvantage to non-ATS trading platforms, which are not subject to the same regulatory obligations designed to protect investors and the integrity of the fixed income markets.[83] Another commenter stated its belief that disparate regulatory treatment across trading platforms impacts market efficiency and competition and introduces potential resiliency risks.[84] Another commenter stated that electronic platforms for bringing together buyers and sellers of fixed income securities for the purpose of effecting transactions should generally be regulated the same regardless of how they are structured internally.[85] The Commission recognizes that the regulatory costs associated with registering and operating as a registered exchange are higher than the regulatory costs associated with registering as a broker-dealer and complying with Regulation ATS. However, Communication Protocol Systems operating outside the exchange regulatory framework are subject to neither national securities exchange nor ATS regulatory costs and therefore have an advantage when competing against other markets that also bring together buyers and sellers of securities.[86] As discussed further in Section VIII, a trading system that performs an exchange market function but is not subject to the exchange regulatory regime could receive a competitive advantage because such systems are not subject to the compliance costs to which regulated exchanges are subject.

Amending Exchange Act Rule 3b–16(a) to include non-firm trading interest would eliminate the possibility that systems may offer the use of non-firm trading interest that, in practice, functions as firm orders, so as to avoid exchange registration or complying with Regulation ATS. In the Regulation ATS Adopting Release, the Commission expressed concern that system providers may label trading interest that is firm in practice as non-firm.[87] The providers of such systems may take the position that their systems arguably do not use ''orders'' and thus do not fall within the criteria of Rule 3b–16. For example, systems that offer the use of non-firm trading interest may monitor participants' firm-up rates in response to a quote they received and may penalize a participant with a low firm-up rate either economically or by limiting its ability to use features of its system. Such activities could cause participants on the systems to believe that trading interest that they submit or receive is effectively firm and affect their behavior on the system. The difference between what is a firm order and what is not requires careful scrutiny of the design of the system, the trading interest offered, and what actually takes place among buyers and sellers interacting on the systems. The Commission believes, however, that the use of firm or non-firm trading interest by a system should no longer be a factor in determining whether a system performs the function of a market place because both firm and non-firm trading interest can be used by a system with the same purpose and effect to bring together buyers and sellers of securities.[88]

Finally, for clarity, Exchange Act Rule 3b–16(a) would continue to encompass systems that make available for trading any type of security. The definition of ''exchange'' under Section 3(a)(1) of the Exchange Act and current Exchange Act Rule 3b–16(a) applies to all securities, including government securities, corporate bonds, municipal securities, NMS stocks, equity securities that are not NMS stocks, private restricted securities, repurchase agreements and reverse repurchase agreements, foreign sovereign debt, and options, and does not exempt or exclude any security or type of securities. The Commission believes that it is important for any system that falls within the criteria of Rule 3b–16(a) to be subject to the exchange regulatory framework, notwithstanding how thinly traded or novel a security may be, and participants on such systems should be able to avail themselves of the same benefits that participants on registered exchanges or ATSs receive. Accordingly, the proposed amendments to Rule 3b–16(a) do not change the Commission's interpretation of the statutory definition of ''exchange''—that is, it applies to all securities.

The Commission received several comments in response to the Concept Release expressing reservations about revising Exchange Act Rule 3b–16 to include certain fixed income markets within the definition of exchange. One commenter stated that doing so would insert unnecessary intermediation between dealers and their customers and threaten to distort the market structure by creating a one-size-fits-all approach that is biased against the trading of less-liquid instruments, damaging liquidity formation.[89] Another commenter expressed concern about the Commission creating additional regulatory obligations in the fixed income space and believed the Commission should undertake a more in-depth review of fixed income trading, engage in discussion with the industry, and outline the problems that any proposed regulations are intended to solve before moving forward with any such regulatory proposal.[90] Likewise, another commenter stated its belief that the Commission should not impose

[81] *See, e.g.,* ICE Bonds Letter II at 2–4; Citadel Letter at 2; MFA Letter at 6 (suggesting that to ensure that similarly situated entities are treated similarly in the trading of government securities, the Commission should review the appropriateness of similar regulation on multiple-to-multiple trading venues with significant volume); MarketAxess Letter at 1 (stating that there should be a common regulatory framework for all multilateral fixed income electronic trading platforms that requires minimum standards of conduct and oversight in areas such as trade reporting, resiliency, cyber-security, operational reporting, financial standards, examination, surveillance, and confidentiality).

[82] *See supra* note 66. The FIMSAC concerns were highlighted by the Commission in the Concept Release.

[83] *See* ICE Bonds Letter II at 4 (stating that the benefits of subjecting non-ATS trading platforms to the same regulatory obligations as current ATSs will be substantial).

[84] *See* FIA PTG Letter at 2. *See also* Citadel Letter at 2 (stating that excluding multilateral RFQ platforms from the current regulatory framework creates an unlevel regulatory field).

[85] *See* letter from Michael Decker, Senior Vice President for Public Policy, Bond Dealers of America, dated March 1, 2021 (''BDA Letter'') at 2. *See also* FINRA Letter at 6–10 (noting inconsistent regulatory treatment among electronic and hybrid fixed income trading platforms, as well as potential regulatory gaps, flowing in part from the definitions and guidance adopted in 1998 in Regulation ATS). The commenter stated its belief that it would be beneficial for the Commission to provide guidance that specifically addresses the characteristics of RFQ trading systems and evaluate whether they meet the ''exchange'' definition for purposes of Regulation ATS.

[86] *See infra* Section VIII.C.3.a.i.

[87] *See* Regulation ATS Adopting Release, *supra* note 31, at 70850.

[88] *See supra* Section II.B.2.

[89] *See* Bloomberg Letter at 17–20. This commenter specifically cited RFQs as a new protocol that has helped in discovering less liquid instruments.

[90] *See* SIFMA Letter at 11. The commenter stated its belief that systems that merely act as informational conduits should remain outside the scope of Regulation ATS.

Regulation ATS and the current exchange framework on existing and emerging electronic trading protocols and functionalities that do not meet the existing definition of an ATS or an exchange [91] because such rules are better suited for regulating systems and trading practices in the equity markets.[92] In addition, one commenter stated that there are a variety of trading protocols that have developed within the fixed income market—such as those that are primarily order-driven (such as retail-focused order books) and others that are driven by price requests (such as RFQs)—and that the market continues to innovate.[93] This commenter stated its belief that the Commission should take into account these distinctions and apply a lighter regulatory approach in order to avoid stifling innovation.[94]

The Commission notes that these comments focused on the fixed income market exclusively. However, these comments have aided in the formulation of this proposal for revising the Commission interpretation of the definition of ''exchange,'' and the Commission looks forward to receiving more comments to aid in its deliberations. As a preliminary response to the comment letters summarized in this section, the Commission does not believe that the proposed amendments to Exchange Act Rule 3b–16 would create a one-size-fits-all model, imposing unnecessary intermediation between dealers and their customers,[95] or import concepts from the equity markets onto emerging electronic trading protocols that would damage the market structure in the fixed income markets.[96] Form ATS and Form ATS–N do not impose or favor any specific market structure or manner of trading, and the Commission is proposing to amend Form ATS–N to accommodate the operations of Communication Protocol Systems. Further, the Commission preliminarily does not believe that regulating fixed income systems, or systems for other asset classes of securities, under the exchange regulatory framework, particularly Regulation ATS, would stifle innovation or be biased against less-liquid instruments using an RFQ protocol. Regulation ATS is designed to be flexible enough to accommodate the evolving technology of ATSs and allow for systems to continue to innovate without the regulatory obligations of registered exchanges, which are SROs.[97] In the years since its adoption in 1998, many systems that chose to operate under the Regulation ATS exemption have had varied business models, including offering RFQ protocols as part of their overall ATS services, for trading different types of securities, including, among others, government securities, corporate bonds, municipal securities, NMS stocks, equity securities that are not NMS stocks, private restricted securities, repurchase agreements and reverse repurchase agreements, foreign sovereign debt, and options.

The Commission seeks public comment on all aspects its proposal to amend Exchange Act Rule 3b–16(a), the Communication Protocol Systems that would fall within the definition of ''exchange,'' and the existing exchange regulatory requirements that would apply to a Communication Protocol System.

C. Proposed Amendments to Exchange Act Rule 3b–16

Today, Exchange Act Rule 3b–16 provides that an organization, association, or group of persons meets the definition of ''exchange'' if it doesn't meet one of the exceptions of the rule and it: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of the trade.

The Commission is proposing to amend Exchange Act Rule 3b–16 to, among other things, include non-firm indications of a willingness to buy or sell a security, in addition to orders, within the interpretation, define ''trading interest,'' add ''communication protocols'' as an established method that an organization, association, or group of persons can provide to bring together buyers and sellers of securities, simplify and align the rule text with the statutory definition of exchange under Section 3(a)(1) of the Exchange Act, and add an exclusion under Exchange Act Rule 3b–16(b). Accordingly, the Commission is proposing to amend Exchange Act Rule 3b–16 to provide that an organization, association, or group of persons would be considered to constitute, maintain, or provide an exchange if it is not subject to an exception under Rule 3b–16(b) and it: (1) Brings together buyers and sellers of securities using trading interest; and (2) makes available established, non-discretionary methods (whether by providing a trading facility or communication protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade.

1. Trading Interest; Brings Together Buyers and Sellers

The Commission is proposing to add a definition of the term ''trading interest'' to Exchange Act Rule 3b–16 and amend the rule to replace ''orders'' with ''trading interest.'' The definition of trading interest would allow for clear and consistent application of the revised functional test for ''exchange'' under Rule 3b–16.

Under the proposal, Exchange Act Rule 3b–16(a) would continue to apply to systems that use orders, as that term is currently defined and applied in Rule 3b–16(c), to bring together buyers and sellers because the term ''orders'' would be included in the definition of ''trading interest.'' ''Trading interest,'' as proposed, would include ''orders,'' as the term is defined under Rule 3b–16(c), or any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price.[98] Based on Commission staff experience, generally, trading systems have offered non-firm trading interest that included the symbol and one of the following: Quantity, direction, or price. For example, a message that is sent to system participants for an NMS stock that only identifies the NMS stock symbol and quantity that the participant seeks to trade would be considered trading interest. A message sent by a participant of a corporate bond system to five potential counterparties that only identifies the CUSIP for a bond and an instruction to buy would be considered trading interest, as proposed, because it contains the symbol and direction. If the same initiating participant only provided the symbol and requested a two-sided quote in response, the response would constitute trading interest as it would identify the symbol

[91] *See* ICI Letter at 2, 7. This commenter stated that, for example, tools that facilitate trade-related communications between market participants should not be subject to rules that are better-suited for order book protocols.

[92] *See id.* at 8.

[93] *See* MarketAxess Letter at 2–4.

[94] *See id.*

[95] *See* Bloomberg Letter at 17–20.

[96] *See* ICI Letter at 8.

[97] *See* Regulation ATS Adopting Release, *supra* note 31, at 70846.

[98] In conjunction with adding the defined term ''trading interest'' to Rule 3b–16, the Commission is proposing to add the definition of ''trading interest'' to Rule 300 of Regulation ATS. *See* proposed Rule 300(q). In addition, to encompass persons who transact in trading interest, and not only orders, the Commission is also proposing to change the definition of ''Subscriber'' in Rule 300(b) to include any person submitting, disseminating, or displaying ''trading interest.'' *See* Rule 300(b), as proposed to be revised.

and a price. Indeed, Commission staff has observed that ATSs that offer a negotiation functionality to bring together buyers and sellers offer the use of non-firm trading interest that includes the symbol and one of the following: Quantity, direction, or price. In addition, there are instances where systems offer the use of non-firm trading interest, such as an indication of interest, that includes the symbol and direction but does not explicitly include a quantity or price, which can be inferred from the facts and circumstances accompanying the trading interest.[99] The Commission believes that a system that offers the use of a message that identifies the security and either the quantity, direction, or price would provide sufficient information to bring together buyers and sellers of securities because it allows a market participant to communicate its intent to trade and a reasonable person receiving the information to decide whether to trade or engage in further communications with the sender.[100]

On the other hand, the Commission preliminarily believes that a message that only indicates the security to be traded without more information would not be trading interest and a system that only offers the use of such messages would be unlikely to bring together buyers and sellers and does not warrant the regulatory oversight accompanying classification as an exchange. Nevertheless, if a system is designed to permit an initiating participant to submit a message that only contains a symbol, yet a responding participant can submit a message that contains a symbol and either quantity, direction, or price that the initiator can accept, the message by the responding participant and acceptance by the initiator would be trading interest because each of these contain the symbol and at least direction, size, or price. As proposed, the revised criteria of Exchange Act Rule 3b–16(a) that include ''trading interest,'' as defined herein, would capture the vast majority of systems that bring together buyers and sellers to agree to the terms of a trade despite not including systems where solely the security is identified. If adopted, however, the Commission would continue to monitor market developments to ascertain whether such systems may warrant further regulation in the future.

The Commission is also proposing to amend Rule 3b–16(a)(1) to change the reference to a system that ''brings together the orders'' to ''brings together buyers and sellers of securities using trading interest.'' Systems that use non-firm trading interest allow participants to communicate their trading intentions, either on a bilateral or multilateral basis, to negotiate a trade. Unlike orders, non-firm trading interest typically does not interact with other non-firm trading interest without further action by the potential counterparties. Rather, the potential counterparties submitting non-firm trading interest interact with each other through the use of communication protocols. To provide for the use of both firm order interaction and participants' interaction through non-firm trading interest, the Commission is proposing to amend Rule 3b–16(a) to replace ''brings together orders'' with ''brings together buyers and sellers of securities using trading interest.'' The phrase ''brings together buyers and sellers of securities using trading interest'' still captures systems that use orders. The Commission is not proposing to change the meaning of ''to bring together'' as defined in the Regulation ATS Adopting Release [101] nor is the Commission proposing to exclude from Rule 3b–16(a) systems that use orders to bring together buyers and sellers of securities—such systems would still be subject to Rule 3b–16.

The Commission is proposing to amend Exchange Act Rule 3b–16(a)(2) to simplify the rule text and align the rule text with the proposed changes to Rule 3b–16(a)(1). Specifically, the Commission is proposing to replace ''under which such orders interact with each other and the buyers and sellers entering such orders agree to the terms of a trade'' with ''under which buyers and sellers can interact and agree to the terms of a trade.'' As explained above, because the Commission is proposing to amend Rule 3b–16(a) to include trading interest, and is no longer limiting the application of the rule to orders, the focus on ''interaction'' should be between buyers and sellers rather than orders. For similar reasons, the Commission is proposing to delete from the rule text the phrase ''the buyers and sellers entering such orders.'' This proposed change is designed to simplify the rule text and remove the reference to orders because the proposed amendments to Rule 3b–16(a) also include non-firm trading interest in addition to orders.

2. Multiple; Exclusion for Issuer Systems

The Commission is proposing to remove the reference to securities of ''multiple'' buyers and sellers from Exchange Act Rule 3b–16(a)(1) and is proposing to codify in Rule 3b–16(b)(3) an example the Commission provided in the Regulation ATS Adopting Release for systems that allow issuers to sell their own securities to investors. These proposed changes are not intended to change the existing scope of Rule 3b–16(a) but only to clarify its application.

The term ''multiple'' was added to Rule 3b–16(a) to help reinforce that single counterparty systems were not included in the definition of ''exchange.'' [102] These systems primarily included systems used by issuers to sell their own securities and systems used by market makers registered with an SRO, which are currently specifically excluded from Rule 3b–16(a) under Rule 3b–16(b)(2). The Commission believes that the term ''multiple'' could be misconstrued to mean that RFQ systems, for example, do not meet the criteria of Rule 3b–16(a) because a *transaction* request typically involves one buyer and multiple sellers or one seller and multiple buyers.[103]

Under current Rule 3b–16(a), whether a system meets the ''multiple'' prong depends on whether the system, when viewed in its entirety, includes more than one buyer and more than one seller and is not determined on a transaction-by-transaction basis. A system, such as an RFQ system, that is designed to provide the ability of more than one buyer to request quotes from more than one seller in securities at the same or different times would meet the ''multiple'' prong of Rule 3b–16(a) because such systems do not include a single counterparty.[104] Because RFQ systems have more than one buyer and more than one seller, such systems do not have a single counterparty and thus

[99] *See* Regulation ATS Adopting Release, *supra* note 31, at 70850.

[100] A system that uses trading interest to bring together buyers and sellers would not meet the definition of ''exchange,'' however, unless it also met all the elements of Rule 3b–16(a), including the element ''makes available established, non-discretionary methods (whether by providing a trading facility or communication protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade.''

[101] *See id.* at 70849.

[102] *See id.*

[103] One commenter on the 2020 Proposal and Concept Release stated its belief that RFQ platforms do not meet the criteria of Rule 3b–16 because such platforms do not offer ''multiple-to-multiple'' order interaction among participants and that the RFQ platforms instead facilitate trading between an individual market participant (requester) and potential liquidity providers (responders). *See* ICI Letter at 2, 7.

[104] The mere interpositioning of a designated counterparty to provide for the anonymity of counterparties to a trade or for settlement purposes after the purchasing and selling counterparties to a trade have been matched would not, by itself, mean the system does not have multiple buyers and sellers. *See* Regulation ATS Adopting Release, *supra* note 31, at 70849.

would meet the standard of ''multiple buyers and sellers'' under Rule 3b–16(a)(1). Nevertheless, removing the term ''multiple'' would mitigate confusion and the potential to misconstrue the application of Rule 3b–16(a) to systems with non-firm trading interest, including RFQ systems, and aligns the rule with the statutory definition of ''exchange.'' [105]

The Commission is proposing to amend Rule 3b–16(b) to add an exclusion from Rule 3b–16(a) for systems that allow an issuer to sell its securities to investors. The Commission stated in the Regulation ATS Adopting Release that systems for issuers to sell their own securities would not fall within Rule 3b–16(a) because such systems have a single counterparty that is selling its securities.[106] The Commission continues to believe that such systems do not meet the criteria of Rule 3b–16(a) because the systems do not bring together multiple buyers and multiple sellers. Given the proposal to remove the term ''multiple'' from Rule 3b–16(a)(1), adding the exclusion for issuer systems would clarify that such systems do not fall within the criteria of Rule 3b–16(a).

3. Established Methods; Communication Protocols

The Commission is proposing to amend Rule 3b–16(a)(2) to replace ''uses established, non-discretionary methods'' with the phrase ''makes available established, non-discretionary methods.'' The proposed change to use the word ''makes available'' rather than ''uses'' is designed to capture established, non-discretionary methods that an organization, association, or group of persons may provide, whether directly or indirectly, for buyers and sellers to interact and agree upon terms of a trade. In contrast to the term ''uses,'' the Commission believes the term ''makes available'' would be applicable to Communication Protocol Systems because such systems take a more passive role in providing to their participants the means and protocols to interact, negotiate, and come to an agreement.

The term ''makes available'' is also intended to make clear that, in the event that a party other than the organization, association, or group of persons performs a function of the exchange, the function performed by that party would still be captured for purposes of determining the scope of the exchange under Exchange Act Rule 3b–16. In the Regulation ATS Adopting Release, the Commission stated that it will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility).[107] The Commission has further recognized how a system may consist of various functionalities, mechanisms, or protocols that operate collectively to bring together the orders for securities of multiple buyers and sellers using non-discretionary methods under the criteria of Rule 3b–16(a), and how, in some circumstances, these various functionalities, mechanisms, or protocols may be offered or performed by another business unit of the registered broker-dealer or government securities broker or government securities dealer that operates the ATS (''broker-dealer operator'') or by a separate entity.[108] These principles equally apply to an organization, association, or group of persons that arranges with another party to provide, for example, a trading facility or communication protocols, or parts thereof, to bring together buyers and sellers and perform a function of a system under Rule 3b–16. Using the term ''makes available'' will help ensure that the investor protection and fair and orderly markets provisions of the exchange regulatory framework apply to all the activities that consist of the system that meets the criteria of Rule 3b–16(a), notwithstanding whether those activities are performed by a party other than the organization that is providing the market place.[109]

The Commission is not proposing to delete the term ''non-discretionary'' from Rule 3b–16(a)(2). The term ''non-discretionary'' was added to Rule 3b–16(a)(2) to modify ''methods'' to distinguish the activities of an exchange from the activities of a broker-dealer.[110] As discussed in the Regulation ATS Adopting Release, broker-dealers exercise control, judgement, or discretion over their customers' orders or trading interests [111] while an exchange operates pursuant to programmed procedures or set rules and does not exercise discretion over orders or trading interest entered into the system.[112] The Commission continues to believe that the distinction between an exchange and a broker-dealer explained in the Regulation ATS Adopting Release is appropriate and the Commission is not proposing to amend Exchange Act Rule 3b–16(a) to include activities of broker-dealers within the definition of ''exchange.'' [113]

The term ''non-discretionary'' should not be misconstrued to mean that a system does not meet the definition of exchange if it permits buyers or sellers using the system to exercise discretion with regard to the use of the system. Under current Rule 3b–16(a)(2), the phrase ''uses established, non-discretionary methods'' applies to the organization, association, or group of persons that provides the means—the trading facility or rules—under which orders interact. Thus, an organization that meets the definition of ''exchange'' does not exercise any discretion in the matching of buyers and sellers or their orders and buyers and sellers participating on an exchange can use their own discretion in finding and selecting a counterparty.[114] The phrase

[105] The use of plural terms in ''buyers and sellers'' in Rule 3b–16(a) and ''purchasers and sellers'' (emphasis added) in the statutory definition of ''exchange'' makes sufficiently clear that an exchange need only have more than one buyer and more than one seller participating on the system to meet this prong.

[106] *See supra* note 102 and accompanying text.

[107] *See* Regulation ATS Adopting Release, *supra* note 31, at 70852.

[108] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38844 (citing Regulation ATS Adopting Release, 63 FR 70852).

[109] Depending on the activities of the persons involved with the market place, a group of persons, who may each perform a part of the 3b–16 system, can together provide, constitute, or maintain a market place or facilities for bringing together purchasers and sellers of securities and together meet the definition of exchange. In such a case, the group of persons would have the regulatory responsibility for the exchange.

[110] *See* Regulation ATS Adopting Release, *supra* note 31, at 70863.

[111] *See id.* at 70851.

[112] *See id.* at 70850.

[113] If a system meets the criteria of Exchange Act Rule 3b–16(a) but includes in that system the ability of the system operator to apply its discretion for handling trading interest, these activities employing discretion by the system operator would be included in the system that meets the criteria of Rule 3b–16(a) and be subject to Federal securities laws and rules applicable to a registered exchange or ATS (including, for example, requirements to provide disclosures about the system operator's activities on Form ATS or ATS–N and, if the ATS is subject to the Fair Access Rule, include in its written standards why the activities of the system operator that result in the different treatment of subscribers are fair and not unreasonably discriminatory).

[114] One commenter on the 2020 Proposal and Concept Release stated their belief that ''unlike an ATS on which trading takes place on a non-discretionary basis, trading discretion is a defining feature of these protocols; a requesting participant can choose the number and identity of participants that will receive the RFQ, while participants who receive an RFQ can choose whether to respond.'' *See* ICI Letter at 7. *See also* Bloomberg Letter at 23 (describing that an RFQ ''consists of discretionary directed order communication network messaging'' and stating its belief that such messaging is not an ATS function because RFQs lack a non-discretionary commitment to trade) and MarketAxess Letter at n.2 (stating its belief that an RFQ trading requestor's trading discretion puts the protocol outside the requirement that the platform use ''established, non-discretionary methods under which such orders interact with each other''). The ''established, non-discretionary methods'' element

''established, non-discretionary methods'' continues to convey that the system provider is providing the trading facility or communication protocols or setting rules and is not applying its discretion in matching counterparties on the system.[115]

The Commission is proposing to amend Rule 3b–16(a)(2) to add ''communication protocols'' as an established method that an organization, association, or group of persons can provide to bring together buyers and sellers of securities. Systems that bring together buyers and sellers of securities may function as exchange market places of securities without orders or a trading facility for orders to interact. In the Commission's experience, communication protocols, which can be applied to various technologies and connectivity, generally use non-firm trading interest as opposed to orders to prompt and guide buyers and sellers to communicate, negotiate, and agree to the terms of the trade. For example, if an entity makes available a chat feature, which requires certain information to be included in a chat message (*e.g.,* price, quantity) and sets parameters and structure designed for participants to communicate about buying or selling securities, the system would have established communication protocols.

While Communication Protocol Systems may not match counterparties' trading interest, buyers and sellers using these can be brought together to interact, either on a bilateral or multilateral basis, and agree upon the terms of the trade. Protocols that a system offers may take many forms and could include: Setting minimum criteria for what messages must contain; setting time periods under which buyers and sellers must respond to messages; restricting the number of persons a message can be sent to; limiting the types of securities about which buyers and sellers can communicate; setting minimums on the size of the trading interest to be negotiated; or organizing the presentation of trading interest, whether firm or non-firm, to participants. These examples are not exhaustive, and the determination of whether the system meets Rule 3b–16(a)(2) would depend on the particular facts and circumstances of each system. Nevertheless, as proposed, the Commission would take an expansive view of what would constitute ''communication protocols'' under this prong of Rule 3b–16(a).[116]

The Commission preliminarily believes that certain systems would not fall within the criteria of Exchange Act Rule 3b–16(a), as proposed to be amended, because the organization, association, or group of persons would not be considered to be providing a trading facility or communication protocol and therefore would not be considered to be making available established, non-discretionary methods under Rule 3b–16(a)(2).[117] The Commission continues to believe that systems that passively display trading interest, such as systems referred to in the industry as bulletin boards, but do not provide means for buyers and sellers to contact each other and agree to the terms of the trade on the system would not be encompassed by Rule 3b–16(a) as proposed to be amended.[118] For example, the Commission does not believe that a system that unilaterally displays trading interest without offering a trading facility or communication protocols to bring together buyers and sellers would be considered to be making available established, non-discretionary methods.[119] In the Regulation ATS Adopting Release, the Commission stated that ''[u]nless a system also establishes rules and operates a trading facility under which subscribers can agree to the terms of their trades, the system will not be included within Rule 3b–16 even if it brings together 'orders.' '' [120] These systems may display trading interest to potential buyers and sellers, but the system provider is not making available established methods for buyers and sellers to interact and agree upon terms of a trade. If adopted, however, the Commission would continue to monitor market developments to ascertain whether such systems may warrant further regulation in the future.

Similarly, a system that displays trading interest and provides only connectivity among participants without providing a trading facility to match orders or providing protocols for participants to communicate and interact would not meet the criteria of Rule 3b–16(a) because such system would not be considered to be making available established, non-discretionary methods. For example, systems that only provide general connectivity for persons to communicate without protocols, such as utilities or electronic web chat providers, would not fall within the communication protocols prong of the proposed rule because such providers are not specifically designed

of Rule 3b–16(a)(2) pertains to the discretion applied by the system provider to bring together buyers and sellers and not discretion that participants may apply. For example, a system provider that matches buyers and sellers using its judgement or discretion would not be using established, non-discretionary methods. As the Commission stated in the Regulation ATS Adopting Release, where customers of a broker-dealer exercise control over their own orders in a trading system operated by the broker-dealer, that broker-dealer is unlikely to be viewed as using discretionary methods in handling the order. *See* Regulation ATS Adopting Release, *supra* note 31, at 70851.

[115] *See id.* (describing that, for example, the Commission does not believe that block trading desks, which generally retain some discretion in determining how to execute a customer's order, and frequently commit capital to satisfy their customers' needs, use established, non-discretionary methods).

[116] One commenter suggested a litmus test to assist the Commission in determining whether a fixed-income trading platform for corporate bonds and municipal securities meets the criteria that warrant registration as an exchange or ATS. According to the commenter, the most relevant criteria were: Whether the system provides multilateral trading, whether the technology provider has any influence on picking the counterparties, whether the system enables any sharing of real-time information across multiple counterparties, whether the system provider has any access to real-time information, and whether the transactions happen on the technology platform. *See* letter from Vijay Kedia, President and CEO, FlexTrade Systems, dated March 1, 2021 (''FlexTrade Systems Letter'') at 2. As discussed above, the Commission believes that conditions have changed whereby systems that offer the use trading interest and protocols to bring together buyers and sellers of securities perform an exchange market place function similar to systems that offer the use of orders and trading facilities. As proposed, a Communication Protocol System can still meet the criteria of Exchange Act Rule 3b–16 even if it has no role in matching counterparties nor displays trading interest. In addition, neither the current rule nor the proposed amendments require that, for a system to be an exchange, an execution occur on the system; rather, that the buyers and sellers agree to the terms of the trade on the system is sufficient. *See* Regulation ATS Adopting Release, *supra* note 31, at 70852 (stating ''whether or not the actual execution of the order takes place on the system is not a determining factor of whether the system falls under Rule 3b–16''). Also, applying some of the criteria that the commenter suggested (whether system provider have any access to real-time information; whether the transactions happen on the technology platform) could result in the exclusion of certain RFQ platforms from the definition of exchange.

[117] To the extent that a system is currently operating consistently with the circumstances described in a staff no-action letter, a system that falls within the scope of Rule 3b–16(a) and seeks to rely on the ATS exemption would need to register as a broker-dealer to comply with the broker-dealer registration requirement under Regulation ATS, regardless of any prior staff statement. Upon the adoption of any final rule, some letters and other staff statements, or portions thereof, may be moot, superseded, or otherwise inconsistent with the final rule and, therefore, would be withdrawn or modified.

[118] *See* Regulation ATS Adopting Release, *supra* note 31, at 70850. *See also* FINRA Letter at 9–10 (requesting the Commission provide additional guidance on the regulatory classification of bulletin boards).

[119] *See* SIFMA Letter at 11 (stating that systems that merely act as informational conduits should remain outside the scope of Regulation ATS); FlexTrade Systems Letter at 2–4 (stating that software vendors that provide functionality for displaying prices do not meet the definition of an exchange).

[120] *See* Regulation ATS Adopting Release, *supra* note 31, at 70850.

to bring together buyers and seller of securities or provide procedures or parameters for buyers and sellers for securities to interact. To the extent that such systems are designed for securities and provide communication protocols for buyers and sellers to interact and agree to the terms of a trade, such systems would fall within the criteria of Exchange Act Rule 3b–16(a) as proposed to be revised.

D. Exchange Registration or ATS Exemption for Communication Protocol Systems Under the Proposed Rules

The proposed amendments to Exchange Act Rule 3b–16(a) would scope Communication Protocol Systems into the definition of ''exchange,'' in which case, the systems may decide between registering as a national securities exchange or registering as a broker-dealer and complying with Regulation ATS. The Commission believes that many Communication Protocol Systems would likely choose to be regulated as an ATS because of the lighter regulatory requirements imposed on them, as compared to the regulatory requirements of registered exchanges, which are SROs. Unlike a national securities exchange, an ATS can trade any type of security and its users are not limited to broker-dealers. In addition, an ATS is not an SRO, is not subject to Section 6 of the Exchange Act, and does not require Commission approval for its activities. Complying with Regulation ATS would therefore allow Communication Protocol Systems more flexibility in the operation of their business than registering as an exchange.[121]

Further, many Communication Protocol Systems make available for trading fixed income securities that are only traded over-the-counter and are not typically registered and approved for listing on an exchange.[122] Unless a national securities exchange receives an exemption to trade unregistered debt securities,[123] it may only list and trade registered debt securities, whereas Communication Protocol Systems need not receive such an exemption to trade unregistered debt securities. Notwithstanding, the Commission discusses the regulatory requirements for both regulatory alternatives below. The Commission is not proposing to make changes to the regulatory structure for exchanges or the requirements for national securities exchanges. The proposed changes to the regulatory requirements under Regulation ATS are discussed in more detail below.[124]

1. National Securities Exchange Registration

A Communication Protocol System that chooses to register as a national securities exchange would be required to do so pursuant to Sections 5 and 6 of the Exchange Act. A national securities exchange is an SRO and must set standards of conduct for its members, administer examinations for compliance with these standards, coordinate with other SROs with respect to the dissemination of consolidated market data, and generally take responsibility for enforcing its own rules and the provisions of the Exchange Act and the rules and regulations thereunder. Before a national securities exchange may commence operations, the Commission must approve its application for registration filed on Form 1.[125] Section 6(b) of the Exchange Act requires, among other things, that the national securities exchange be so organized and have the capacity to carry out the purposes of the Exchange Act and to comply and enforce compliance by its members, and persons associated with its members, with the Federal securities laws and the rules of the exchange.[126] Pursuant to Section 6 of the Exchange Act, national securities exchanges must establish rules that generally: (1) Are designed to prevent fraud and manipulation, promote just and equitable principles of trade, and protect investors and the public interest; (2) provide for the equitable allocation of reasonable fees; (3) do not permit unfair discrimination; (4) do not impose any unnecessary or inappropriate burden on competition; and (5) with limited exceptions, allow any broker-dealer to become a member.[127]

After approval of its application for registration, a national securities exchange must file with the Commission any proposed changes to its rules.[128] The initial application on Form 1, amendments thereto, and filings for proposed rule changes, in combination, publicly disclose important information about national securities exchanges, such as trading services and fees. The Commission's order approving the application is also public. The Commission oversees the exchanges under the Exchange Act through, among other things, its examination authority under Section 17, its enforcement authority under Sections 19(h)(1) and 21C, its authority to approve and disapprove rules under Section 19(b), and its rulemaking authority under various Exchange Act provisions. Under the Exchange Act, securities traded on a national securities exchange must be registered with the Commission and approved for listing on an exchange. National securities exchanges can only have broker-dealer members. As an SRO, a national securities exchange enjoys certain unique benefits, such as limited immunity from private liability with respect to its regulatory functions and the ability to receive consolidated revenue under the national market system plans for equity market data (*i.e.,* Consolidated Tape Association (CTA)/ Consolidated Quotation (CQ) and Unlisted Trading Privilege (UTP)),[129] among others.

2. Regulation ATS Exemption; Broker-Dealer Registration

A Communication Protocol System may choose to operate as an ATS pursuant to Regulation ATS, which exempts an ATS from the definition of ''exchange'' on the condition that the ATS is in compliance with the requirements of Regulation ATS. An ATS that fails to comply with the requirements of Regulation ATS would

[121] ATSs have more flexibility in the operation of their business than exchanges insofar as ATSs are not subject to Section 6 of the Exchange Act and are not required to comply with the statutory standards with respect to unfair discrimination, burdens on competition, and the equitable allocation of reasonable fees.

[122] Section 12(a) of the Exchange Act makes it unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration statement has been filed with the Commission and is in effect as to such security for such exchange in accordance with the provisions of the Exchange Act and the rules and regulations thereunder. 15 U.S.C. 78l(a). Section 12(b) of the Exchange Act, 15 U.S.C. 78l(b), contains procedures for the registration of securities on a national securities exchange. Section 12(a) does not apply to an exchange that the Commission has exempted from registration as a national securities exchange. *See, e.g.,* Securities Exchange Act Release No. 28899 (February 20, 1991), 56 FR 8377 (February 29, 1991). *See also* Regulation ATS Adopting Release, *supra* note 31, at 70886.

[123] *See, e.g.,* Securities Exchange Act Release No. 54767 (November 16, 2006), 71 FR 67680 (November 22, 2006) (SR–NYSE–2004–69) (issuing exemption permitting NYSE to trade unregistered debt securities on its bonds platform, now known as NYSE Bonds).

[124] *See infra* Section III.B.2 (discussing proposed changes to Rule 301(b)(1) of Regulation ATS), Section IV (discussing proposed changes to Rule 304 and Form ATS–N), Section V.A (discussing proposed changes to Rule 301(b)(5) and 301(b)(6)), and Section V.C (discussing proposed changes to Rule 301(b)(2)(vii)).

[125] *See* 15 U.S.C. 78f.

[126] *See* Section 6(b)(1) of the Exchange Act, 15 U.S.C. 78f(b)(1). The Commission must also find that the national securities exchange has rules that meet certain criteria. *See generally* Exchange Act Section 6(b)(2) through (10), 15 U.S.C. 78f(b)(2) through (10).

[127] *See* Section 6(b) of the Exchange Act.

[128] *See generally* Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b).

[129] Details and the history of each plan can be found at *https://www.ctaplan.com/plans;* and *https://www.utpplan.com.*

no longer qualify for the ATS exemption and thus risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act.

To operate under the exemption, an ATS must register as a broker-dealer under Exchange Act Section 15 or as a government securities broker or government securities dealer under Exchange Act Section 15C(a)(1)(A),[130] and comply with the filing and conduct obligations associated with being a registered broker-dealer, including membership in an SRO, such as FINRA,[131] and compliance with the SRO's rules.[132] Requiring Communication Protocol Systems to register as broker-dealers and be a member of an SRO would ensure that they are subject to SRO examination and market surveillance, trade reporting obligations, and certain investor protection rules. Broker-dealer registration provides important investor protections under the Federal securities laws and FINRA rules, such as: (1) Various disclosure and supervision obligations; (2) anti-money laundering obligations (including suspicious activity reporting); (3) FINRA over-the-counter (OTC) trade reporting requirements, including requirements to maintain membership in, or maintain an effective clearing arrangement with a participant of, a clearing agency registered under the Exchange Act; and (4) Commission examinations and FINRA examinations and surveillance of members and markets that its members operate.

In addition, ATSs are subject to certain reporting and disclosure requirements, as applicable. ATSs other than NMS Stock ATSs or, as proposed, Government Securities ATSs, would be required, pursuant to Rule 301(b)(2) of Regulation ATS, to file an initial operation report with the Commission on Form ATS [133] at least 20 days before commencing operations or, in the case of Newly Designated ATSs,[134] no later than 30 calendar days after the effective date of any final rule.[135] Form ATS provides the Commission with the opportunity to identify problems that might impact investors before the system begins to operate.[136] Unlike a Form 1 filed by a national securities exchange, a Form ATS is not approved by the Commission.[137] Also unlike a Form 1 application, a Form ATS is deemed confidential when filed.[138] Requiring Communication Protocol Systems to file Form ATS and amendments thereto will help the Commission monitor and oversee such ATSs' operations.

NMS Stock ATSs and, as proposed, Government Securities ATSs, would be subject to enhanced filing and disclosure requirements under Rule 304 of Regulation ATS. NMS Stock ATSs or Government Securities ATSs would, in lieu of Form ATS, be required to file public Form ATS–N in EDGAR, in which they must disclose detailed information about the manner in which their trading systems operate and the potential for conflicts of interest and information leakage.[139] Form ATS–N is subject to a Commission review and effectiveness process.[140] An NMS Stock ATS or Government Securities ATS would not be permitted to operate pursuant to the Rule 3a1–1(a)(2) exemption until its Form ATS–N has become effective.[141] In addition, the ATS would be required to file amendments on Form ATS–N to provide notice of changes to its operations and broker-dealer and affiliate relationships.[142] Form ATS–N and the Commission review and effectiveness process, which is described in detail below,[143] would provide operational transparency and regulatory oversight of Communication Protocol Systems that are NMS Stock ATSs or Government Securities ATSs.

In addition, all ATSs are required to periodically, by paper submission, report certain information about transactions in the ATS and information about certain activities on Form ATS–R within 30 calendar days after the end of each calendar quarter in which the market has operated, pursuant to Rule 301(b)(9).[144] Form ATS–R requires quarterly volume information for specified categories of securities, as well as a list of all securities traded in the ATS during the quarter and a list of all subscribers that were participants during the quarter,[145] and for ATSs subject to the Fair Access Rule to provide certain additional

[130] The Commission is proposing to amend Rule 301(b)(1) to allow an ATS to register as a government securities broker or government securities dealer under Exchange Act Section 15C(a)(1)(A). *See infra* notes 272–278 and accompanying text.

[131] *See* Section 15(b)(8) of the Exchange Act; 15 U.S.C. 78*o*(b)(8).

[132] *See* Regulation ATS Adopting Release, *supra* note 31, at 70903.

[133] Form ATS and the Form ATS Instructions are *available at https://www.sec.gov/about/forms/formats.pdf.* Form ATS would require, among other things, that the ATS (other than a Government Securities ATS or NMS Stock ATS) provide information about: Classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing entry of trading interest and execution; and trade reporting, clearance and settlement of trades on the ATS. *See infra* Section V.B (describing proposed changes to Form ATS). Regulation ATS provides that a report on Form ATS or Form ATS–R shall be considered filed upon receipt by the Division of Trading and Markets, at the Commission's principal office in Washington, DC (*i.e.,* in paper form), and that information filed by an ATS on Form ATS is deemed confidential when filed. *See* 17 CFR 242.301(b)(2)(vii). *See also infra* Section V.C.

[134] ''Newly Designated ATSs'' would be defined as ATSs operating as of the effective date of any final rule that meet the criteria under Rule 3b–16(a) as of the effective date of any final rule but did not meet the criteria under Rule 3b–16(a) in effect prior to the effective date of any final rule. *See* Rule 300(r).

[135] *See infra* note 180 and accompanying text. The Commission is also proposing changes to Rule 301(b)(2)(i) to clarify that the requirement to file Form ATS does not apply to Covered ATSs or Covered Newly Designated ATSs. *See* proposed Rule 301(b)(2)(i). *See also* proposed Rule 300(s) (defining ''Covered Newly Designated ATS'').

[136] *See* Regulation ATS Adopting Release, *supra* note 31, at 70864.

[137] Form ATS provides the Commission with notice about an ATS's operations prior to commencing operations. An ATS is also required to notify the Commission of any changes in its operations by filing an amendment to its initial operation report. There are three types of amendments to an initial operation report. First, if any material change is made to its operations, the ATS must file an amendment on Form ATS at least 20 calendar days before implementing such change. *See* 17 CFR 242.301(b)(2)(ii). A ''material change,'' includes, but is not limited to, any change to the operating platform, the types of securities traded, or the types of subscribers. In addition, the Commission has stated that ATSs implicitly make materiality decisions in determining when to notify their subscribers of changes. *See* Regulation ATS Adopting Release, *supra* note 31, at 70864. Second, if any information contained in the initial operation report becomes inaccurate for any reason and has not been previously reported to the Commission as an amendment on Form ATS, the ATS must file an amendment on Form ATS correcting the information within 30 calendar days after the end of the calendar quarter in which the system has operated. *See* 17 CFR 242.301(b)(2)(iii). Third, an ATS must promptly file an amendment on Form ATS correcting information that it previously reported on Form ATS after discovery that any information was inaccurate when filed. *See* 17 CFR 242.301(b)(2)(iv). An ATS is required to promptly file a cessation of operations on Form ATS. *See* 17 CFR 242.301(b)(2)(v).

[138] *See* 17 CFR 242.301(b)(2)(vii); Form ATS at 3, General Instructions A.7.

[139] *See* proposed changes to 17 CFR 242.304.

[140] *See infra* Section IV.A.

[141] *See* Rule 304(a)(1)(i).

[142] *See infra* Section IV.A.

[143] *See infra* Section IV.

[144] *See* 17 CFR 242.301(b)(9)(i). Form ATS–R and the Form ATS–R Instructions are *available at https://www.sec.gov/about/forms/formats-r.pdf. See also* Section V.B (describing proposed changes to Form ATS–R).

[145] *See* Form ATS–R at 4, Items 1 and 2 (describing the requirements for Exhibit A and Exhibit B of Form ATS–R). ATSs must also complete and file Form ATS–R within 10 calendar days after ceasing to operate. *See* 17 CFR 242.301(b)(9)(ii); Form ATS–R at 2, General Instructions A.2 to Form ATS–R.

information.[146] Like Form ATS, Rule 301(b)(2)(vii) and the instructions to Form ATS–R provide that Form ATS–R is deemed confidential when filed.[147] The information reported on Form ATS–R by Communication Protocol Systems would permit the Commission to monitor the trading on these ATSs for compliance with the Exchange Act and applicable rules thereunder and enforce the Fair Access Rule.[148]

NMS Stock ATSs must comply with certain order display and execution access obligations [149] under Rule 301(b)(3) if the ATS displays subscriber orders in an NMS stock to any person (other than an employee of the ATS) and meets certain volume requirements.[150] These order display and execution access obligations were adopted by the Commission with the expectation they would promote additional market integration and further discourage two-tier markets when trading in an NMS stock on an ATS reaches a certain level.[151] In addition, an NMS Stock ATS must not charge any fee to broker-dealers that access the ATS through a national securities exchange or national securities association that is inconsistent with the equivalent access to the NMS Stock ATS that is required under Rule 301(b)(3)(iii).[152] This requirement is designed to promote equal access to ATSs.

As discussed in more detail below,[153] ATSs are required to comply with the Fair Access Rule [154] under Rule 301(b)(5) if the ATS meets volume thresholds in NMS stocks, equity securities that are not NMS stocks and for which transactions are reported to an SRO, municipal securities, or corporate debt securities.[155] The Commission is proposing to apply the requirements of the Fair Access Rule to trading of U.S. Treasury Securities and Agency Securities on ATSs.[156]

Additionally, under Rule 301(b)(6) (''Capacity, Integrity, and Security Rule''), an ATS that trades only municipal securities or corporate fixed income debt with 20% or more of the average daily volume traded in the U.S. during at least four of the preceding six calendar months would be required to comply with capacity, integrity, and security standards [157] with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison.[158] Information provided under the Capacity, Integrity, and Security Rule would enable the Commission staff to better understand the operation of certain Communication Protocol Systems and to identify potential problems and trends that may require attention.

NMS Stock ATSs, ATSs that trade non-NMS equity securities that are reported to an SRO, and Government Securities ATSs that meet certain trading thresholds would be subject to Regulation SCI. Regulation SCI superseded and replaced Rule 301(b)(6) requirements with regard to ATSs that trade NMS stocks and non-NMS stocks.[159] The Commission is proposing to apply Regulation SCI to Government Securities ATSs, as discussed below.[160] Regulation SCI is designed to help address the technological vulnerabilities, and improve the Commission's oversight of the core technology of key entities.

All ATSs, regardless of the volume traded on their systems, are required, pursuant to Rule 301(b)(7),[161] to permit the examination and inspection of their premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by the Commission or by an SRO of which such subscriber is a member. Because an ATS subscriber to whom the Commission's inspection authority may not extend could use the ATS to manipulate the market in a security, the requirement is designed to require that ATSs cooperate in all inspections, examinations, and investigations.

ATSs are also required, pursuant to Rule 301(b)(8),[162] to make and keep current the records specified in Rule 302 of Regulation ATS [163] and preserve

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[146] Form ATS–R also requires an ATS that is subject to the fair access obligations under Rule 301(b)(5) of Regulation ATS to provide a list of all persons granted, denied, or limited access to the ATS during the period covered by the ATS–R and designate for each person each of the following: Whether the person was granted, denied, or limited access; the date the ATS took such action; the effective date of such action; and the nature of any denial or limitation of access. *See* Form ATS–R at 6, Item 7 (explaining requirements for Exhibit C).

[147] *See* 17 CFR 242.301(b)(2)(vii); Form ATS–R at 2, General Instruction A.7.

[148] *See* Regulation ATS Adopting Release, *supra* note 31, at 70874 and 70878.

[149] An ATS that displays orders and meets the volume requirements must provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the ATS, for inclusion in the quotation data made available by the national securities exchange or national securities association pursuant to Rule 602 under Regulation NMS. *See* 17 CFR 242.301(b)(3)(ii). With respect to any such displayed order, the ATS must provide to any broker-dealer that has access to the national securities exchange or national securities association to which the ATS provides the prices and sizes of displayed orders pursuant to Rule 301(b)(3)(ii), the ability to effect a transaction with such orders that is equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and at the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer. *See* 17 CFR 242.301(b)(3)(iii).

[150] An ATS that displays subscriber orders in an NMS stock must comply with Rule 301(b)(3) if, during at least four of the preceding six calendar months, it had an average daily trading volume of 5% or more of the aggregate average daily share volume for that NMS stock, as reported by an effective transaction reporting plan. *See* 17 CFR 242.301(b)(3)(i).

[151] *See* Regulation ATS Adopting Release, *supra* note 31, at 70867.

[152] *See* 17 CFR 242.301(b)(4). In addition, if the national securities exchange or national securities association to which an ATS provides the prices and sizes of orders under Rules 301(b)(3)(ii) and (iii) establishes rules designed to assure consistency with standards for access to quotations displayed on such national securities exchange, or the market operated by such national securities association, the ATS shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules. *See id.*

[153] *See infra* Section III.B.4 and Section V.A.

[154] An ATS subject to the Fair Access Rule, as proposed to be revised, must: Establish and apply reasonable written standards for granting, limiting, and denying access to the services of the ATS; make and keep records of all grants of access including, for all participants, the reasons for granting such access, and all denials or limitations of access and reasons, for each applicant and participant, for denying or limiting access; and report on Form ATS–R a list of persons granted, denied, and limited access to the ATS. *See infra* Section V.A.

[155] *See* 17 CFR 242.301(b)(5).

[156] *See infra* Section III.B.4.

[157] An ATS that meets the volume requirements must, with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, establish reasonable current and future capacity estimates; conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner; develop and implement reasonable procedures to review and keep current its system development and testing methodology; review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; establish adequate contingency and disaster recovery plans; on an annual basis, perform an independent review, in accordance with established audit procedures and standards, of the ATS's controls for ensuring that the above requirements are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and promptly notify the Commission and its staff of material systems outages and significant systems changes. *See* 17 CFR 242.301(b)(6)(ii).

[158] *See* 17 CFR 242.301(b)(6)(i).

[159] Regulation SCI does not apply to ATSs that trade only municipal securities or corporate debt securities. *See infra* notes 351–356 and accompanying text. *See also* Regulation SCI Adopting Release, *supra* note 3, at 72262.

[160] *See infra* Section III.C.

[161] *See* 17 CFR 242.301(b)(7).

[162] *See* 17 CFR 242.301(b)(8).

[163] *See* 17 CFR 242.302. Rule 302 requires all ATSs to make and keep current certain records,

the records specified in 17 CFR 242.303.[164] The Commission is proposing to amend Rule 302 of Regulation ATS to require recordkeeping related to ''trading interest.'' Rule 302 requires that an ATS shall make and keep certain records, which the rule enumerates. Communication Protocol Systems that choose to comply with Regulation ATS would be required to keep the records enumerated in Rule 302. The Commission is proposing to revise certain of these enumerated records that relate to ''orders'' to require such records related to ''trading interest,'' which would include both firm orders and non-firm trading interest.[165] This would include time-sequenced records of trading interest information in the ATS.[166] The recordkeeping requirements would require Communication Protocol Systems to make and keep certain records for an audit trail of trading activity that would allow the Commission to detect and investigate potential market irregularities, examine whether the ATS is in compliance with Federal securities laws, and ensure investor protections.[167]

In addition, ATSs are required to establish adequate written safeguards and written procedures [168] to protect confidential trading information and to separate ATS functions from other broker-dealer functions, including principal and customer trading pursuant to Rule 301(b)(10).[169] Furthermore, all ATSs must adopt and implement adequate written oversight procedures to ensure that the above written safeguards and procedures are followed.[170] These requirements are designed to help prevent the potential for abuse of subscriber confidential trading information.[171]

In addition, an ATS must not use in its name the word ''exchange,'' or any derivation of the word ''exchange'' pursuant to Rule 301(b)(11).[172] The Commission believes that the use of the word ''exchange'' by an ATS would be deceptive and could lead investors to believe incorrectly that such ATS is registered as a national securities exchange.[173]

The Commission is proposing amendments to facilitate an orderly transition for Communication Protocol Systems to comply with the applicable conditions of the Regulation ATS exemption.[174] The Commission understands that some Communication Protocol Systems are not currently registered as broker-dealers.[175] To become a registered broker-dealer, these Communication Protocol Systems would be required to file Form BD with the Commission and complete FINRA's processes for new members.[176] The Commission is proposing to allow Communication Protocol Systems that are not registered as broker-dealers at the time the proposed rule would be effective, if adopted, to provisionally operate pursuant to the Rule 3a1–1(a)(2) exemption while their broker-dealer registration is pending until the earlier of (1) the date the ATS registers as a broker-dealer under Section 15 of the Exchange Act or Section 15C(a)(1)(A) of the Exchange Act and becomes a member of a national securities association or (2) the date 210 calendar days after the effective date of any final rule.[177] The 210 calendar day period is designed to provide time for a Communication Protocol System to submit its broker-dealer registration application, or continuing membership application, as applicable, and for FINRA to conduct its review of new member application and continuing member application. The proposed transition period is designed to provide a Communication Protocol System that is not a registered broker-dealer adequate time to comply with the necessary broker-dealer registration requirements under Regulation ATS without disrupting its market or its participants.

Proposed Rule 301(b)(2)(i) requires ATSs (other than Covered ATSs) [178] to file an initial operation report on Form ATS at least 20 days before commencing operations; however, Communication Protocol Systems that seek to operate as ATSs already will be operating when the proposed rule, if adopted, becomes effective. To avoid disruption of the services of the ATS, the Commission is proposing to amend Rule 301(b)(2)(i) to require Communication Protocol Systems (other than those that are Covered ATSs) [179] to file an initial operation report on Form ATS no later than 30 calendar days after the effective date of any final rule.[180] The Commission is also proposing changes, as discussed below, to Rule 301(b)(2)(viii) and Rule 304 to facilitate the transition for Communication Protocol Systems that are Covered ATSs to file Form ATS–N.[181] Requiring Communication Protocol Systems to file a Form ATS with the Commission at the proposed time would provide the Commission with information about its

including: A record of subscribers to the ATS; daily summaries of trading in the ATS; and time-sequenced records of order information in the ATS. *See* 17 CFR 242.302.

[164] *See* Rule 303 of Regulation ATS. In the Regulation ATS Adopting Release, the Commission stated that these requirements to make, keep, and preserve records are necessary to create a meaningful audit trail and to permit surveillance and examination to help ensure fair and orderly markets. *See* Regulation ATS Adopting Release, *supra* note 31, at 70877–78.

[165] *See supra* note 98 and accompanying text.

[166] Specifically, the Commission is proposing to revise Rule 302(c)(1) (date and time (expressed in terms of hours, minutes, and seconds) that the trading interest was received); (c)(3) (the number of shares, or principal amount of bonds, to which the trading interest applies); (c)(5) (the designation of the trading interest as buy or sell trading interest); (c)(8) (any limit or stop price prescribed by the trading interest); (c)(9) (the date on which the trading interest expires and, if the time in force is less than one day, the time when the trading interest expires); (c)(10) (the time limit during which the trading interest is in force); (c)(11) (any instructions to modify or cancel the trading interest); (c)(12) (the type of account for which the trading interest is submitted); (c)(13) (date and time that the trading interest was executed); (c)(14) (price at which the trading interest is executed); and (c)(15) (size of the trading interest executed).

[167] *See* Regulation ATS Adopting Release, *supra* note 31, at 70878.

[168] These written safeguards and written procedures must include: Limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with these or any other applicable rules; and implementing standards controlling employees of the ATS trading for their own accounts.

[169] *See* 17 CFR 242.301(b)(10); NMS Stock ATS Adopting Release, *supra* note 2, Section VI.

[170] *See* 17 CFR 242.301(b)(10)(ii).

[171] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38864.

[172] *See* 17 CFR 242.301(b)(11); Regulation ATS Adopting Release, *supra* note 31, Section II.C.

[173] *See* Securities Exchange Act Release No. 39884 (April 17, 1998), 63 FR 23504, 23523 (April 29, 1998) (''Regulation ATS Proposing Release'').

[174] For purposes of the rule text, the Commission is proposing to apply the transitional rules to ''Newly Designated ATSs.''

[175] A registered broker-dealer that operates a Communication Protocol System and is currently a FINRA member may, under FINRA rules, be required to file a Continuing Membership Application with FINRA noticing material changes to business operations in connection with its operation of an ATS.

[176] After receiving a substantially complete application package, FINRA must review and process it within 180 calendar days. *See* ''How to Become a Member—Member Application Time Frames'' *available at https://www.finra.org/registration-exams-ce/broker-dealers/how-become-member-membership-application-time-frames. See also* FINRA Rule 1014.

[177] *See* proposed revisions to Rule 301(b)(1). This transition period for the proposed rule, if adopted, would also apply to Currently Exempted Government Securities ATSs (*i.e.,* Legacy Government Securities ATSs formerly not required to comply with Regulation ATS pursuant to the exemption under § 240.3a1–1(a)(3) prior to effective date of any final rule) not registered as a broker-dealer. *See infra* note 283.

[178] ''Covered ATS'' is defined *infra* note 257. The Commission is proposing changes to Rule 301(b)(2)(i) to clarify that the requirement to file Form ATS does not apply to ATSs other than Covered ATSs. *See* proposed Rule 301(b)(2)(i).

[179] The rule text uses the term ''Covered Newly Designated ATS.''

[180] *See* proposed changes to Rule 301(b)(2)(i).

[181] *See infra* note 300 and Section IV.A.

operations and facilitate oversight of the systems.

Request for Comment

1. Should the Commission amend Exchange Act Rule 3b–16 as proposed? Should the Commission adopt a more expansive or limited interpretation of the definition of ''exchange''? Do commenters agree that, in the current market, Communication Protocol Systems function as market places that conduct similar activities as exchanges do? Would any systems that conduct similar activities as exchanges that should be included in proposed Rule 3b–16 be excluded? Are there any asset classes or types of securities that should be excluded from the definition of exchange? If so, why?

2. What are commenters' views on the potential consequences of expanding or limiting the definition of ''exchange'' under Exchange Act Rule 3b–16? What are commenters' views on how changing Rule 3b–16 could benefit or harm investors and market participants? Are new systems that meet the definition of exchange likely to choose to operate as ATSs instead of national securities exchanges?

3. Should the Commission adopt the proposed definition of ''trading interest'' under Exchange Act Rule 3b–16? Should the definition of ''trading interest'' require attributes to be identified in addition to at least the security and either quantity, direction (buy or sell), or price? Alternatively, would only one of the security, quantity, direction (buy or sell), or price be adequate to indicate trading interest? Should the definition of ''exchange'' continue to be limited to systems that use orders? If so, why?

4. Should the Commission revise Exchange Act Rule 3b–16 to focus on bringing together buyers and sellers, rather than bringing together orders (or trading interest)? Would the proposed revisions to the rule appropriately describe systems that use non-firm trading interest to allow participants to communicate their trading interest?

5. Should the Commission revise Exchange Act Rule 3b–16(a)(2) to describe a system that ''makes available established, non-discretionary methods'' under which buyers and sellers interact? Should the Commission revise the language further to clarify that a system provider that makes available a trading facility or communication protocol by way of a third party or affiliate would fall within the criteria of Rule 3b–16(a)(2)? Should there be any minimum or baseline to the established methods a system must have to qualify as an exchange? If so, what are they? Do commenters agree that making available communication protocols, as discussed herein, is sufficient to be an established, non-discretionary method under which buyers and sellers can interact?

6. Should the Commission remove the reference to ''multiple'' in Rule 3b–16(a)(1))? If so, why? If not, why not?

7. Should Communication Protocol Systems that choose to comply with Regulation ATS be subject to all of the requirements of Regulation ATS? Are there certain requirements of Regulation ATS that should or should not be applicable to Communication Protocol Systems, or certain Communication Protocol Systems? For example, are the current Regulation ATS recordkeeping requirements appropriate for Communication Protocol Systems? Should the Commission require a Communication Protocol System that chooses to operate as an ATS to create and maintain records that are not otherwise required by Rule 301(b)(8) of Regulation ATS? Is there anything that is not currently among the conditions to the Regulation ATS exemption that a Communication Protocol System and/or an existing ATS should comply with as part of Regulation ATS? And if so, why?

8. Should the Commission amend Regulation ATS, Form ATS, Form ATS–R, or Form ATS–N in any way to be more tailored to Communication Protocol Systems? If so, how?

9. Are the proposed transition periods for Communication Protocol Systems appropriate? Should the Commission provide Communication Protocol Systems more or less time to comply with any of the requirements of Regulation ATS? Please explain.

10. Is the Commission's proposal that a Newly Designated ATS must file an initial operation report on Form ATS no later than 30 calendar days after the effective date of any final rule, if adopted, appropriate? If not, should the Commission provide more time or less time for a Newly Designated ATS to file an initial Form ATS?

11. Should the Commission allow a Newly Designated ATS that is not registered as a broker-dealer to operate pursuant to the Rule 3a1–1(a)(2) exemption on a provisional basis? Does the proposal to allow such ATSs a maximum 210 calendar days to comply with the broker-dealer registration requirement provide an appropriate amount of time to register as a broker-dealer? If not, what, if any, transition period would be appropriate and why?

III. Proposed Changes Applicable to Government Securities ATSs

A. ATS Markets for Government Securities

Government securities [182] play a critical role in the U.S. and global economies. Among other things, for example, Treasury rates are a fundamental benchmark for pricing virtually all other financial assets.[183] Systems currently operating as ATSs, particularly those that operate in the secondary interdealer markets for the most-recently issued (''on-the-run'') U.S. Treasury Securities, have become a significant location of trading interest for government securities.[184] Specifically, most interdealer trading takes place on electronic platforms provided by interdealer brokers that operate limit order books, with electronic interdealer trading being

[182] Under the Exchange Act, government securities are defined as, among other things, securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States. *See* 15 U.S.C. 78c(42)(A). Government securities include U.S. Treasury securities, debt securities issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8), and Agency Mortgage-Backed Securities (''MBSs''). Government securities also include securities which are issued or guaranteed by the Tennessee Valley Authority or by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors; securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the Commission; and any put, call, straddle, option, or privilege on one of the aforementioned (subject to limited exceptions). 15 U.S.C. 78c(42)(B)–(C).

[183] *See* Group of Thirty Working Group on Treasury Market Liquidity, *U.S. Treasury Markets: Steps Toward Increased Resilience. Group of Thirty* at 1 (2021) (''G30 Report''), *available at https://group30.org/publications/detail/4950.*

[184] *See* Recent Disruptions and Potential Reforms in the U.S. Treasury Market: A Staff Progress Report, at 32, *available at https://home.treasury.gov/system/files/136/IAWG-Treasury-Report.pdf* (''November 2021 IAWG Report''). The November 2021 IAWG Report is a joint report issued by the Inter-Agency Working Group for Treasury Market Surveillance (''IAWG''), which consists of staff from the U.S. Department of the Treasury, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Commission, and the Commodity Futures Trading Commission. Among other things, the November 2021 IAWG report provides an overview of the current structure of the Treasury market and a detailed analysis of the recent disruptions to the Treasury market at the onset of the COVID–19 pandemic in March 2020 as well as other recent disruptions to the Treasury market. The report also sets forth what the IAWG believes are the six guiding principles for the Treasury market and provides an update about the work streams for specific policy analysis being undertaken by the members of the IAWG.

concentrated in on-the-run Treasury securities.[185] In July 2021, average daily trading in government securities totaled $978 billion, or roughly 95 percent of all fixed income trading volume in the U.S.[186]

Legacy Government Securities ATSs now operate with complexity similar to that of markets that trade NMS stocks in terms of use of technology and speed of trading, the use of limit order books, order types, algorithms, connectivity, data feeds, and the active participation of principal trading firms (''PTFs'').[187] For example, based on the Commission's review of Form ATS filings by ATSs that trade government securities and discussions with market participants, the Commission believes that Legacy Government Securities ATSs often offer subscribers a variety of order types to pursue both aggressive and passive trading strategies and low latency, high-speed connectivity to the ATS. These ATSs frequently use automated systems to match orders anonymously on a price/time priority basis. Some Legacy Government Securities ATSs also segment orders into categories by participants or allow participants the ability to interact with specific counterparty groups in the ATS and facilitate order interaction and execution.[188] Likewise, Communication Protocol Systems are increasingly used as electronic means to bring together buyers and sellers for government securities and are particularly prevalent in the dealer-to-customer market for U.S. Treasury and markets for off-the-run[189] U.S. Treasury Securities, Agency Securities,[190] and repos.

The most liquid and commonly traded government securities are U.S. Treasury Securities, which are direct obligations of the U.S. Government issued by the U.S. Department of the Treasury (''Treasury Department''). The Treasury Department issues several different types of securities, including Treasury bills, nominal coupons notes and bonds, Floating Rate Notes, and Treasury Inflation Protected Securities. Treasury nominal coupon notes and bonds, as well as Treasury Inflation Protected Securities, may also be separated into principal and interest payments and traded as STRIPS.[191] For each security type, the on-the-run securities are generally considered the most liquid in the secondary market.[192] Market participants commonly refer to securities issued prior to ''on-the-run'' securities as ''off-the-run'' securities.[193] Market participants use U.S. Treasury Securities as an investment instrument, hedging vehicle, and to source orders and trading interest, among other things. U.S. banks commonly own U.S. Treasury Securities due to their low risk and strong liquidity characteristics. Additionally, U.S. Treasury Securities are often used as collateral in lending arrangements or as margin on other financial transactions.

For U.S. Treasury Securities, the secondary market is bifurcated between the dealer-to-customer market, in which dealers trade with their customers (*e.g.,* investment companies, pension funds, insurance companies, corporations, or retail), and the interdealer market, in which dealers and specialty firms trade with one another.[194] Customers, also referred to as ''end users,'' have not traditionally traded directly with other end users.[195] Rather, end users primarily trade with dealers, and dealers use the interdealer market as a source of liquidity to help facilitate their trading with clients in the dealer-to-customer market. Trading in the U.S. Treasury Securities dealer-to-customer market is generally—and has historically been—conducted bilaterally using voice, and more recently, electronically through the use of Communication Protocol Systems, most commonly using an RFQ protocol. Broker-dealers also internalize a portion of their customer flow, although the extent to which broker-dealers internalize is unclear.[196]

In the interdealer market, the majority of trading in on-the-run U.S. Treasury Securities currently occurs on ATSs using limit order books supported by advanced electronic trading technology.[197] Furthermore, interdealer trading for on-the-run U.S. Treasury Securities is generally concentrated within a very small number of ATSs, especially when compared to the market for NMS stocks, which is dispersed among many trading venues.[198] While

[185] *See id.* at 3.

[186] *See* SIFMA Fixed Income Trading Volume, *available at https://www.sifma.org/resources/research/us-fixed-income-trading-volume/.* This includes U.S. Treasury Securities, Agency Mortgage-Backed Securities, and Federal Agency Securities.

[187] *See* November 2021 IAWG Report, *supra* note 184, at 31. *See also* NMS Stock ATS Adopting Release, *supra* note 2, at 38771 for a discussion about the current operational complexities of NMS Stock ATSs.

[188] *See also* November 2021 IAWG Report, *supra* note 184, at 31; Joint Staff Report: The U.S. Treasury Market on October 15, 2014, at 11, 35–36, *available at https://www.sec.gov/files/treasury-market-volatility-10-14-2014-joint-report.pdf* (''October 15 Staff Report''); Department of the Treasury Release No. 2015–0013 (January 22, 2016), Notice Seeking Public Comment on the Evolution of the Treasury Market Structure, 81 FR 3928 (January 22, 2016) (''Treasury Request for Information''). This evolution in the interdealer secondary cash markets for U.S. Treasury Securities was also highlighted in the October 15 Staff Report, the Treasury Request for Information, and public comment received by the Commission. The October 15 Staff Report is a joint report about the unusually high level of volatility and rapid round-trip in prices that occurred in the U.S. Treasuries market on October 15, 2014. Among other things, the October 15 Staff Report provides an overview of the market structure, liquidity, and applicable regulations of the U.S. Treasury market, as well as the broad changes to the structure of the U.S. Treasury market that have occurred over the past two decades.

[189] *See infra* note 193 for a description of ''off-the-run'' securities.

[190] *See* James Collin Harkrader and Michael Puglia, *Fixed Income Market Structure: Treasuries* vs. *Agency MBS,* Board of Governors of the Federal Reserve System: FEDS NOTES (August 25, 2020), *available at https://www.federalreserve.gov/econres/notes/feds-notes/fixed-income-market-structure-treasuries-vs-agency-mbs-20200825.htm* (''August 25th FEDS Notes'') (explaining the recent evolution of the government securities market structure).

[191] STRIPS is the acronym for Separate Trading of Registered Interest and Principal of Securities. STRIPS let investors hold and trade the individual interest and principal components of eligible Treasury notes and bonds as separate securities. STRIPS are Treasury securities that don't make periodic interest payments. Market participants create STRIPS by separating the interest and principal parts of a Treasury note or bond. STRIPS can only be bought and sold through a financial institution, broker, or dealer and held in the commercial book-entry system. *See* TreasuryDirect, STRIPS, *available at https://www.treasurydirect.gov/instit/marketables/strips/strips.htm.*

[192] On-the-run U.S. Treasury Securities are the most recently issued nominal coupon securities. Nominal coupon securities pay a fixed semi-annual coupon and are currently issued at original maturities of 2, 3, 5, 7, 10, 20, and 30 years. These standard maturities are commonly referred to as ''benchmark'' securities because the yields for these securities are used as references to price a number of private market transactions.

[193] Off-the-run or ''seasoned'' U.S. Treasury Securities are the issues that preceded the current on-the-run securities. The U.S. Treasury Securities market also comprises futures and options on U.S. Treasury Securities, and securities financing transactions in which U.S. Treasury Securities are used as collateral. *See* Treasury Request for Information, *supra* note 188, at 3928. For the purpose of this proposal, the Commission focuses on the secondary cash market.

[194] *See id.*

[195] *See id.*

[196] *See id.* For the purposes of this proposal, internalization refers to a broker filling a customer order either from the firm's own inventory or by matching the order with other customer order flow, instead of sending the order to an interdealer market for execution. *See id.* at 3928 n.5.

[197] *See* October 15 Staff Report, *supra* note 188, at 11, 35–36. *See also* Bloomberg Letter at 5, stating that liquid on-the-run government securities are mostly traded on limit order books.

[198] The growth of electronic trading has contributed to a marked shift in the composition of the interdealer cash market for U.S. Treasury Securities over time. Traditionally, interdealer brokers only allowed primary dealers to access their trading venues. After 1992, however, interdealer brokers expanded access to all entities that were netting members of the Government Securities Clearing Corporation (which is now the Fixed Income Clearing Corporation's Government Securities Division). Thereafter, other entities gained access to these trading venues through their

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trading in the most liquid NMS stocks occur on a variety of trading venues (*e.g.,* exchanges, ATSs, single-dealer broker platforms), the majority of overall trading in the interdealer secondary market for on-the-run U.S. Treasury Securities occurs on ATSs.[199] For example, during the first nine months of 2021, one ATS accounted for $14.9 trillion in total dollar volume in all government securities, the majority of which were on-the-run U.S. Treasury Securities.[200] For off-the-run U.S. Treasury Securities,[201] the majority of interdealer trading occurs via transactions through traditional voice-assisted interdealer broker platforms and Communication Protocol Systems that offer various trading protocols to bring together buyers and sellers,[202] though some interdealer trading of off-the-run U.S. Treasury Securities does occur on ATSs.[203]

Another type of government securities is Agency Securities. Agency Securities include securities issued by or guaranteed by U.S. Government corporations or U.S. Government sponsored enterprises (''GSEs'').[204] Agency Securities, which may not be backed by the full faith and credit of the U.S. Government, are generally considered to be very liquid and offer state and local tax advantages to the holder. Market participants can use ATSs to buy and sell Agency Securities, although, based on the Commission's review of Form ATS–R filings, transaction volume of Agency Securities is not as large as that of U.S. Treasury Securities on ATSs.[205] Investors, banks, and other market participants often acquire Agency Securities in the secondary market to support various investing strategies, such as hedging against other more risky investments in a given portfolio. Agency Securities also trade on Communication Protocol Systems where buyers and sellers can use RFQ protocols, for example, to engage in price discovery, find a counterparty, and negotiate and execute a transaction.

Repos provide short-term financing (often overnight) to help fund the borrower's (usually a broker-dealer) trading or lending activities. However, the collateral is sold to the lender, and the repo obligates the borrower to repurchase the collateral. U.S. Treasury Securities are frequently used as the underlying collateral of a repo. Several ATSs have provided notice on their Form ATS disclosures that they facilitate the trading of repos. Much like the markets for U.S. Treasury Securities and Agency Securities, repo trading has historically been conducted bi-laterally by voice; however, over the past decade, electronic trading of repos on Communication Protocol Systems has increased significantly. Electronic trading of repos is primarily conducted via RFQ protocols, and many systems for trading in repos now offer electronic trading options.

With regard to the interdealer secondary markets for on-the-run U.S. Treasury Securities, the continued growth of electronic trading has contributed to an increased presence of PTFs in the market place.[206] Currently, PTFs account for the majority of trading and provide top-of-the-book liquidity for on-the-run U.S. Treasury Securities on electronic interdealer trading venues.[207] From January 1, 2021 to June 30, 2021, PTFs traded on 13 Government Securities ATSs accounting for approximately 48.6 percent of total on-the-run Government Securities ATS trading volume.[208] PTFs usually have direct access to electronic interdealer trading venues for U.S. Treasury Securities, and as is the case with the equity markets, PTFs trading on the electronic interdealer trading venues for on-the-run U.S. Treasury Securities often employ automated algorithmic trading strategies that rely on speed and allow the PTFs to cancel or modify quotes in response to perceived market events.[209] Furthermore, most PTFs trading U.S. Treasury Securities on these trading venues for on-the-run U.S. Treasury Securities also restrict their activities to principal trading and do not hold positions long term, while dealers use the interdealer market as a source of orders and trading interest to help facilitate their trading with clients in the dealer-to-customer market.[210] As explained in the October 15 Staff Report, the increase in trading by PTFs in the interdealer market may affect the amount of liquidity available to end users in the dealer-to-customer market.[211]

In response to the 2020 Proposal, the Commission received several comments that broadly supported expanding the regulatory framework under Regulation ATS with respect to Government Securities ATSs.[212] Commenters stated that ATSs have become increasingly important in the government securities market.[213] One commenter stated that, given that Government Securities ATSs closely resemble NMS Stock ATSs, it would be appropriate to impose similar regulatory oversight, including regulatory oversight by the Commission

prime brokers, who themselves had access, and in recent years the trading venues granted direct access to an even wider range of participants, including non-dealers, which account for more than half of the trading activity in the futures and electronically brokered interdealer cash markets. *See* October 15 Staff Report, *supra* note 188, at 36. *See also* Treasury Request for Information, *supra* note 188, at 3928.

[199] *See infra* Table VIII.2 and accompanying text.

[200] For an additional discussion of trading volume in the U.S. bond market as a whole and U.S. Treasury Securities, *see infra* Section VIII.B.2.

[201] Also, as noted in the October 15 Staff Report issued by the Treasury Department, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, the Commission, and U.S. Commodity Futures Trading Commission, trading in off-the-run U.S. Treasury Securities has always been less active than trading in on-the-run U.S. Treasury Securities, and price discovery in the cash markets primarily occurs in on-the-run securities. *See* October 15 Staff Report, *supra* note 188 at n.7.

[202] *See* November 2021 IAWG Report, *supra* note 184, at 3. *See also* Bloomberg Letter at 5, stating that less liquid off-the-run government securities are mostly traded using methods other than limit order books.

[203] While trading in on-the-run securities likely accounts for more than half of total daily trading volumes, off-the-run U.S. Treasury Securities make up over 95 percent of the outstanding marketable U.S. Treasury Securities. *See* G30 Report, *supra* note 183, at 1, n.2.

[204] *See* U.S. Department of the Treasury Resource Center, ''Fixed Income: Agency Securities,'' *available at https://www.treasury.gov/resource-center/faqs/Markets/Pages/fixedfederal.aspx*. For example, the Government National Mortgage Association (''Ginnie Mae'') is a U.S. Government corporation that issues mortgage-backed securities guaranteed by the full faith and credit of the U.S. Government. The assets collateralized into the securities issued by Ginnie Mae are federally insured and guaranteed mortgage loans. Agency Securities issued by GSEs include those issued by the Federal Home Loan Banks (''FHLBs''), the Federal National Mortgage Association (''Fannie Mae''), the Federal Home Loan Mortgage Corporation (''Freddie Mac''), and the Student Loan Marketing Association (''Sallie Mae''). Agency Securities issued by GSEs are not normally backed by the full faith and credit of the U.S. Government and therefore, may present some default and credit risk.

[205] Additionally, repos on government securities are also traded on some ATSs.

[206] PTFs are not, however, very active in the electronic markets for Agency Securities. *See* August 25th FEDS Notes, *supra* note 190 (''Though parts of the agency MBS market have moved from voice-based to screen-based trading since the early 2000s, algorithmic high-frequency electronic trading still does not comprise a meaningful share of average daily volume and the market remains devoid of PTF participation.'').

[207] *See* November 2021 IAWG Report, *supra* note 184, at 5. *See also* October 15 Staff Report, *supra* note 188, at 36; Remarks of Deputy Secretary Justin Muzinich at the 2019 U.S. Treasury Market Structure Conference (September 23, 2019), *available at https://home.treasury.gov/news/press-releases/sm782*.

[208] *See infra* Table VIII.2. (ATS PTF volume/ATS volume) × 100 = PTF share of ATS volume (%).

[209] *See* October 15 Staff Report, *supra* note 188, at 32, 35–36, 39.

[210] *See* November 2021 IAWG Report, *supra* note 184, at 5; October 15 Staff Report, *supra* note 188, at 38.

[211] *See* October 15 Staff Report, *supra* note 188, at 37.

[212] *See, e.g.,* BrokerTec Letter, SIFMA Letter, AFREF Letter.

[213] *See* FINRA Letter.

and FINRA.[214] Likewise, another commenter stated that many of the concerns surrounding potential conflicts of interest that arise between an ATS and the activities of its bank/broker-dealer operator and affiliates—and the transparency of an ATS's operations—are equally relevant with respect to ATSs that transact in government securities as to NMS Stock ATSs.[215] In addition, one commenter stated that critical intermediaries in the U.S. Treasury market are ''effectively unregulated'' as trading venues or dealers, and this hampers availability of information concerning trading in these critical markets, and that oversight of the core ''plumbing'' of these critical markets, which determines their resiliency, is lacking.[216] This commenter stated that several ATSs now dominate the trading of U.S. Treasury Securities and agency mortgage backed securities, and that ensuring that Regulation ATS and Regulation SCI apply to these entities will provide for additional data and create more transparency into the trading around those critical markets.[217] This commenter also stated that expanding Regulation ATS with respect to ATSs that trade U.S. Treasuries has also become important as the role of PTFs has become more significant in the U.S. Treasury markets and related repo markets.[218]

B. Heightened Regulatory Requirements Under Regulation ATS for Government Securities ATSs

The vast majority of ATSs that operate today do so pursuant to the exemption provided by Exchange Act Rule 3a1–1(a)(2), which requires the ATSs to be in compliance with Regulation ATS, which includes, among other things, registering as broker-dealers. Currently Exempted Government Securities ATSs, however, operate pursuant to Exchange Act Rule 3a1–1(a)(3)[219] and Rule 301(a)(4)(ii)(A).[220] These provisions currently exempt an ATS from compliance with the requirements in Rule 301(b) of Regulation ATS[221] if, in relevant part, the ATS (1) is registered as a broker-dealer under Sections 15(b)[222] or 15C[223] of the Exchange Act, or is a bank, and (2) limits its securities activities to government securities (as defined in Section 3(a)(42) of the Exchange Act), repos, any puts, calls, straddles, options, or privileges on government securities, other than puts, calls, straddles, options, or privileges that: (i) Are traded on one or more national securities exchanges; or (ii) for which quotations are disseminated through an automated quotation system operated by a registered securities association, and commercial paper.[224] Accordingly, such Currently Exempted Government Securities ATSs are not required to register as a national securities exchange or comply with Regulation ATS.[225] To the Commission's knowledge, most Currently Exempted Government Securities ATSs operating pursuant to this exemption register as broker-dealers with the Commission.[226]

ATSs that do not limit their securities activities solely to government securities or repos, trading for example corporate bonds or municipal securities, cannot use this exemption. Such ATSs must either register as an exchange or comply with Regulation ATS pursuant to Exchange Act Rule 3a1–1(a)(2), which includes, among other things, registering as a broker-dealer under Section 15 of the Exchange Act.[227] Government Securities ATSs that are currently subject to Regulation ATS must report transactions in U.S. Treasury Securities and Agency Securities to the Trade Reporting and Compliance Engine (''TRACE''),[228] and FINRA publicly disseminates data about these transactions. Currently, FINRA publishes weekly aggregated transaction information on U.S. Treasury Securities and disseminates certain transaction information on Agency Securities immediately upon receipt of a transaction report.[229] Today, Legacy Government Securities ATSs are subject only to certain provisions of Regulation ATS because not all the provisions are applicable to trading in government securities.[230] In particular, government securities are not included in any category of securities under the Fair Access Rule.[231] Today, the categories of securities under the Fair Access Rule only include NMS stocks, equity securities that are not NMS stocks and for which transactions are reported to an SRO, municipal securities, and corporate debt securities.[232] In addition, Regulation SCI does not apply to ATSs with respect to their trading in

[214] *See* SIFMA Letter at 2.

[215] *See also* MFA Letter at 4.

[216] *See* AFREF Letter at 1.

[217] *See id.*

[218] *See id.* at 2 (stating that the growing role of PTFs means that much trading activity is not coming from long-term investors but rather proprietary trading firms who may trade in-and-out of their positions several times in a day and are likely to react sharply to market volatility).

[219] 17 CFR 240.3a1–1(a)(3).

[220] 17 CFR 242.301(a)(4)(ii)(A).

[221] 17 CFR 242.301(b).

[222] *See* 15 U.S.C. 78o(b) (pertaining to the registration and regulation of brokers and dealers).

[223] *See* 15 U.S.C. 78o–5 (pertaining to the registration and regulation of government securities brokers and dealers).

[224] *See* 15 U.S.C. 78c(a)(42). The definition of ''government securities'' in Section 3(a)(42) of the Exchange Act (and, therefore, references to ''government securities'' throughout this proposal) includes certain puts, calls, straddles, options, or privileges on government securities, other than puts, straddles, options, or privileges that: Are traded on one or more national securities exchanges; or for which quotations are disseminated through an automated quotation system operated by a registered securities association. *See supra* note 182.

[225] *See* 17 CFR 242.301(a)(4)(i) and (a)(4)(ii)(A). Although not required to register as a national securities exchange or comply with Regulation ATS, a Currently Exempted Government Securities ATS may need to register as a broker-dealer under Section 15(b) or as a government securities broker or government securities dealer pursuant to Exchange Act Section 15C, and comply with the associated regulatory requirements. *See, e.g.,* 17 CFR chapter IV, subchapter A—Regulations under Section 15C of the Securities Exchange Act of 1934.

[226] Some ATSs that are eligible for the exemption voluntarily comply with Regulation ATS, even though ATSs that trade only government securities are not required to comply with Regulation ATS at all.

[227] *See supra* notes 130–131 and accompanying text.

[228] *See* FINRA Rule 6730(a)(1) requires FINRA members to report transactions in TRACE-Eligible Securities, which FINRA Rule 6710 defines to include U.S. Treasury Securities and Agency Securities. For each transaction in U.S. Treasury Securities and Agency Securities, a FINRA member would be required to report the CUSIP number or similar numeric identifier or FINRA symbol; size (volume) of the transaction; price of the transaction (or elements necessary to calculate price); symbol indicating whether transaction is a buy or sell; date of trade execution (''as/of'' trades only); contra-party's identifier; capacity (principal or agent); time of execution; reporting side executing broker as ''give-up'' (if any); contra side introducing broker (in case of ''give-up'' trade); the commission (total dollar amount), if applicable; date of settlement; if the member is reporting a transaction that occurred on an ATS pursuant to FINRA Rule 6732, the ATS's separate Market Participant Identifier (''MPID''); and trade modifiers as required. For when-issued transactions in U.S. Treasury Securities, a FINRA member would be required to report the yield in lieu of price. *See* FINRA Rule 6730(c).

[229] FINRA Rule 6750(a) requires FINRA to disseminate information on all transactions on certain securities, including Agency Securities (but excluding U.S. Treasury Securities), immediately upon receipt of the transaction report. FINRA is permitted to publish or distribute weekly aggregated transaction information and statistics on U.S. Treasury Securities, and has stated that it intends to publish weekly volume information aggregated by U.S. Treasury subtype (*e.g.,* Bills, Floating Rate Notes, Treasury Inflation-Protected Securities, and Nominal Coupons). *See* Securities Exchange Release No. 87837 (December 20, 2019), 84 FR 71986 (December 30, 2019) (approving a proposed rule change to allow FINRA to publish or distribute aggregated transaction information and statistics on U.S. Treasury Securities).

[230] *See* 17 CFR 242.301(b)(1), (2), and (7) through (11). The order display and execution access provisions under Rule 301(b)(3) and the related fee restrictions of Rule 301(b)(4) of Regulation ATS only apply to an ATS's NMS stock activities. *See* 17 CFR 242.301(b)(3) and (4). *See also supra* Section II.D.2 (discussing the requirements for compliance with the Regulation ATS exemption).

[231] 17 CFR 242.301(b)(5). *See also supra* notes 153–157 and accompanying text.

[232] *See* 17 CFR 242.301(b)(5).

government securities.[233] The Capacity, Integrity, and Security Rule under Rule 301(b)(6) [234] also does not apply to the government securities activities of an ATS.[235]

Finally, Government Securities ATSs are not required to comply with rules applicable to ATSs that trade NMS stocks, including the obligation to file a public Form ATS–N pursuant to Rule 304 of Regulation ATS.[236] ATSs that transact in government securities or repos are also not required to comply with the order display and execution access provisions under Rule 301(b)(3) [237] and the related fee restrictions of Rule 301(b)(4),[238] both of which only apply to an ATS's NMS stock activities.

Despite the critical role of government securities in the U.S. and global economy, the significant volume in government securities transacted on ATSs, and these ATSs' growing importance to investors and overall securities market structure, Currently Exempted Government Securities ATSs are exempt from exchange registration and are not required to comply with Regulation ATS. In addition, Communication Protocol Systems that transact in government securities and/or repos, but do not currently meet the definition of ''exchange,'' are not subject to exchange registration requirements and are likewise not required to comply with Regulation ATS.[239] Furthermore, ATSs that trade both government securities and non-government debt securities (*e.g.,* corporate bonds) are not subject to all the provisions of Regulation ATS. Market participants today have limited access to information that permits them to adequately compare and contrast how they can use a Government Securities ATS or how their trading interest would be handled by Government Securities ATSs.[240] In addition, Government Securities ATSs are not currently subject to the Fair Access Rule and Regulation SCI, which would help ensure the fair treatment of subscribers and address technological vulnerabilities, and improve the Commission's oversight, of the core technology of key entities in the markets for government securities.[241] Given these concerns, and comments received on the 2020 Proposal, the Commission is re-proposing and revising the amendments described below.

1. Proposed Definition of Government Securities ATS

The Commission is re-proposing to amend Rule 300 of Regulation ATS to define ''Government Securities ATS'' to mean an alternative trading system, as defined in Rule 300(a), that trades government securities, as defined in section 3(a)(42) of the Exchange Act (15 U.S.C. 78c(a)(42)), or repurchase and reverse repurchase agreements on government securities.[242] To meet the definition of a Government Securities ATS, the organization, association, person, group of persons, or system must meet the definition of an alternative trading system under Rule 300(a) of Regulation ATS.[243] The Commission is also re-proposing that a Government Securities ATS shall not trade securities other than government securities or repos [244] and that trading of securities other than government securities or repos would require the separate filing of a Form ATS or a Form ATS–N, depending on the types of securities traded.[245] Other than complying with Rule 304 and filing Form ATS–N, this amendment would not, however, impose new compliance requirements on ATSs that currently trade government securities in addition to non-government securities.[246] Under the proposal, if a broker-dealer operator currently operates an ATS for government securities and non-government securities (for example, corporate bonds), the broker-dealer operator would separately be required to comply with Regulation ATS for: (1) A Government Securities ATS that would trade government securities, which would be subject to Rule 304, and file disclosures on Form ATS–N, as proposed to be revised and (2) a non-Government Securities ATS (that, for example, would trade corporate bonds), which would not be subject to Rule 304, and file disclosures on its existing Form ATS, as amended to remove references to government securities.

In response to the 2020 Proposal, the Commission received one comment letter opposing the proposed definition of Government Securities ATS.[247] This commenter stated that separating trading activity in government securities and repos from non-NMS stock trading activity could impose administrative and operational burdens on both Government Securities ATSs and subscribers.[248] The commenter stated that the Commission did not explain why requiring a Government Securities ATS to separate its operations from other non-NMS Stock ATS trading activity would improve Commission oversight or other regulatory goals.[249]

The proposed definition of Government Securities ATS, however, would not require operational separation by a Government Securities ATS, and the operational costs that the commenter described would therefore not apply.[250] The proposed definition would not, for example, require the Government Securities ATS to develop a new matching engine nor require changes with regard to how subscribers enter trading interest into the ATS. Other than requiring the Government Securities ATS to separately comply with the requirements of Regulation ATS (and, as applicable, Regulation SCI), the proposed definition does not create new compliance requirements on

[233] *See infra* Section III.C (describing the types of entities that are currently subject to the requirements of Regulation SCI).

[234] 17 CFR 242.301(b)(6).

[235] *See supra* notes 157–158 and accompanying text.

[236] 17 CFR 242.304. *See also supra* notes 139–143 and accompanying text.

[237] *See supra* notes 149–151 and accompanying text.

[238] *See supra* note 152 and accompanying text.

[239] *See supra* Section II.A.

[240] *See, e.g.,* 2020 Proposal, *supra* note 4, at 87125.

[241] *See id.* at Section III.B.4 (discussing the Fair Access Rule) and III.C (discussing Regulation SCI).

[242] *See* proposed Rule 300(l).

[243] 17 CFR 242.300(a). *See* Regulation ATS Adopting Release, *supra* note 31, at 70851–52.

[244] *See* proposed Rule 300(l).

[245] An ATS that does not trade NMS stocks or government securities, as proposed, must file Form ATS. If the broker-dealer operates an ATS that trades NMS stocks and an ATS that trades government securities, it would be required to file a separate Form ATS–N for each of the NMS Stock ATS and Government Securities ATS.

[246] Broker-dealers that operate Government Securities ATSs that are currently subject to Regulation ATS already must have established written safeguards and written procedures to protect subscribers' confidential trading information, pursuant to Rule 301(b)(10), and already must make and keep records pursuant to Rule 301(b)(8) that are tailored to the types of securities the ATS trades and the subscribers that trade those securities on the ATS. The Commission believes the proposal is broadly consistent with the manner in which broker-dealers that operate NMS Stock ATSs and non-NMS Stock ATSs currently comply with Regulation ATS. For further discussion, *see infra* Section III.B.3.

[247] *See* ICE Bonds Letter I at 5.

[248] *See id.* The commenter stated that the initial set-up of a new Government Securities ATS would require, among other things, the development of a matching engine, separate connectivity for subscribers, new clearing connectivity, additional personnel to support trading operations of the Government Securities ATS, and regulatory controls (*e.g.,* Rule 15c3–5). The commenter further stated that these requirements would ultimately lead to fewer venues for subscribers to trade and hedge and concentrate trading among a few large Government Securities ATSs, as smaller Legacy Government Securities ATSs may determine that this separation requirement is cost prohibitive. In addition, the commenter stated that if a subscriber has to execute a corporate bond on one ATS and sell the treasury on a different ATS, there is an administrative and operational burden placed on the subscriber, as well as additional economic and market risk to the subscriber as the price on the other venue may move by the time the hedge trade is initiated.

[249] *See id.*

[250] *See id.*

Government Securities ATSs.[251] Under the proposed rule, a broker-dealer operator for an ATS that currently trades both government securities and corporate debt securities, for example, would be required to file a Form ATS–N for the trading of government securities on a Government Securities ATS and a separate Form ATS for trading of corporate debt securities on an ATS. In this example, the broker-dealer operator for a Government Securities ATS and non-Government Securities ATS may be required to disclose certain information on Form ATS–N about the non-Government Securities ATS. For example, to the extent that any persons support both the operation of the Government Securities ATS and the ATS that trades corporate debt securities and have access to subscriber confidential trading information for the Government Securities ATS, the Government Securities ATS would need to disclose that on Part II, Item 7 of Form ATS–N.[252] In addition, the Government Securities ATS would be required to provide under Part III, Item 11 information about interaction with non-government securities markets (*e.g.,* futures, currencies, swaps, corporate bonds).[253]

Further, the Commission believes that by stating that a Government Securities ATS trades only government securities, the definition of Government Securities ATS clarifies which regulatory requirements are applicable for trading activity in government securities and non-government securities. For example, a Government Securities ATS would file a Form ATS–N specifically disclosing information regarding its trading in government securities, which would enable market participants to understand the ATS's government securities operations and readily compare the ATS against other Government Securities ATSs.

To provide that the same approach applies to broker-dealers that operate NMS Stock ATSs and non-NMS Stock ATSs, and to clarify requirements applicable to NMS Stock ATSs, the Commission is proposing to amend the definition of ''NMS Stock ATS'' to state that an NMS Stock ATS shall not trade securities other than NMS stocks.[254] Today, securities other than NMS stocks are not traded in any NMS Stock ATS and the proposed amendment to the definition of NMS Stock ATS would have no impact on any existing ATS nor on the requirements applicable to existing NMS Stock ATSs. Broker-dealer operators of NMS Stock ATSs are currently required to file a Form ATS–N for NMS Stock ATS operations and a separate Form ATS for any non-NMS Stock ATS operations.[255] This would not change under this proposal. In addition, to facilitate the orderly transition to the heightened requirements for Government Securities ATSs that are currently operating, the Commission is defining such ATSs as Legacy Government Securities ATSs.[256]

To help specify which ATSs are subject to Rule 304 requirements, the Commission is proposing to define ''Covered ATS'' as an NMS Stock ATS or Government Securities ATS, as applicable.[257] The Commission is also proposing to define ''Covered Newly Designated ATS'' to mean a Newly Designated ATS that is a Government Securities ATS or NMS Stock ATS, which the Commission believes would facilitate the transition of Communication Protocol Systems that are NMS Stock ATSs or Government Securities ATSs to the regulatory requirements of Regulation ATS.[258]

The Commission is also proposing to add definitions of ''U.S. Treasury Security'' and ''Agency Security'' for purposes of Regulation ATS.[259] ''U.S. Treasury Security'' would mean a security issued by the U.S. Department of the Treasury. ''Agency Security'' would mean a debt security issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8). The proposed definitions are designed to provide the scope of securities a Government Securities ATS must include when calculating whether the fair access requirements set forth in Rule 301(b)(5) are applicable and to facilitate compliance with the Fair Access Rule.[260]

Request for Comment

12. Should the Commission adopt a more limited or expansive definition of Government Securities ATS than the definition that is being proposed? Given that, unlike the 2020 Proposal, the definition of Government Securities ATS would now include Communication Protocol Systems that transact in government securities and/or repos, do commenters believe that the definition of Government Securities ATS should be limited or expanded?

13. Should the Commission cite to the section 3(a)(42) (15 U.S.C. 78c(a)(42)) definition of government securities for purposes of defining Government Securities ATS? Should the securities encompassed by the definition (*e.g.,* certain options on government securities) be considered ''government securities'' for purposes of this regulation?

14. Should the Commission modify the proposed definitions of U.S. Treasury Securities and Agency Securities in any way? For example, should the proposed definitions of U.S. Treasury Securities and Agency Securities be based on definitions in any other existing rules?

15. The proposed amendments to the definitions of NMS Stock ATS and Government Securities ATS are not designed to limit a broker-dealer operator for an NMS Stock ATS or Government Securities ATS with respect to other types of securities that the broker-dealer operator may make available for trading in an ATS that is subject to Rule 301(b)(2) of Regulation ATS or how the broker-dealer operator may structure the operations of its ATS businesses. Would the proposed amendments to the definitions of NMS Stock ATS and Government Securities ATS impose any operational or other burdens on the broker-dealer operator, other than those related to filing Form ATS, Form ATS–R, or Form ATS–N, as applicable?

16. Should the Commission require an ATS that currently trades government securities and non-government securities, such as corporate bonds, to comply with Rule 304, including filing a Form ATS–N, with respect to the ATS's corporate bond activities as well as its government securities activities?

2. Proposed Elimination of the Exemption for ATSs That Limit Securities Activities to Government Securities and Repos

The Commission is re-proposing amendments to Regulation ATS that would require a Currently Exempted Government Securities ATS that seeks to operate pursuant to the exemption from the definition of an ''exchange'' under Exchange Act Rule 3a1–1(a)(2), and thus not be required to be registered as a national securities exchange, to comply with Regulation ATS. The Commission is proposing to eliminate the exemption under Rule 301(a)(4) of

[251] *See supra* note 246.

[252] *See infra* Section IV.D.4.f.

[253] *See infra* Section IV.D.5.k.

[254] *See* proposed Rule 300(k).

[255] *See* current Rule 301(b)(2)(viii).

[256] *See* proposed Rule 300(n). *See also supra* note 5. *See infra* notes 433–439 and accompanying text for a description of the filing and effectiveness rules applicable to Legacy Government Securities ATSs.

[257] *See* proposed Rule 300(m).

[258] *See* proposed Rule 300(s).

[259] *See* proposed Rule 300(o)–(p).

[260] *See infra* Section III.B.4. The proposed definitions are similar to those in FINRA's rules. *See* FINRA Rules 6710(l) and 6710(p).

Regulation ATS, which exempts from the definition of an ''exchange'' under Section 3(a)(1) of the Exchange Act an ATS that is operated by a registered broker-dealer or a bank that solely trades government securities or repos.[261] As a result, Currently Exempted Government Securities ATSs would either have to register as an exchange or operate pursuant to an exemption to such registration, such as the exemption under Regulation ATS.[262] A Currently Exempted Government Securities ATS that opts to comply with Regulation ATS would then be subject to the conditions to the exemption from exchange registration that are designed to provide its subscribers with investor protections and enable Commission oversight, including the surveillance and examination of ATSs, and to help assure fair and orderly markets.[263] The Commission is also proposing to subject Currently Exempted Government Securities ATSs to the enhanced public transparency requirements of Rule 304 and Form ATS–N.

In response to the 2020 Proposal, several commenters expressed support for eliminating the exemption for ATSs that both (1) limit their securities activities to government securities or repos and (2) either register as broker-dealers or are banks.[264] Commenters stated such requirements would help impose regulatory oversight,[265] and one commenter stated that the requirements could promote market transparency, resiliency, and integrity.[266] One commenter stated that requiring Currently Exempted Government Securities ATSs to adopt written safeguards and procedures to protect subscriber confidential trading information could help protect the integrity of a subscriber's confidential trading information that could otherwise be at risk of unauthorized disclosure and subject to potential misuse.[267] In addition, commenters specifically expressed support for the requirement that all Government Securities ATSs register as broker-dealers, stating that such requirement would provide regulatory oversight with regard to risk management and regulatory controls.[268]

One commenter suggested the Commission consider subjecting ATSs for a class of securities to an enhanced regime if the ATSs trading in that asset class are ''significant''; the commenter suggested that the Commission may recognize 30 percent as the threshold for ''significant'' threshold, and noted that equity-NMS Stock ATSs were matching about 30 percent of the total share volume when Regulation ATS was implemented.[269] The commenter suggested that the Commission apply this test when considering removing the exemption for Currently Exempted Government Securities ATSs and that the Commission make proposed Form ATS–G public when the ATSs are ''significant'' with respect to trading volume.[270] The Commission is not, however, proposing a specific trading volume test to determine whether to remove the exemption for Currently Exempted Government Securities ATSs. In addition to the significant volume in government securities transacted on ATSs (as well as Communication Protocol Systems),[271] the Commission also recognizes that government securities have a critical role in the U.S. and global economy and ATSs have grown in importance to investors and overall securities market structure for purposes of the execution and pricing of government securities.

The Commission is also proposing to amend Rule 301(b)(1) of Regulation ATS, which currently requires an ATS to register as a broker-dealer under Section 15 of the Exchange Act,[272] to allow an ATS to register either as a broker-dealer under Exchange Act Section 15 or a government securities broker or government securities dealer under Exchange Act Section 15C(a)(1)(A).[273] Registration pursuant to Section 15C(a)(1)(A) specifically applies to government securities brokers and dealers other than registered broker-dealers or financial institutions.[274] Registration as a broker-dealer under Section 15 or government securities broker or government securities dealer under Section 15C(a)(1)(A) of the Exchange Act is important because, among other things, it requires membership in an SRO, such as FINRA.[275] Because ATSs that register as broker-dealers or government securities brokers or dealers do not have self-regulatory responsibilities, the Commission believes it is important for these ATSs to be members of an SRO and thus subject to SRO examination and market surveillance,[276] trade reporting obligations,[277] and certain investor protection rules.[278] Like ATSs registered as broker-dealers under Section 15, an ATS registered as a government securities broker or government securities dealer under Section 15C(a)(1)(A) would be subject to oversight and market surveillance by an SRO.[279]

[261] *See* 17 CFR 240.3a1–1(a)(3) and 17 CFR 242.301(a)(4).

[262] The Commission is proposing to delete the text of Rule 301(a)(4)(ii)(A)–(C) and replace each paragraph with the term ''Reserved.'' Based on Commission staff experience, ATSs generally do not trade commercial paper, and the Commission is not proposing to eliminate Rule 301(a)(4)(ii)(D), which exempts an ATS from compliance with Regulation ATS if the ATS limits its securities activities to commercial paper. Accordingly, the only ATSs that would continue to be exempt under Rule 301(a)(4) would be ATSs that are registered broker-dealers or are banks and limit their securities activities to commercial paper.

[263] *See* Regulation ATS Adopting Release, *supra* note 31, at 70878. *See also infra* notes 287–297 and accompanying text.

[264] *See, e.g.,* SIFMA Letter at 2 (stating that given that Government Securities ATSs closely resemble ATSs that trade NMS stocks, it would be appropriate to impose similar regulatory oversight over such trading venues); FINRA Letter at 2; BrokerTec Letter at 2; ICE Bonds Letter I at 2.

[265] *See* SIFMA Letter at 2; FINRA Letter at 2; MFA Letter at 3; ICE Bonds Letter I at 2; and AFREF Letter at 2–3 (stating that the regulatory extension would help to discourage some of the deceptive and manipulative trading practices that occur in government securities markets).

[266] *See* Citadel Letter.

[267] *See* MFA Letter at 3.

[268] *See* SIFMA Letter at 2.

[269] *See* Bloomberg Letter at 4.

[270] *See id.*

[271] *See, e.g., supra* note 197 and accompanying text (describing that, on the interdealer market, the majority of trading currently occurs on ATSs). *See also infra* note 840 and accompanying text (describing that Communication Protocol Systems account for approximately 30 to 40 percent of total electronic trading volume on multilateral U.S. Treasury trading venues).

[272] 15 U.S.C. 78o.

[273] *See* 15 U.S.C. 78o–5. Exchange Act Section 15C(a)(1)(A) makes it unlawful for a government securities broker or government securities dealer (other than a registered broker or dealer or a financial institution) to make use of the mails or any means or instrumentality of interstate commerce to effect a transaction in any government securities unless the government securities broker or government securities dealer is registered with Commission pursuant to Exchange Act Section 15C(a)(2). *See* 15 U.S.C. 78o–5(a)(1)(A). Section 15C(e) in turn generally requires that a government securities broker or government securities dealer that is registered or required to be registered under Section 15C(a)(1)(A) must be a member of a registered national securities exchange or registered securities association such as FINRA.

[274] Broker-dealers that limit their activity to government securities require specialized registration under Section 15C of the Exchange Act and do not have to register as general-purpose broker-dealers under Section 15(b). *See* 15 U.S.C. 78o–5.

[275] *See* Regulation ATS Adopting Release, *supra* note 31, at 70863 (discussing the importance of an ATS being a member of an SRO because ATSs registered as broker-dealers will not have self-regulatory responsibilities). As noted above, Section 15C(e) generally requires SRO membership for a government securities broker or government securities dealer that is registered or required to be registered under Section 15C(a)(1)(A). Similarly, Section 15(b)(8) generally requires a registered broker-dealer to be a member of a registered securities association such as FINRA.

[276] *See, e.g.,* FINRA Rule 1000 Series, FINRA Rules 4140, 4510, 4520, 4530, and 8210.

[277] *See, e.g.,* FINRA Rule 6730.

[278] *See, e.g.,* FINRA Rules 3110, 4370, 5210, 5220, 5230, 5310, and 5340.

[279] *See* Regulation ATS Adopting Release, *supra* note 31, at 70863.

In contrast, SRO membership is not required for a bank or other financial institution that registers as a government securities broker or dealer.[280] Accordingly, the amendment to Regulation ATS would not permit a bank or other financial institution to satisfy the broker-dealer registration requirement by registering as a government securities broker or government securities dealer under Section 15C(a)(1)(B) of the Exchange Act.[281] The Commission believes it is important for an ATS to be a member of an SRO, and unlike registrants under Sections 15 and 15C(a)(1)(A), a bank or other financial institution that registers under Section 15C(a)(1)(B) is not required to be a member of an SRO.[282]

As a result, a bank-operated ATS that trades only government securities or repos would be unable to rely on the exemption provided by Regulation ATS, as proposed to be amended, and could not otherwise operate unless registered as a national securities exchange as required by Section 5 of the Exchange Act. However, this is the case currently with respect to bank-operated ATSs that trade securities other than government securities, and it is the Commission's understanding that these ATSs often are operated by bank affiliates that are themselves registered broker-dealers, rather than by the banks themselves. The Commission believes that a bank that operates an ATS that trades only government securities might adopt a similar registered affiliate structure for its government securities operations, such as by moving its ATS operations into a new or existing broker-dealer affiliate of the bank.

In addition to Rule 301(b)(1) of Regulation ATS, which most Currently Exempted Government Securities ATSs already satisfy,[283] a Currently Exempted Government Securities ATS would be required to comply with other conditions of the Regulation ATS exemption, as proposed to be amended. This includes Rule 304, which would require that Government Securities ATSs file Form ATS–N. Government Securities ATSs would not, however, be subject to the order display and execution access provisions under Rule 301(b)(3) or the fees provision of Rule 301(b)(4) that are applicable only to NMS Stock ATSs.[284] The Commission is proposing to require Government Securities ATSs that meet a certain volume threshold to comply with the Fair Access Rule with respect to trading in U.S. Treasury Securities and Agency Securities.[285] Because the Commission is proposing to apply Regulation SCI to certain Government Securities ATSs that trade U.S. Treasury Securities and/or Agency Securities, the Capacity, Integrity, and Security Rule under Rule 301(b)(6) would not apply to the trading of government securities on ATSs.[286]

The Commission believes that it is important that all Government Securities ATSs, including Currently Exempted Government Securities ATSs, be subject to the conditions of the Regulation ATS exemption, which are designed to protect investors and to facilitate Commission oversight. Accordingly, the Commission is re-proposing that a Currently Exempted Government Securities ATS must:

- Permit the examination and inspection of its premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by the Commission or by an SRO of which such subscriber is a member, pursuant to Rule 301(b)(7).[287] The Commission believes that because subscribers to whom the Commission's inspection authority may not extend could use a Currently Exempted Government Securities ATS to manipulate the market in a security, it is important that these ATSs cooperate in all inspections, examinations, and investigations.[288]
- Make and keep certain records specified in Rule 302 [289] and preserve records specified in Rule 303,[290] pursuant to Rule 301(b)(8).[291] The recordkeeping requirements would require the Currently Exempted Government Securities ATSs to make and keep certain records for an audit trail of trading activity that would allow the Commission to examine whether the ATS is in compliance with Federal securities laws.[292]
- Periodically report certain information about transactions in the ATS and information about certain activities on Form ATS–R within 30 calendar days after the end of each calendar quarter in which the market has operated pursuant to Rule 301(b)(9).[293] The information reported on Form ATS–R by Currently Exempted Government Securities ATSs will permit the Commission to monitor the trading on these ATSs for compliance with the Exchange Act and applicable rules thereunder and enforce the Fair Access Rule.[294]
- Adopt written safeguards and written procedures to protect confidential trading information and to separate ATS functions from other broker-dealer functions, including principal and customer trading pursuant to Rule 301(b)(10).[295] The Commission believes that applying the requirements of Rule 301(b)(10) to Currently Exempted Government Securities ATSs will help prevent the potential for abuse

[280] Unlike registered broker-dealers (Section 15(b)(8)) and government securities brokers or government securities dealers that are registered or required to be registered under Section 15C(a)(1)(A) (Section 15C(e)), there is no statutory requirement of SRO membership for banks. Because banks typically operate in reliance on exceptions from broker or dealer status, they are not required to become a member of an SRO, such as FINRA. In this regard, Exchange Act Section 3(a)(4)(B)(iii)(II) excludes from the definition of ''broker'' a bank that effects transactions in ''exempted securities'' such as government securities. 15 U.S.C. 78c(a)(4)(B)(iii)(II). *See* Exchange Act Section 3(a)(12) (defining ''exempted securities'' to include ''government securities'' as defined in Section 3(a)(42) of the Exchange Act). Exchange Act Section 3(a)(5)(C)(i)(II) similarly excepts from the definition of ''dealer'' a bank that buys or sells exempted securities. 15 U.S.C. 78c(a)(5)(C)(i)(II).

[281] Exchange Act Section 15C(a)(1)(B) makes it unlawful for any government securities broker or government securities dealer that is a registered broker or dealer or a financial institution to make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any government security unless such government securities broker or government securities dealer has filed with the appropriate regulatory agency written notice that it is a government securities broker or government securities dealer. 15 U.S.C. 78o–5(a)(1)(B)(i).

[282] *See* Exchange Act Sections 3(a)(6) (defining ''bank'') and 3(a)(46) (defining ''financial institution'').

[283] *See supra* text accompanying note 226 (stating that most Currently Exempted Government Securities ATSs register as broker-dealers with the Commission). For those Currently Exempted Government Securities ATSs that are operating as banks and not registered broker-dealers, the Commission is proposing to amend Rule 301(b)(1) to provide a transition period to allow them to operate without interruption while their broker-dealer registration is pending until the earlier of the date the alternative trading system registers as a broker-dealer under section 15 of the Act or section 15C(a)(1)(A) of the Act and becomes a member of a national securities association; or the date 210 calendar days after effective date of any final rule. *See supra* note 177.

[284] *See* 17 CFR 242.301(b)(3)–(4).

[285] *See infra* Section III.B.4.

[286] *See infra* Section III.C.

[287] *See* 17 CFR 242.301(b)(7). *See also* Regulation ATS Adopting Release, *supra* note 31, Section IV.A.2.f.

[288] *See* Regulation ATS Adopting Release, *supra* note 31, at 70877.

[289] *See supra* note 163.

[290] *See supra* notes 164 and 166.

[291] *See* 17 CFR 242.301(b)(8). *See also* Regulation ATS Adopting Release, *supra* note 31, Section IV.A.2.g.

[292] *See* Regulation ATS Adopting Release, *supra* note 31, at 70878.

[293] *See* 17 CFR 242.301(b)(9). *See also supra* notes 144–148 and *infra* Section III.B.4.

[294] *See* Regulation ATS Adopting Release, *supra* note 31, at 70874 and 70878.

[295] *See* 17 CFR 242.301(b)(10); *infra* note 168; NMS Stock ATS Adopting Release, *supra* note 2, Section VI.

of subscriber confidential trading information.[296]

• Not use in its name the word ''exchange,'' or any derivation of the word ''exchange'' pursuant to Rule 301(b)(11).[297] The Commission believes that the use of the word ''exchange'' by an ATS, including a Currently Exempted Government Securities ATS, would be deceptive and could lead investors to believe incorrectly that such ATS is registered as a national securities exchange.[298]

Request for Comment

17. Should the Commission amend Regulation ATS to eliminate the exemption from compliance with Regulation ATS under Rule 301(a)(4)(ii)(A) for all Currently Exempted Government Securities ATS, including those operated by banks?

18. Should the proposed elimination of the exemption from compliance with Regulation ATS only apply to Government Securities ATSs that trade a certain type of government security (*e.g.,* only U.S. Treasury Securities or only Agency Securities)? Should the proposed elimination of the exemption from compliance with Regulation ATS only apply to Government Securities ATSs that trade government securities (and not repos)? If so, for which type of Government Securities ATS should the exemption be eliminated?

19. Should Government Securities ATSs seeking to operate pursuant to the exemption provided by Regulation ATS have the alternative option to satisfy broker-dealer registration with the Commission pursuant to Section 15C(a)(1)(A)?

20. Should the Commission adopt any alternatives to requiring Government Securities ATSs to register with the Commission as broker-dealers under Section 15 or Section 15C(a)(1)(A)? For example, should the Commission amend Rule 301(b)(1) of Regulation ATS to include an alternative for a bank to register as a government securities broker or dealer pursuant to Section 15C(a)(1)(B), which would not require the bank to become a member of an SRO?

21. Should there be a transition period for Currently Exempted Government Securities ATSs that are currently operated by banks to comply with the proposed amendments to Rule 301(b)(1), including ATSs provided and operated by an affiliate of the bank? Should the Commission allow a Currently Exempted Government Securities ATS that is not registered as a broker-dealer to operate pursuant to the Rule 3a1–1(a)(2) exemption on a provisional basis? Does the proposal to allow such ATSs a maximum 210 calendar days from the effective date to comply with the broker-dealer registration requirement provide an appropriate amount of time to register as a broker-dealer? If not, what, if any, transition period would be appropriate? For Currently Exempted Securities ATSs that are currently operated by banks, should there be a different transition period? If so, why?

22. Should there be a transition period for Currently Exempted Government Securities ATSs or Covered Newly Designated ATSs to comply with all or some of the requirements of Regulation ATS? If so, which requirements would require such a transition period, and how long should such transition period be?

23 Should the Commission amend Regulation ATS to remove the exemption from Regulation ATS for ATSs that limit their securities activities to commercial paper? Do market participants use ATSs to trade commercial paper? If so, how is commercial paper traded on an ATS? Should the Commission remove any other exemption from Regulation ATS available under Rule 301?

24. Should the Commission require Currently Exempted Government Securities ATSs to comply with all of the requirements of Regulation ATS applicable to all ATSs that are currently required to comply with Regulation ATS? If not, which requirements should a Currently Exempted Government Securities ATS not be required to comply with and why?

3. Filing Requirements for Broker-Dealers That Operate ATSs That Trade Government Securities and Non-Government Securities

The Commission is re-proposing to revise Rule 301(b)(2)(viii) [299] of Regulation ATS to provide that a Legacy Government Securities ATS that is operating pursuant to a Form ATS as of the effective date of any final rule will continue to be subject to the Rule 301(b)(2) requirements to file a Form ATS. However, once the ATS files a Form ATS–N, it will no longer be subject to Rule 301(b)(2)(i) through (vii) and will instead be subject to the reporting requirements under Rule 304, which provides the rules for filing of Form ATS–N. The Commission is also proposing to provide that as of the effective date of any final rule, an entity seeking to operate as a Government Securities ATS will not be subject to the requirements of Rule 301(b)(2)(i) through (vii) and will instead be required to file reports under Rule 304. In addition, the Commission is proposing rules to make clear that a Currently Exempted Government Securities ATS would be subject to Rule 304 and would not be subject to Rule 301(b)(2)(i) through (viii). These rules are designed to prevent Government Securities ATSs from being subject to potentially duplicative requirements in Rule 304 and Rule 301(b)(2).

The Commission is proposing to amend Rule 301(b)(2)(viii) to make clear that Covered ATSs are required to file reports pursuant to § 242.304 and ATSs that are not Covered ATSs are subject to Rule 301(b)(2).[300] Today, there are some broker-dealers that operate multiple types of ATSs that trade different types of securities (*e.g.,* NMS Stock ATS and non-NMS Stock ATS) or operate multiple ATSs that trade the same type of securities but are separate and distinct from each other (*e.g.,* a broker-dealer registered for, and operates, two NMS Stock ATSs, each of which maintains a separate book of orders that is governed by distinct priority and order interaction rules for one type of security).[301] In both instances, each of the ATSs must comply with Regulation ATS.[302] The Commission is proposing to add to Rule 301(b)(2)(viii) to provide that each NMS Stock ATS or Government Securities ATS that is operated by a broker-dealer that is the

[296] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38864.

[297] *See* 17 CFR 242.301(b)(11); Regulation ATS Adopting Release, *supra* note 31, Section II.C.

[298] *See* Regulation ATS Proposing Release, *supra* note 173.

[299] 17 CFR 242.301(b)(2)(viii). Current Rule 301(b)(2)(viii) provides that NMS Stock ATSs must file with the Commission the reports and amendments required by Rule 304 and that NMS Stock ATSs are not subject to Rule 301(b)(2). NMS Stock ATSs or entities seeking to operate as NMS Stock ATSs would continue to file reports pursuant to Rule 304. Because the Commission review period for all Forms ATS–N filed by Legacy NMS Stock ATSs ended in October 2019, the Commission is proposing to delete references in Rule 301(b)(2)(viii) to Legacy NMS Stock ATSs. The Commission is also proposing to consolidate the current provisions of Rule 301(b)(2)(viii) applicable to NMS Stock ATSs to state that NMS Stock ATSs or entities seeking to operate as an NMS Stock ATS shall not be subject to the requirements of Rule 301(b)(2)(i) through (vii) and would be subject to Rule 304.

[300] The Commission is also proposing to amend Rule 301(b)(2)(viii) to state that Covered Newly Designated ATSs will be subject to Rule 304.

[301] The Commission is proposing that, for the purposes of calculating volume thresholds for the Fair Access Rule, the average trading volume of ATSs that are operated by a common broker-dealer, or ATSs operated by affiliated broker-dealers, will be aggregated. *See infra* Section V.A.2.

[302] *See* Rule 3a1–1(a)(2) (providing that an organization, association, or group of persons shall be exempt from the definition of ''exchange'' if it is in compliance with Regulation ATS) and Rule 301(a) (providing that an ATS shall comply with the requirements of Rule 301(b)).

registered broker-dealer for more than one ATS must comply with Regulation ATS, including the filing requirements of Rule 304. The Commission believes that the proposed language makes clear that the proposal would not require compliance with the heightened transparency requirements of Regulation ATS for ATSs that are not NMS Stock ATSs or Government Securities ATSs. Under the proposal, a broker-dealer operator, for example, for an ATS that noticed on its initial operation report on Form ATS that the ATS trades government securities and corporate debt securities would be the broker-dealer operator for two types of ATSs that would be separate from each other with regard to trading these types of securities and each would comply with Regulation ATS. These two types of ATSs would be (1) a Government Securities ATS that would file a Form ATS–N with respect to government securities and (2) a non-Government Securities ATS that would file a Form ATS with respect to corporate debt.[303] In addition, each of the two ATSs would be required to comply with the conditions to Regulation ATS, including, among other things, adopting written safeguards and written procedures to protect subscriber confidential trading information for the ATS pursuant to Rule 301(b)(10) and making and keeping records for the ATS pursuant to Rule 301(b)(8).[304]

The Commission also is proposing to amend Rule 301(b)(9) of Regulation ATS.[305] This rule requires an ATS to report transaction volume in various types of securities, including government securities and repos, on Form ATS–R on a quarterly basis and within 10 calendar days after it ceases operation.[306] As discussed above, the Commission is proposing to define ''Government Securities ATS'' and to clarify the definition of ''NMS Stock ATS'' to make clear that a Government Securities ATS cannot trade securities other than government securities or repos and that an NMS Stock ATS cannot trade securities other than NMS stocks.[307] For example, a Government Securities ATS operated by a broker-dealer that is also the registered broker-dealer for a non-Government Securities ATS would be required to file a Form ATS–R for the Government Securities ATS and a separate Form ATS–R for the non-Government Securities ATS. The Commission is proposing to amend Rule 301(b)(9) by removing language stating that an ATS must ''separately file'' a Form ATS–R for transactions in NMS stocks and for transactions in securities other than NMS stocks to simplify the text and convey that each ATS, even if operated by a broker-dealer that operates other ATSs, must file a Form ATS–R. This is consistent with the current Form ATS–R filing process for a broker-dealer that operates an NMS Stock ATS and non-NMS Stock ATS.[308]

Request for Comment

25. Should an NMS Stock ATS or Government Securities ATS that is operated by a broker-dealer that is a registered broker-dealer for more than one ATS be subject to Rule 304 independent of any other ATS operated by its broker-dealer?

26. Should a broker-dealer that is the registered broker-dealer for more than one ATS be required to file separate Forms ATS–R for each of the ATSs it operates?

27. Should a broker-dealer that is the registered broker-dealer for an ATS that trades government securities or repos and an ATS that trades NMS stocks be required to file separate Forms ATS–N for each of the ATSs it operates?

28. Should the Commission allow a broker-dealer operator of an NMS Stock ATS or a Government Securities ATS to disclose on its Form ATS–N its non-government securities or non-NMS stock activities, in addition to its government securities or NMS stock activities, on a voluntary basis?

29. Do commenters believe that additional changes or requirements to the ATS framework are needed? For example, should the Commission propose amendments to Regulation ATS to require ATSs that trade equity securities other than NMS stocks, corporate debt securities, municipal securities, or any other category of securities to comply with Rule 304, including filing with the Commission public Form ATS–N and requiring their Forms ATS–N to be subject to Commission review and effectiveness processes?

4. Application of Fair Access to Government Securities ATSs

The Fair Access Rule, as proposed to be amended and as described in detail below,[309] requires an ATS to, among other things, establish and apply reasonable written standards for granting access on its system. Today, the Fair Access Rule only applies if an ATS's trading volume for certain securities or a certain type of securities exceeds an average daily volume threshold during a period time set forth in the rule. Currently, the Fair Access Rule only applies to the trading of NMS stocks, equity securities that are not NMS stocks and for which transactions are reported to an SRO, municipal securities, and corporate debt securities, but not to trading in government securities.[310]

The Fair Access Rule was designed to ensure that qualified market participants have fair access to the significant sources of liquidity in the U.S. securities markets. When Regulation ATS was adopted, the Commission explained that the fair treatment by ATSs of potential and current subscribers is particularly important when an ATS captures a large percentage of trading volume in a security, because viable alternatives to trading on such a system are limited.[311] The Commission further explained that if an ATS has a significantly large percentage of the volume of trading in a security or type of security, unfairly discriminatory actions can hurt investors lacking access to that ATS.[312] Currently, however, Regulation ATS does not provide a mechanism to prevent unfair denials or limitations of access by ATSs that trade U.S. Treasury Securities or Agency Securities or regulatory oversight of such denials or limitations of access. Today, the principles undergirding the Fair Access Rule are equally relevant to a Government Securities ATS, and amending the Fair Access Rule to include the trading of U.S. Treasury Securities and Agency Securities would help ensure the fair treatment of potential and current subscribers to ATSs that consist of a large percentage

[303] Under the proposed rules, a broker-dealer operator for an ATS that currently trades government securities and corporate bonds, for example, would file a Form ATS–N to disclose its government securities activities for the Government Securities ATS. The broker-dealer operator would disclose the corporate bond activities of its existing ATS by filing with the Commission a material amendment to its Form ATS pursuant to Rule 301(b)(2)(ii) of Regulation ATS to remove information regarding government securities activities. *See* Regulation ATS Adopting Release, *supra* note 31, at 70864 (discussing circumstances under which an ATS would file a material amendment to Form ATS pursuant to Rule 301(b)(2), which, among other things, includes changes to the operating platform, the types of securities traded, or types of subscribers).

[304] *See supra* note 246 and accompanying text.

[305] *See* 17 CFR 242.301(b)(9).

[306] The information filed on Form ATS–R permits the Commission to monitor trading on an ATS. *See* Regulation ATS Adopting Release, *supra* note 31, at 70878.

[307] *See supra* notes 244 and 254 and accompanying text.

[308] *See* NMS Stock ATS Adopting Release, *supra* note 2, Section III.B.5.

[309] *See infra* Section V.A. *See also* proposed Rule 301(b)(5)(iii).

[310] *See* 17 CFR 242.301(b)(5)(i).

[311] *See* Regulation ATS Adopting Release, *supra* note 31, at 70872.

[312] *See id.*

of trading volume in these two types of securities.[313]

In the 2020 Proposal, the Commission proposed that a Government Securities ATS would be subject to the Fair Access Rule if during at least four of the preceding six calendar months, the Government Securities ATS had: (1) With respect to U.S. Treasury Securities, five percent or more of the average weekly dollar volume traded in the United States as provided by the SRO to which such transactions are reported; or (2) with respect to Agency Securities, five percent or more of the average daily dollar volume traded in the United States as provided by the SRO to which such transactions are reported.

In response to the 2020 Proposal, commenters generally supported amending Regulation ATS to apply the Fair Access Rule for Government Securities ATSs that meet certain trading thresholds.[314] Some commenters stated that the proposed amendments would ensure that market participants are not unreasonably denied access from important sources of liquidity for a particular security,[315] and prevent discriminatory actions that could hurt investors, and potentially result in higher trading costs and a reduction in trading efficiency.[316] One commenter stated that the Commission should, as was proposed in the 2020 Proposal, apply the thresholds to all types of U.S. Treasury Securities and Agency Securities, each on an aggregate basis.[317] One commenter, however, suggested that the Commission may apply the fair access thresholds to on-the-run securities that are ''likely'' to trade on an ATS as off-the-run securities are less liquid and tend to trade using other methods.[318]

The Commission is re-proposing to apply the Fair Access Rule to the trading of government securities on an ATS with certain revisions. After considering comments received, proposed changes to Exchange Act Rule 3b–16, and further analysis of the U.S. Treasury Securities markets, as explained further below, the Commission is proposing to revise the average weekly trading volume percentage for ATSs trading U.S. Treasury Securities from the threshold proposed in the 2020 Proposal. Accordingly, the Commission is proposing that a Government Securities ATS will be subject to the Fair Access Rule if, during at least four of the preceding six calendar months: (1) It had three percent or more of the U.S. Treasury Securities average weekly dollar volume traded in the United States as provided by the SRO to which such transactions are reported; or (2) it had five percent or more of the Agency Securities average daily dollar volume traded in the United States as provided by the SRO to which such transactions are reported.

First, the Commission is re-proposing that the thresholds include only securities for which transactions are reported to an SRO, and the volume thresholds are based on how the SRO subsequently reports that volume to the public. FINRA publishes weekly aggregate data on U.S. Treasury Securities based on the mandatory transaction reports of its members to TRACE, and disseminates transaction data about Agency Securities immediately upon receipt of a transaction report.[319] Currently, FINRA neither provides individual trade reports nor aggregates daily volume data for U.S. Treasury Securities transactions to TRACE subscribers (or to the public). FINRA, however, provides individual trade reports for all Agency Securities transactions to TRACE subscribers.[320] Accordingly, because weekly dollar volume data about transactions in U.S. Treasury Securities and daily dollar volume data about transactions in Agency Securities are publicly available via TRACE, Government Securities ATSs will be able to readily calculate whether they meet the applicable thresholds.[321]

Second, the Commission continues to believe that separate volume thresholds for U.S. Treasury Securities and Agency Securities would best advance the investor protection goals of the Fair Access Rule.[322] The proposed volume thresholds would help ensure that the Fair Access Rule is appropriately tailored so that it only applies to the category of security for which an ATS has significant trading volume.[323] The Commission believes that it would be unnecessary and overly burdensome to require a Government Securities ATS to comply with the Fair Access Rule for a category of government security for which that ATS does not have significant volume. Furthermore, the Commission now proposes different trading volume thresholds for U.S. Treasury Securities and Agency Securities. As such, the Commission believes it would be impractical for the Fair Access Rule to combine trading volume in these two types of securities to determine whether a Government Securities ATS has triggered its requirements.

Third, the Commission believes that it is appropriate to determine these volume thresholds on a category basis.[324] Given that U.S. Treasury

[313] Under the proposal, the Fair Access Rule would not apply to trading of repos, including repos on U.S. Treasury Securities and Agency Securities. The Commission notes FINRA does not require ATSs to report transactions for repos. The Commission is requesting comment on its preliminary assessment and on whether the Commission should amend Regulation ATS to require Government Securities ATSs that meet certain volume thresholds for the trading of repos, including repos on U.S. Treasury Securities and Agency Securities, to be subject to the requirements of the Fair Access Rule.

[314] *See, e.g.,* SIFMA Letter; MFA Letter; ICE Bonds Letter I; and Healthy Markets Letter.

[315] *See* SIFMA Letter at 4. *See also* ICI Letter at 4 (stating that funds generally are not able to directly access liquidity on most of these platforms, and that applying the fair access requirements would enhance the ability of funds to onboard and participate on these platforms directly and would generally enhance market structure for U.S. Treasury Securities and benefit fund shareholders); FIA PTG Letter at 2 (stating that the requirements will ensure qualified market participants have access to the government securities market).

[316] *See* MFA Letter at 4. *See also* ICI Letter at 4 (stating that the fair access requirements would enable the Commission to evaluate ATS standards and determine whether they are being applied in an unfair or discriminatory manner).

[317] *See* Tradeweb Letter at 3 (stating that the Commission should not, for example, distinguish between on-the-run and off-the-run U.S. Treasury Securities, and that a broader measure of market significance is preferable in order to provide for more stable application of the Fair Access Rule); ICE Bonds Letter I at 5.

[318] *See* Bloomberg Letter at 5 (noting that FINRA's aggregated weekly data report currently segments the data into on-the-run/off-the-run and dealer-to-dealer and dealer-to-customer transactions).

[319] *See supra* note 229.

[320] The Commission believes that the vast majority—and likely, all—broker-dealer operators of Legacy Government Securities ATSs that trade Agency Securities currently subscribe to TRACE. Communication Protocol Systems that are not currently FINRA members, however, are not required to report to TRACE. The Commission is requesting public comment on the extent to which Government Securities ATSs (which may include Legacy Government Securities ATSs and Communication Protocol Systems) have access to TRACE trade reports for Agency Securities.

[321] In response to the 2020 Proposal, one commenter stated that the proposal would need to be based on ''weekly par value traded'' because FINRA publishes volume data on a weekly basis. *See* Bloomberg Letter at 6. The Commission believes that data to calculate the proposed threshold, which is based on dollar volume published by FINRA on a weekly basis, would be readily available.

[322] In response to the 2020 Proposal, one commenter stated that it supports applying the Fair Access Rule to all types of U.S. Treasury Securities and all types of Agency Securities, each on an aggregate basis. *See* Tradeweb Letter at 3.

[323] For example, suppose a Government Securities ATS has significant trading volume in U.S. Treasury Securities but not Agency Securities. In this example, the proposed rule would help ensure that investors receive fair access to the ATS's services with respect to U.S. Treasury Securities, but it would not require the ATS to provide fair access for its Agency Securities services.

[324] In response to the 2020 Proposal, some commenters stated that they support applying the thresholds on an aggregate basis. *See* ICE Bonds Letter at 6 and Tradeweb Letter at 3. One

Securities and Agency Securities are types of debt securities, doing so would be consistent with the Fair Access Rule's application to other categories of fixed income securities (*i.e.,* corporate bonds and municipal securities). The Fair Access Rule applies on a security-by-security basis for NMS stocks and equity securities that are not NMS stocks, and on a category basis for corporate bonds and municipal securities.

Fourth, the Commission is proposing that a Government Securities ATS would be required to comply with the Fair Access Rule only if it has met at least one of the applicable volume thresholds during at least four of the preceding six calendar months.[325] For ATSs that trade Agency Securities, this is the same time period for evaluating the applicability of the Fair Access Rule that is currently applied to ATSs that trade NMS stocks, equity securities that are not NMS stocks and for which transactions are reported to an SRO, municipal securities, and corporate debt securities.

Fifth, the Commission is proposing a three percent threshold to apply the Fair Access Rule for Government Securities ATSs that trade U.S. Treasury Securities. The Commission received several comments on the threshold proposed in the 2020 Proposal, which expressed differing opinions. One commenter stated that it would support a threshold of three percent of daily market volume, observing that such a threshold would apply the Fair Access Rule to only four ATSs for U.S. Treasury Securities and one for Agency Securities, and stating that these ATSs are ''leading exchanges'' whose customers deserve fair access.[326] On the other hand, one commenter stated that an ATS should be subject to the Fair Access Rule only if it is a ''significant'' source of liquidity and that it believed that most market participants view 10 percent of the par value traded in the asset class as the market share threshold where an ATS's liquidity is significant.[327] Another commenter supported the previously-proposed five percent thresholds.[328]

While public comment on what constitutes a significant market center for U.S. Treasury Securities is split, the Commission believes that a three percent average weekly trading volume threshold would encompass the significant markets for and advance the policy goals of the Fair Access Rule. The Commission believes that the policy goals behind the Fair Access Rule are of particular importance in the U.S. Treasury Securities market. Market participants must have reasonable access to significant sources of liquidity in the secondary markets for U.S. Treasury Securities because, among other things, U.S. Treasury Securities play a vital and irreplaceable role in both the U.S. and global economies. In addition, ATSs that operate in the secondary interdealer markets for on-the-run U.S. Treasury Securities have become a significant source of trading interest for government securities. Also, under this proposal, RFQ systems will now be subject to Regulation ATS. Given that RFQ systems make up over half of secondary trading in the U.S. Treasury market,[329] the Fair Access Rule's policy goals would be advanced by requiring RFQs that facilitate a significant percentage of U.S. Treasury trading to provide fair access to market participants. Additionally, when compared to the application of the Fair Access Rule to NMS Stock ATSs, denying fair access to services of an ATS for U.S. Treasury Securities under this proposal would be particularly impactful. The Fair Access Rule would be applied categorically for government securities rather than on a security-by-security basis like in the NMS equities market. Thus, a market participant being denied access to a significant U.S. Treasury Securities ATS could be denied access to the system's entire portfolio of U.S. Treasury Securities operations.

Based on the current market, a three percent volume threshold would help ensure appropriate access for market participants, particularly retail and other non-broker-dealer investors who rely on liquidity in the government securities markets. Specifically, under the proposed three percent threshold, based on volume currently required to be reported to TRACE, the Commission estimates that seven Legacy Government Securities ATSs that trade U.S. Treasury Securities (including four Legacy Government Securities ATSs with greater than three percent market share and three affiliated ATSs with which their volume would be aggregated under the proposed changes to the Fair Access Rule) [330] would be subject to the Fair Access Rule.[331] Under the previously proposed five percent threshold, an estimated three ATSs trading U.S. Treasury Securities (including two Legacy Government Securities ATSs with greater than five percent market share and one affiliated ATS) would be subject to the Fair Access Rule.[332] As such, a three percent threshold would result in market participants having fair access to an estimated nearly eight percent more of the U.S. Treasury Securities market than they would under a five percent threshold, based on volume currently reported to TRACE.[333]

Furthermore, applying the Fair Access Rule to ATSs that meet a three percent threshold in U.S. Treasury Securities would result in the Fair Access Rule applying to Legacy Government Securities ATSs transacting in approximately 32 percent of market volume currently reported to FINRA in U.S. Treasury Securities. ATSs that trade U.S. Treasury Securities that would be subject to the Fair Access Rule under the proposed three percent threshold would comprise approximately 94 percent of U.S. Treasury Securities volume traded on ATSs.[334] Accordingly, the Commission believes that the three percent threshold would provide investors with access to

commenter stated that Commission should not, for example, distinguish between on-the-run and off-the-run Treasuries in applying the Fair Access Rule because a broader measure of market significance is preferable in order to provide for a more stable application of the Fair Access Rule. *See* Tradeweb Letter at 3.

[325] However, if, for example, during the six month period from January to June, the Government Securities ATS met the threshold for U.S. Treasury Securities only during January and April and met the threshold for Agency Securities only during February and May, the Government Securities ATS would not be subject to the Fair Access Rule in July because the ATS would not have met the threshold for either type of security during at least four of the preceding six months in either U.S. Treasury Securities or Agency Securities.

[326] *See* AFREF Letter at 3.

[327] *See* Bloomberg Letter at 6.

[328] *See* SIFMA Letter at 5.

[329] *See* Treasury Market Practices Group (TMPG), *White Paper on Clearing and Settlement in the Secondary Market for U.S. Treasury Securities* (July 2019), *available at https://www.newyorkfed.org/medialibrary/Microsites/tmpg/files/CS_FinalPaper_071119.pdf.*

[330] *See infra* Section V.A. *See also infra* Table VIII.1. For purposes of estimating the number of unique affiliated ATSs that would meet the proposed three percent threshold, the data in Table VIII.1 (stating a total of nine ''grouped-affiliated ATSs'' would be affected) has been adjusted based on the Commission's knowledge of current ATS operations.

[331] Based on Coalition Greenwich's Greenwich MarketView data from April 2021 through September 2021, approximately two currently operating Communication Protocol Systems would be subject to the Fair Access Rule using a three percent threshold in U.S. Treasury Securities. This would remain unchanged if the Commission used the previously-proposed five percent threshold.

[332] *See infra* Table VIII.1. For purposes of estimating the number of unique affiliated ATSs that would meet a five percent threshold, the data in Table VIII.1 (stating a total of five ''grouped-affiliated ATSs'' would be affected) has been adjusted based on the Commission's knowledge of current ATS operations.

[333] *See id.*

[334] Data is based on the regulatory version of TRACE for U.S. Treasury Securities from April 1, 2021 through September 30, 2021.

markets that are important venues for trading in U.S. Treasury Securities.

Sixth, the five percent threshold set forth in the 2020 Proposal for Agency Securities is being re-proposed unchanged. Because the U.S. Treasury Securities market is one of the deepest and most liquid in the world, and because of the vital role that U.S. Treasury Securities play in the U.S. and global economies, it is particularly important to ensure that investors have access to ATSs with significant volume in U.S. Treasury Securities. The Agency Securities market, however, does not share the unique qualities of the U.S. Treasury Securities market, and accordingly, the Commission is re-proposing for Agency Securities a five percent threshold that is consistent with the current volume threshold applicable to corporate bonds and municipal securities.[335] Furthermore, based on volume currently reported to TRACE, the estimated one Legacy Government Securities ATS that would exceed the proposed five percent threshold for Agency Securities accounts for nearly 12 percent of volume reported in TRACE in Agency Securities.[336]

The Commission is proposing a compliance period for Communication Protocol Systems, which seek to operate as ATSs, and Legacy Government Securities ATSs that become subject to the Fair Access Rule. Under the proposal, a Communication Protocol System or a Legacy Government Securities ATS that becomes subject to the Fair Access Rule would be required to comply with the Fair Access Rule one month from the date that the Communication Protocol System or the Legacy Government Securities ATS initially triggers any of the fair access thresholds.[337] The Commission believes that it is appropriate to provide the one-month compliance period to allow the Communication Protocol System or the Legacy Government Securities ATS to establish and apply reasonable written standards for granting, limiting, and denying access to the ATS services, as proposed, and, for those that would be NMS Stock ATSs and Government Securities ATSs, to prepare responses to Item 24 of Form ATS–N.[338] The additional compliance period is designed to provide the Communication Protocol Systems and the Legacy Government Securities ATSs sufficient time to transition into the new ATS regulatory regime and prevent any disruptions to the operation of these systems and their participants.

Request for Comment

30. Should any other type of government securities be included as a category of securities under Rule 301(b)(5)? Should the Commission apply Rule 301(b)(5) to all Government Securities ATSs? What would be the costs and benefits associated with such a requirement?

31. Should the proposed three percent fair access threshold for U.S. Treasury Securities be applied to all types of U.S. Treasury Securities or to subset categories of U.S. Treasury Securities? For example, should the three percent fair access threshold be applied to transaction volume in only on-the-run U.S. Treasury Securities? Should the five percent fair access threshold be applied to all Agency Securities or to subset categories? If so, why or why not?

32. Should the proposed three percent fair access threshold for U.S. Treasury Securities be set higher or lower than three percent? Should the proposed five percent fair access threshold for Agency Securities be set higher or lower than five percent? If so, what should the percentage thresholds be? Should there be no thresholds so that the Fair Access Rule would apply to all Government Securities ATSs that trade U.S. Treasury Securities or Agency Securities regardless of volume transacted on the ATS? Please support your views. Are the five percent and three percent thresholds appropriate thresholds to capture ATSs that are significant markets for trading in U.S. Treasury Securities and Agency Securities, respectively? Would the proposed thresholds capture ATSs that are not significant markets for U.S. Treasury Securities and Agency Securities? If there should be a percent threshold for a category finer than all U.S. Treasury Securities, for example on-the-run U.S. Treasury Securities or off-the-run U.S. Treasury Securities, what should that threshold should be?

33. Should the fair access threshold be based on average weekly dollar volume traded in the United States for U.S. Treasury Securities and daily dollar volume traded in the United States for Agency Securities?

34. Would the proposed four out of six month period be an appropriate period to measure the volume thresholds for U.S. Treasury Securities and Agency Securities? With respect to calculating the appropriate thresholds, would Government Securities ATSs have available appropriate data with which to determine whether the proposed thresholds have been met? Would ATSs that trade U.S. Treasury Securities be able to readily calculate whether they meet the volume thresholds in at least four out of the preceding six months, given that U.S. Treasury Securities are disseminated on a weekly, rather than daily basis? Would it be appropriate for the Commission to change the proposed four out of six month period to a time period measured in weeks (*e.g.,* at least 16 out of the preceding 24 weeks) with respect to U.S. Treasury Securities? What effect would any such change have on the likelihood that ATSs trading U.S. Treasury Securities would meet the volume thresholds?

35. If the average weekly dollar volumes were to include transactions for U.S Treasury Securities by non-FINRA members, which currently are not reported to, or collected by, the SRO that makes public average weekly dollar volume statistics, should the fair access threshold change? If so, what should be the appropriate threshold?

36. Would it be appropriate to use five percent of average daily dollar volume traded in the United States as a fair access threshold for Agency Securities? Do ATSs that trade Agency Securities currently subscribe to TRACE and, therefore, receive TRACE trade reports for Agency Securities? If not, what percentage of these ATSs do not currently subscribe to TRACE?

37. Should the requirements under the Fair Access Rule be amended specifically for Government Securities ATS? If so, how?

38. Are there any unique challenges for ATSs that would be required to comply with the requirements under the Fair Access Rule for the first time? If so, please explain.

39. Do commenters believe that it is appropriate to provide to Communication Protocol Systems and Legacy Government Securities ATSs a one-month compliance period to comply with the Fair Access Rule? Should the proposed compliance period be longer or shorter? Should the eligibility for the compliance period be expanded to ATSs that are currently operating or limited in any way? Please explain.

[335] *See* Rule 301(b)(5)(i)(A)–(D).

[336] This ATS would also meet the proposed threshold for trading in U.S. Treasury Securities.

[337] *See* proposed Rule 301(b)(5)(i)(G). The rule text uses the term ''Newly Designated ATS'' to refer to a Communication Protocol System. *See supra* note 134. Under this proposal, an ATS that triggers the fair access threshold for a security (for NMS stocks or equity securities that are not NMS stocks) or a category of security (for municipal securities, corporate debt securities, U.S. Treasury Securities, or Agency Securities) would not be able to avail itself to the one-month compliance period for triggering the fair access threshold for another security or another category of securities.

[338] *See infra* Section V.A.3.

C. Application of Regulation SCI to Government Securities ATS

The Commission is re-proposing to amend Regulation SCI to expand the definition of ''SCI alternative trading system'' to include Government Securities ATSs that meet a specified volume threshold. A Government Securities ATS that meets the proposed amended definition of ''SCI alternative trading system'' would fall within the definition of ''SCI entity'' and, as a result, would be subject to the requirements of Regulation SCI.

Because the proposed amendments to Exchange Act Rule 3b–16(a) would cause Communication Protocol Systems to fall within the definition of ''exchange,'' [339] Communication Protocol Systems that transact in U.S. Treasuries or Agency Securities that choose to register as a broker-dealer and comply with Regulation ATS would, if they meet the proposed volume threshold, also meet the proposed amended definition of ''SCI alternative trading system'' and become subject to the requirements of Regulation SCI. The proposed amendments to Exchange Rule 3b–16(a) likewise would cause Communication Protocol Systems that transact in NMS stocks and equity securities that are not NMS stocks to fall within the current definition of SCI alternative trading system if they reached the current volume thresholds within the definition, and become subject to the requirements of Regulation SCI.[340] As discussed in detail below, the Commission believes that extending the requirements of Regulation SCI to Government Securities ATSs that trade a significant volume in U.S. Treasury Securities or Agency Securities would help to address any technological vulnerabilities, and improve the Commission's oversight, of the core technology of key entities in the markets for government securities.

The Commission adopted Regulation SCI in November 2014 to strengthen the technology infrastructure of the U.S. securities markets.[341] As discussed in the Regulation SCI Adopting Release, a number of factors contributed to the Commission's proposal and adoption of Regulation SCI. These factors included: The evolution of the markets becoming significantly more dependent upon sophisticated, complex, and interconnected technology; the successes and limitations of the Automation Review Policy (''ARP'') Inspection Program; a significant number of, and lessons learned from, systems issues at exchanges and other trading venues; [342] and increased concerns over the potential for ''single points of failure'' in the securities markets.[343] Regulation SCI is designed to strengthen the infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and implement an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems.[344]

The key market participants that are currently subject to Regulation SCI are called ''SCI entities'' and include certain SROs (including stock and options exchanges, registered clearing agencies, FINRA and the MSRB) (''SCI SROs''), alternative trading systems that trade NMS and non-NMS stocks exceeding specified volume thresholds (''SCI ATSs''), the exclusive SIPs (''plan processors''), certain exempt clearing agencies, and SCI competing consolidators.[345] ATSs trading NMS or non-NMS stocks that are currently subject to Regulation SCI are heavily reliant on trading technology and represent a significant pool of liquidity for NMS and non-NMS stocks. As discussed in further detail below, Regulation SCI requires these SCI entities to, among other things, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their key automated systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that such systems operate in accordance with the Exchange Act and the rules and regulations thereunder and the entities' rules and governing documents, as applicable.[346] Broadly speaking, Regulation SCI also requires SCI entities to take appropriate corrective action when systems issues occur, provide certain notifications and reports to the Commission regarding systems problems and systems changes, inform members and participants about systems issues, conduct business continuity and disaster recovery testing, conduct annual reviews of their automated systems, including penetration testing, and make and keep certain books and records.[347]

Regulation SCI applies primarily to the systems of SCI entities, whether operated by SCI entities or on their behalf, that directly support any one of six key securities market functions—trading, clearance and settlement, order routing, market data, market regulation, and market surveillance (''SCI systems'').[348] With respect to security, Regulation SCI also applies to systems that, if breached, would be reasonably likely to pose a security threat to SCI systems (''indirect SCI systems'').[349] In addition, certain systems whose functions are critical to the operation of the markets, including those that represent single points of failure (defined as ''critical SCI systems''), are subject to certain heightened requirements.[350]

When the Commission adopted Regulation SCI, the Commission departed from its proposal to apply Regulation SCI to fixed income ATSs that trade municipal and corporate debt.[351] Explaining this departure, the Commission differentiated ATSs trading

[339] *See supra* Section II.

[340] A Communication Protocol System that chooses to register as a national securities exchange would also be subject to Regulation SCI under the definition of ''SCI entity'' which includes SROs such as national securities exchanges. As discussed above, Communication Protocol Systems, such as RFQ systems, that use trading interest and protocols to bring together buyers and sellers perform an exchange market place function similar to systems that offer the use of orders and trading facilities. These systems allow market participants to use non-firm trading interest to seek and negotiate a trade. Accordingly, the Commission preliminarily believes that such systems, whether they are systems of a registered national securities exchange or an ATS that is an SCI entity, would be covered by the definition of ''SCI systems'' under Regulation SCI because they directly support trading. *See* 17 CFR 242.1000 and *infra* note 348 and accompanying text. As detailed further below, the Commission is requesting comment on whether Communication Protocol Systems of SCI entities would meet the definition of ''SCI systems'' under Regulation SCI.

[341] *See* Regulation SCI Adopting Release, *supra* note 3, at 72252–56 for a discussion of the background of Regulation SCI.

[342] *See id.* at 72253–56.

[343] *See id.* at 72277–79.

[344] *Id.* at 72253, 72256.

[345] *See* 17 CFR 242.1000.

[346] *See* 17 CFR 242.1001; *infra* notes 397–398.

[347] *See* 17 CFR 242.1002–1007; *infra* notes 400–411.

[348] *See* 17 CFR 242.1000.

[349] *Id.*

[350] *Id. See also* Regulation SCI Adopting Release, *supra* note 3, at 72277. Paragraph (1) of the definition of ''critical SCI systems'' in Rule 1000 of Regulation SCI specifically enumerates certain systems to be within its scope, including those that directly support functionality relating to: Clearance and settlement systems of clearing agencies; openings, reopenings, and closings on the primary listing market; trading halts; initial public offerings; the provision of consolidated market data; or exclusively-listed securities. The second prong of the definition provides a broader catch-all for systems that ''[p]rovide functionality to the securities markets for which the availability of alternatives is significantly limited or nonexistent and without which there would be a material impact on fair and orderly markets.'' 17 CFR 242.1000 (definition of ''critical SCI system'').

[351] *See* Regulation SCI Proposing Release, Securities Exchange Act Release No. 69077 (Mar. 8, 2013), 78 FR 18084, 18093–95 (Mar. 25, 2013).

municipal and corporate debt securities from those trading equity securities, stating generally that fixed income markets rely much less on automation and electronic trading than markets that trade NMS stocks or non-NMS stocks.[352] The Commission also stated that the municipal and corporate debt markets tend to be less liquid than the equity markets, with slower execution times and less complex routing strategies.[353] At the same time, the Commission stated that it would ''monitor and evaluate the implementation of Regulation SCI, the risks posed by the systems of other market participants, and the continued evolution of the securities markets, such that it may consider, in the future, extending the types of requirements in Regulation SCI to additional categories of market participants.'' [354]

In the 2020 Proposal, where the Commission was addressing Government Securities ATSs specifically, the Commission stated that, in light of the increasing automation of the government securities market and the operational similarities between many Government Securities ATSs and NMS Stock ATSs, it believed that it was appropriate to propose to apply the requirements of Regulation SCI to Government Securities ATSs that meet certain volume thresholds, and noted again that while technological developments provide many benefits to the U.S. securities markets, they also have increased the risk of operational problems that have the potential to cause a widespread impact on the securities market and its participants.[355] Therefore, the Commission stated in the 2020 Proposal that application of Regulation SCI to Government Securities ATSs that trade a significant volume of U.S. Treasury Securities or Agency Securities would further help to address those technological vulnerabilities, and improve the Commission's oversight, of the core technology used by key U.S. securities markets participants.[356]

A number of commenters on the 2020 Proposal supported applying the requirements of Regulation SCI to Government Securities ATSs above a specified volume threshold.[357] These commenters stated that such requirements could promote the integrity and resiliency of the key automated systems of Government Securities ATSs and ensure Commission oversight.[358] One commenter added that extending Regulation SCI to Government Securities ATSs could reduce the potential for systems issues, as well as reduce the frequency, severity, and duration of any systems issues that may occur.[359] As support for the 2020 Proposal, some commenters cited the increased automation in the government securities markets and/or operational similarities with NMS stock ATSs,[360] with one commenter stating that the distinctions that the Commission made between stock market ATSs and fixed income ATSs in its adoption of Regulation SCI have not ''stood up well against the rapid evolution of the markets.'' [361] One commenter asserted that the government securities markets are more systemically significant than the equity markets, to which Regulation SCI already applies.[362]

Other commenters on the 2020 Proposal opposed requiring Government Securities ATSs above a volume threshold to comply with Regulation SCI.[363] These commenters advocated for applying the narrower technology and resiliency requirements of Rule 301(b)(6), rather than Regulation SCI.[364] Some of these commenters expressed concerns regarding the costs and burdens of complying with Regulation SCI.[365] One commenter distinguished the equities markets from the market for government securities, asserting that the government securities markets do not have the same type of linkages among trading venues that increase the risk of a systems issue in one market spreading to another and causing significant market impact.[366] As such, this commenter argued that applying Regulation SCI would only increase costs without materially increasing the integrity or security of the government securities markets. Another commenter, while focusing its comments on the corporate and municipal bond markets, argued that, when the Commission adopted Regulation SCI, it did not include fixed-income ATSs within the scope of the regulation out of a concern that it could discourage greater automation in the fixed-income markets and that this concern still exists today.[367]

Acknowledging comment letters on the 2020 Proposal, the Commission continues to believe that the inclusion of Government Securities ATSs meeting specified volume thresholds in Regulation SCI would be appropriate because such Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed), are heavily reliant on technology and represent significant pools of liquidity, as the Commission has determined to be the case for current SCI ATSs.[368] The Commission believes that, particularly in light of the evolution of the government securities markets, it is important to impose the requirements of Regulation SCI to help ensure that the technology systems of such Government Securities ATSs are reliable and resilient.[369]

The focus of the Commission's discussion in the Regulation SCI

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[352] *See* Regulation SCI Adopting Release, *supra* note 3, at 72270.

[353] *See id.*

[354] *See id.*

[355] *See* 2020 Proposal, *supra* note 4, at 87152. *See also supra* Section II.B; Regulation SCI Adopting Release, *supra* note 3, at 72253.

[356] *See* 2020 Proposal, *supra* note 4, at 87152.

[357] *See* SIFMA Letter at 5; MFA Letter at 5; AFREF Letter at 2, 4; Healthy Markets Letter at 9–11; and ICE Bonds Letter II at 5 (stating that it would support application of Regulation SCI to fixed income ATSs if the threshold was set at the 20% volume threshold test currently used under Rule 301(b)(6)). Commenters on the 2020 Proposal that generally supported the application of Regulation SCI expressed varying views as to the appropriate threshold level that the Commission should adopt. *See* discussion *infra* regarding comments pertaining to threshold levels.

[358] *See* SIFMA Letter at 5; MFA Letter at 5; AFREF Letter at 2, 4; and Healthy Markets Letter at 10–11.

[359] *See* MFA Letter at n.13.

[360] *See* MFA Letter at 5; and Healthy Markets Letter at 9.

[361] *See* Healthy Markets Letter at 10. *See also infra* note 367 and accompanying text (discussing MarketAxess's comment with respect to stock market ATSs and fixed income ATSs).

[362] *See* AFREF Letter at 2.

[363] *See* Tradeweb Letter at 3, 11; BrokerTec Letter at 5–9; and MarketAxess Letter at 11. The Commission notes that MarketAxess focused its comments specifically on corporate and municipal bonds, rather than government securities, but we have included such comments here for completeness.

[364] *See* Tradeweb Letter at 11; BrokerTec Letter at 5–9; and MarketAxess Letter at 11.

[365] *See* Tradeweb Letter at 3, 11; and BrokerTec Letter at 8–9.

[366] *See* Tradeweb Letter at 3, 11.

[367] *See* MarketAxess Letter at 11.

[368] Some commenters on the 2020 Proposal also provided views on whether the Commission should extend application of Regulation SCI to additional entities beyond Government Securities ATSs. *See, e.g.,* Healthy Markets Letter at 9 (stating that the Commission should expand the scope of Regulation SCI to include not just government securities ATSs, but other essential market participants in equities, futures, and fixed income markets); and SIFMA Letter at 5 (arguing that the Commission should not extend Regulation SCI to broker-dealers more generally at this time). As the Commission stated in the Regulation SCI Adopting Release, the Commission will continue to monitor and evaluate the risks posed by the systems of other market participants and the continued evolution of the securities markets to determine whether it would be appropriate to extend the requirements of Regulation SCI to additional categories of entities in the future. *See* Regulation SCI Adopting Release, *supra* note 3, at 72259.

[369] As discussed in detail above and as commenters have stated, the structure of the U.S. Treasury market has evolved in recent years and electronic trading has become an increasingly important feature of the interdealer market for U.S. Treasury Securities. *See supra* Section II.B and notes 62–63, 187 and accompanying text.

Adopting Release regarding the fixed income markets was on the corporate and municipal bond markets, not the government securities markets.[370] As discussed in detail below, given the evolution of the government securities markets, the Commission now believes that there are Government Securities ATSs that operate with similar complexity as SCI ATSs that are currently subject to Regulation SCI, and that Government Securities ATSs with significant trading volume play an important role in the government securities markets and face similar technological vulnerabilities as existing SCI entities. Several commenters on the 2020 Proposal stated that[371] the application of Regulation SCI would help the Commission improve its oversight of the market for government securities, thereby continuing its efforts to address technological vulnerabilities of the core technology systems of key U.S. securities markets entities.

The Commission explained in the Regulation SCI Adopting Release that it adopted Regulation SCI to expand upon, update, and modernize the requirements of Rule 301(b)(6) for those ATSs trading NMS stocks and non-NMS stocks that it had identified as playing a significant role in the securities markets.[372] As stated above, because Government Securities ATSs with significant trading volume play an important role in the government securities markets and present similar risks to the market as SCI ATSs, the re-proposal of the broader set of requirements and safeguards of Regulation SCI is more appropriate for such entities than proposing to amend the older and more limited requirements of Rule 301(b)(6).[373]

In discussing the costs and burdens of Regulation SCI, one commenter on the 2020 Proposal characterized the requirements of Regulation SCI as being prescriptive and ''one size fits all.'' [374] This commenter argued that many Government Securities ATSs already align with industry standards that are more flexible and achieve many of the same goals of Regulation SCI without additional compliance costs. Regulation SCI specifically incorporates, and provides that SCI entities can look to, industry standards to comply with the policies and procedures requirement under Regulation SCI.[375] As the Commission emphasized at the time of adoption, Regulation SCI is not intended to be a ''one-size-fits-all'' regulation, but rather takes a risk-based approach pursuant to which an SCI entity's policies and procedures could be tailored to a particular system's criticality and risk, and includes other rules and definitions that similarly incorporated risk-based considerations.[376]

Accordingly, the Commission is re-proposing to expand the definition of ''SCI ATSs'' to include Government Securities ATSs that meet certain volume thresholds with respect to U.S. Treasury Securities and/or Agency Securities.[377] Specifically, the definition of ''SCI ATS'' would be revised to include those ATSs which, during at least four of the preceding six calendar months, had, with respect to U.S. Treasury Securities, five percent or more of the average weekly dollar volume traded in the United States as provided by the SRO to which such transactions are reported; or had, with respect to Agency Securities, five percent or more of the average daily dollar volume traded in the United States as provided by the SRO to which such transactions are reported.

Several commenters on the 2020 Proposal discussed the specific proposed volume thresholds for Government Securities ATSs to become subject to Regulation SCI. One commenter stated that the five percent threshold level represents a reasonable level for the systemic integrity issues targeted by Regulation SCI,[378] while other commenters expressed support for the application of Regulation SCI as proposed without specifically commenting on the threshold level.

Other commenters offered alternative standards for determining which Government Securities ATSs should be included within the scope of Regulation SCI. For example, one commenter recommended that the Commission adopt a lower (*i.e.,* more stringent) threshold level and incorporate a threshold based on a dollar amount.[379]

Other commenters on the 2020 Proposal suggested adoption of a higher threshold level for the application of Regulation SCI to Government Securities ATSs. For example, one commenter stated that it would support the application of Regulation SCI instead of Rule 301(b)(6) to fixed income ATSs if the Commission adopted the 20 percent volume threshold test currently used under Rule 301(b)(6).[380] One commenter who generally opposed the 2020 Proposal also urged the Commission to adopt a higher threshold if it, in fact, extended application of Regulation SCI to Government Securities ATSs.[381] Another commenter suggested that application of Regulation SCI should depend on whether the ATS itself is a ''significant'' source of liquidity, recommending that this determination could, for example, be based on whether the ATS's par value traded in the asset class, for four months over the prior six months, averaged at least 10 percent of par value traded in the asset class.[382]

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[370] *See* Regulation SCI Adopting Release, *supra* note 3, at 72270.

[371] *See generally* SIFMA Letter at 5, MFA Letter at 5, and AFREF Letter at 2.

[372] *See* Regulation SCI Adopting Release, *supra* note 3, at 72264.

[373] *See* 17 CFR 242.301(b)(6). At the same time, as specified below, the Commission continues to request comment on whether Government Securities ATSs that meet the proposed volume thresholds for SCI ATSs should be governed by Rule 301(b)(6) instead of being defined as SCI entities. The requirements of Rule 301(b)(6) are less rigorous than the requirements of Regulation SCI. Among other things, Rule 301(b)(6) requires an ATS to notify the Commission staff of material systems outages and significant systems changes and that the ATS establish adequate contingency and disaster recovery plans. *See id.* Regulation SCI expanded upon these requirements, by, for example, expanding the requirements to a broader set of systems, imposing new requirements for information dissemination regarding SCI events, and requiring Commission notification for additional types of events, among others. Rule 301(b)(6) currently applies to an ATS that trades only municipal securities or corporate debt securities with 20 percent or more of the average daily volume traded in the United States during at least four of the preceding six calendar months. Currently, there are no ATSs that are subject to requirements of Rule 301(b)(6) of Regulation ATS.

[374] *See* BrokerTec Letter at 6.

[375] Specifically, 17 CFR 242.1001(a)(4) (Rule 1001(a)(4)) provides that the policies and procedures required under Rule 1001(a) shall be deemed to be reasonably designed if they are consistent with current SCI industry standards. *See* Rule 1001(a)(4) of Regulation SCI. ''SCI industry standards'' are those standards comprising information technology practices that are widely available to information technology professionals in the financial sector and issued by an authoritative body that is a U.S. governmental entity or agency, association of U.S. governmental entities or agencies, or widely recognized organization.

[376] *See* Regulation SCI Adopting Release, *supra* note 3, at 72259–60, 72290–91.

[377] *See* paragraphs (3) and (4) of the definition of ''SCI ATS'' under Rule 1000 of Regulation SCI.

[378] *See* AFREF Letter at 2 and 4.

[379] Specifically, this commenter stated that Regulation SCI should apply to any family of related trading venues for government or agency securities with combined notional average daily values over the lesser of one percent of the overall market share on an appropriate dollar threshold, *e.g.,* $25 billion. *See* Healthy Markets Letter at 10–11. In contrast, two commenters advocated for the application of Rule 301(b)(6) rather than Regulation SCI to Government Securities ATSs, but stated that the current 20 percent threshold in Rule 301(b)(6) is too high. *See* MarketAxess Letter at 10 (noting that 20 percent is not an appropriate threshold to capture ATSs with a significant percentage of trading volume in corporate or municipal debt); and BrokerTec Letter at 8 (recommending that Rule 301(b)(6) should apply to all Government Trading Securities regardless of trading volume).

[380] *See* ICE Bonds Letter II at 5.

[381] *See* Tradeweb Letter at 3, 11. This commenter stated that the threshold should be raised to a ''more material percentage'' such as 25 percent.

[382] *See* Bloomberg Letter at 5.

The Commission is re-proposing the five percent thresholds for Government Securities ATSs, consistent with the 2020 Proposal. Although some commenters provided suggestions for different thresholds or recommended applying Rule 301(b)(6) instead, the Commission believes that the proposed five percent thresholds for applying Regulation SCI to Government Securities ATSs (inclusive of Communication Protocol Systems, as now proposed) would be appropriate measures to identify those ATSs that have the potential to significantly impact investors and the market should a systems issue occur and thus warrant the protections and requirements of Regulation SCI.[383] At the same time, as detailed further below, the Commission is requesting additional comment on whether these proposed volume thresholds should be set higher or lower for ATSs trading government securities.

The Commission has analyzed the number of entities it believes are likely to be covered by the thresholds it is proposing and believes that, currently, approximately two Legacy Government Securities ATSs trading U.S. Treasury Securities would be subject to Regulation SCI under the five percent volume thresholds, one of which would also meet the volume thresholds for trading Agency Securities.[384] In addition, the Commission believes that approximately two currently operating Communication Protocol Systems would likely be subject to Regulation SCI under the proposed five percent threshold in U.S. Treasury Securities.

The Commission believes that the proposed volume thresholds to apply Regulation SCI to a Government Securities ATS that trades U.S. Treasury Securities and Agency Securities are reasonable compared to volume thresholds that would subject an ATS to Rule 301(b)(6) under Regulation ATS for the ATS's trading of corporate bonds and municipal securities. Currently, an ATS that trades corporate bonds or municipal securities is subject to Rule 301(b)(6) if its trading volume reaches 20 percent or more of the average daily volume traded in the United States for either corporate bonds or municipal securities. As discussed in detail above, when the Commission adopted Regulation SCI, it decided not to apply Regulation SCI and its lower volume thresholds to the fixed income markets, concluding that a systems issue in fixed income markets would not have had as significant or widespread an impact as in the equities market.[385] Among other things, the Commission reasoned that the fixed income markets at the time relied much less on electronic trading than the equities markets, and that the municipal securities and corporate bond fixed income markets tended to be less liquid than the equity markets, with slower execution times and less complex routing strategies.[386] As explained above, however, ATSs for government securities now operate with complexity similar to that of markets that trade NMS stocks in terms of use of technology and speed of trading, the use of limit order books, order types, algorithms, connectivity, data feeds, and the active participation of PTFs, and Communication Protocol Systems are increasingly used as electronic means to bring together buyers and sellers using non-firm trading interest for government securities, being particularly prevalent in the dealer-to-customer market for off-the-run U.S. Treasury securities, Agency Securities, and repos.[387] Given the critical role government securities play in the U.S. and global economies,[388] the Commission believes that, due to their increased reliance on electronic trading and the important role played by Government Securities ATSs in today's markets, an ATS whose government securities volume falls between five percent and 20 percent of trading volume could significantly impact investors and the market should a systems issue occur. By proposing to apply Regulation SCI to Government Securities ATSs with a threshold of five percent, the Commission seeks to impose the protections of Regulation SCI to these ATSs because of their importance and potential technological risks to the U.S. securities markets.[389]

While the Commission acknowledges that, as one commenter on the 2020 Proposal suggested,[390] the government securities markets may not have the same type of linkages between trading venues as exists in the equities markets today, as described above, Government Securities ATSs with significant trading volume have the potential to significantly impact investors, the overall market, and the trading of individual securities should an SCI event occur, similar to SCI ATSs currently subject to Regulation SCI. In addition, a system outage at a significant Government Securities ATS could disrupt trading at another significant Government Securities ATS even if these Government Securities ATSs are not connected. For example, if a significant Government Securities ATS is experiencing a system outage, there could be a sudden surge in message traffic (*e.g.,* quoting activities) and trading at another significant Government Securities ATS, which could exceed the system capacity of such Government Securities ATS and potentially result in a systems issue and/or a disruption of trading on that ATS as well. Further, the Commission did not base its determination regarding which entities played a significant role in the market and should be included within the scope of the regulation on the linkages that exist in the equities markets. In adopting Regulation SCI, the Commission acknowledged that a temporary outage at an ATS might not lead to a widespread systemic disruption and stated that ''Regulation SCI is not designed to solely address

[383] Regulation SCI would not apply to Government Securities ATSs that trade repos, including repos on U.S. Treasury Securities and Agency Securities. The Commission notes FINRA does not require ATSs to report transactions for repos. *See supra* note 313. Based on information available to the Commission, the Commission does not believe that ATSs today capture a significant market share for trading repos nor do they rely on the same use of technology as ATSs that trade U.S. Treasury Securities or Agency Securities, but below requests comment on whether Government Securities ATSs that trade repos, including repos on U.S. Treasury Securities and Agency Securities should be subject to Regulation SCI.

[384] *See supra* Section II.D and *infra* Section X.B.1a. As discussed above with regard to the Fair Access Rule, the ATS with the largest market volume in U.S. Treasury Securities has approximately 14 percent of market volume, while the second largest has approximately six percent of market share, and the third and fourth largest both have a little less than four percent market share. The one Legacy Government Securities ATS that would also exceed the threshold for Agency Securities accounts for roughly 11 percent of volume in Agency Securities. *See infra* Table VIII.1. If the proposed volume thresholds were ten percent, only one Legacy Government Securities ATS would be subject to Regulation SCI, meeting the threshold levels for both U.S. Treasury Securities and Agency Securities. However, the Commission believes that there would still be approximately two currently operating Communication Protocol Systems subject to Regulation SCI using a ten percent threshold in U.S. Treasury Securities. *See id.*

[385] *See* Regulation SCI Adopting Release, *supra* note 3, at 72270.

[386] *See id.*

[387] *See supra* notes 187–190 and accompanying text.

[388] *See supra* notes 182–186 and accompanying text. One commenter, while arguing that Government Securities ATSs should be subject to Rule 301(b)(6) in lieu of expanding Regulation SCI, in fact similarly emphasized the fundamental importance of the U.S. Treasury market and the need to take appropriate steps to enhance the resilience of the market, arguing that all Government Securities ATSs should be subject to technology and resiliency requirements regardless of volume. *See* BrokerTec Letter at 8.

[389] The Commission also recognizes that ATSs for corporate bonds and municipal securities are becoming increasingly electronic and as part of the 2020 Proposal, the Commission requested comment on, among other things, whether the 20 percent volume threshold under Rule 301(b)(6) of Regulation ATS should be amended to capture ATSs that might be critical markets for those securities.

[390] *See* Tradeweb Letter at 3, 11.

systems issues that cause widespread systemic disruption, but also to address more limited systems malfunctions that can harm market participants.'' [391] The Commission believes that, without appropriate safeguards in place for these Government Securities ATSs, technological vulnerabilities could lead to the potential for failures, disruptions, delays, and intrusions, which could place government securities market participants at risk and interfere with the maintenance of fair and orderly markets.

The Commission believes that the proposed volume thresholds to apply Regulation SCI to a Government Securities ATS that trades U.S. Treasury Securities and Agency Securities are reasonable as compared to the volume thresholds for applying Regulation SCI to ATSs that trade NMS stocks and ATSs that trade equities that are not NMS stocks. First, an ATS that trades NMS stocks is subject to Regulation SCI if its trading volume reaches: (i) Five percent or more in any single NMS stock and one-quarter percent or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or (ii) one percent or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans. With respect to non-NMS equity securities, an ATS is subject to Regulation SCI if its trading volume is five percent or more of the average daily dollar volume (across all non-NMS equity securities) as calculated by the SRO to which such transactions are reported. These thresholds reflect the Commission's determination as to what constitutes a material pool of liquidity traded by ATSs in the respective asset classes: One percent for NMS stocks and five percent for non-NMS equity securities. The proposed five percent SCI volume thresholds for Government Securities ATSs would be similar to those for ATSs that trade non-NMS equity securities. Basing the thresholds on volume as provided to the SRO to which such transactions are reported is reasonable given that there is no transaction reporting plan for government securities and thus, the trading figures are based on dollar volume traded in the United States as provided by the SRO to which such transactions are reported.

With regard to one commenter's suggestion that the threshold should be based on combined notional average daily values of any family of related trading venues, the Commission requests comment, as set forth below, on whether it would be appropriate to aggregate the volumes of ATSs that trade the same security or category of securities and are operated by a common broker-dealer, or operated by affiliated broker-dealers, and treat the ATSs market places as a single ATS for purposes of determining whether the ATSs meet the threshold levels in the definition of SCI ATS.[392]

One commenter on the 2020 Proposal urged the Commission to apply the deferred compliance period in the current definition of ''SCI ATS'' to Government Securities ATSs and asked for clarification as to whether this provision would be applicable.[393] Specifically, the definition of SCI ATS currently provides that an SCI ATS shall not be required to comply with the requirements of Regulation SCI until six months after satisfying the thresholds for NMS or non-NMS stocks for the first time. The Commission believes that it is appropriate to provide Government Securities ATS that meet the volume threshold in the definition of ''SCI ATS'' for the first time a period of time before they are required to comply with the requirements of Regulation SCI. Thus, the Commission is providing clarification that the deferred compliance period would be applicable to Government Securities ATSs.[394] Accordingly, Rule 1000 would provide that, like ATSs trading NMS stocks and non-NMS stocks, a Government Securities ATS would not be required to comply with the requirements of Regulation SCI until six months after satisfying the U.S. Treasury Securities or Agency Securities thresholds in the definition for the first time.[395] The Commission believes that this six-month additional compliance period is appropriate to allow a Government Securities ATS the time needed to take steps to meet the requirements of the rules, rather than requiring compliance immediately upon meeting the threshold level.

Government Securities ATSs trading U.S. Treasury Securities and/or Agency Securities that meet the volume thresholds under the proposed revised definition of SCI ATS would be subject to the requirements of Regulation SCI, as broadly described below.[396] The provision at 17 CFR 242.1001(a) requires SCI entities to establish, maintain, enforce and periodically update policies and procedures reasonably designed to ensure that their SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and includes certain minimum requirements for those policies and procedures relating to capacity planning, stress tests, systems development and testing methodology, the identification of vulnerabilities, business continuity and disaster recovery plans (including geographic diversity and resumption goals), market data, and monitoring.[397]

Rule 1001(b) of Regulation SCI requires that each SCI entity establish, maintain, enforce and periodically update written policies and procedures reasonably designed to ensure that its SCI systems operate in a manner that complies with the Exchange Act and the rules and regulations thereunder and the entity's rules and governing documents, as applicable, and specifies certain minimum requirements for such policies and procedures.[398]

Rule 1001(c) of Regulation SCI requires SCI entities to establish, maintain, enforce periodically update reasonably designed written policies and procedures that include the criteria for identifying responsible SCI personnel, the designation and documentation of responsible SCI personnel, and escalation procedures to quickly inform ''responsible SCI personnel'' of potential SCI events.[399]

Under 17 CFR 242.1002, SCI entities have certain obligations related to SCI events. Specifically, when any responsible SCI personnel has a reasonable basis to conclude that an SCI event has occurred, the SCI entity must

[391] *See* Regulation SCI Adopting Release, *supra* note 3, at 72263.

[392] *See supra* note 379.

[393] *See* BrokerTec Letter at 9–10.

[394] As in the 2020 Proposal, the Commission is proposing to amend the last paragraph in the definition of ''SCI alternative trading system or SCI ATS'' (newly redesignated paragraph (5)), which provides for the 6-month deferred compliance period, to apply it to Government Securities ATSs.

[395] *See* Rule 1000 of Regulation SCI.

[396] In the 2020 Proposal, the Commission requested comment on whether all of the obligations in Regulation SCI should apply to Government Securities ATSs that would be SCI ATSs, or whether only certain requirements should be imposed, such as those requiring written policies and procedures, notification of systems problems, business continuity and disaster recovery testing (including testing with subscribers of ATSs), and penetration testing. While, as discussed above, some commenters argue that Rule 301(b)(6) would be more appropriate framework for Government Securities ATSs (*see supra* note 364), no commenters advocate for applying only a subset of the requirements of Regulation SCI to Government Securities ATSs.

[397] 17 CFR 242.1001(a) (Rule 1001(a) of Regulation SCI).

[398] 17 CFR 242.1001(b)(1)–(2).

[399] 17 CFR 242.1001(c).

begin to take appropriate corrective action which must include, at a minimum, mitigating potential harm to investors and market integrity resulting from the SCI event and devoting adequate resources to remedy the SCI event as soon as reasonably practicable.[400] Rule 1002(b) provides the framework for notifying the Commission of SCI events including, among other things, to: Immediately notify the Commission of the event; provide a written notification within 24 hours that includes a description of the SCI event and the system(s) affected, with other information required to the extent available at the time; provide regular updates regarding the SCI event until the event is resolved; and submit a final detailed written report regarding the SCI event.[401] Rule 1002(c) of Regulation SCI also requires that SCI entities disseminate information to their members or participants regarding SCI events.[402] These information dissemination requirements are scaled based on the nature and severity of an event. [403]

The provison at 17 CFR 242.1003(a) requires SCI entities to provide quarterly reports to the Commission relating to system changes.[404] Rule 1003(b) of Regulation SCI also requires that an SCI entity conduct an ''SCI review'' not less than once each calendar year.[405] ''SCI review'' is defined in Rule 1000 of Regulation SCI to mean a review, following established procedures and standards, that is performed by objective personnel having appropriate experience to conduct reviews of SCI systems and indirect SCI systems, and which review contains: A risk assessment with respect to such systems of an SCI entity; and an assessment of internal control design and effectiveness of its SCI systems and indirect SCI systems to include logical and physical security controls, development processes, and information technology governance, consistent with industry standards.[406] Under Rule 1003(b)(2)–(3), SCI entities are also required to submit a report of the SCI review to their senior management, and must also submit the report and any response by senior management to the report, to their board of directors as well as to the Commission.[407]

The provision at 17 CFR 242.1004 sets forth the requirements for testing an SCI entity's business continuity and disaster recovery plans with its members or participants.[408]

SCI entities are required by 17 CFR 242.1005 to make, keep, and preserve certain records related to their compliance with Regulation SCI [409] and by 17 CFR 242.1006 to make required filings electronically, on Form SCI.[410] Finally, 17 CFR 242.1007 contains requirements relating to a written undertaking when records required to be filed or kept by an SCI entity under Regulation SCI are prepared or maintained by a service bureau or other recordkeeping service on behalf of the SCI entity.[411]

Request for Comment

40. Should Regulation SCI apply to Government Securities ATSs that meet the proposed definition of SCI ATS? If so, are the proposed revisions to the definition of SCI ATS appropriate? If not, please specifically explain how the policy goals of Regulation SCI would be achieved for such systems without application of the regulation.

41. What are the risks associated with systems issues at a significant Government Securities ATS? What impact would a systems issue have on the trading of government securities and the maintenance of fair and orderly markets? Do the government securities markets have the same types of linkages between trading venues as the equities markets? If not, what kind of linkages between trading venues exist in the government securities markets? How does this impact the risk of an SCI event at a Government Securities ATS on the market and/or market participants? Should all of the requirements set forth in Regulation SCI apply to Government Securities ATSs that meet the proposed definition of SCI ATS?

42. Should Government Securities ATSs that meet the proposed volume thresholds for SCI ATSs be governed by the Capacity, Integrity, and Security Rule instead of being defined as SCI entities? Are there Government Securities ATSs that play a significant role in the secondary market for U.S. Treasury Securities but do not meet the proposed volume thresholds for SCI ATSs for which a different threshold should be established to mandate compliance with the Capacity, Integrity, and Security Rule? If yes, what additional regulatory requirements, if any, should be imposed on such ATSs? What would be the costs and benefits associated with applying Rule 301(b)(6) to Government Securities ATSs that are not SCI ATSs?

43. Should the Commission amend Regulation ATS to require Government Securities ATSs to comply with Rule 301(b)(6) but adopt a threshold that is lower or higher than 20 percent? For example, should the Commission amend Rule 301(b)(6) to subject Government Securities ATSs, or certain Government Securities ATSs, to the requirements of the rule if the Government Securities ATS reaches a 5 percent, 7.5 percent, 10 percent, or 15 percent volume threshold?

44. Should the volume threshold to meet the definition of SCI ATS include trading in U.S. Treasury Securities and Agency Securities? Should Regulation SCI be applied to ATSs for any other type of government securities? Should Regulation SCI be applied to ATSs that trade repos or reverse repos on government securities, including repos or reverse repos on U.S. Treasury Securities, Agency Securities, or both?

45. Should the proposed five percent threshold test for U.S. Treasury Securities be applied to all types of U.S. Treasury Securities or to a subset of U.S. Treasury Securities? For example, should the five percent volume test only be applied to transaction volume in on-the-run U.S. Treasury Securities? Should the five percent threshold be applied to transaction volume in all Agency Securities or to a subset of Agency Securities? If so, why or why not?

46. Is the proposed five percent threshold an appropriate threshold to apply Regulation SCI to Government Securities ATSs (inclusive of

[400] *See* 17 CFR 242.1002(a) (Rule 1002(a) of Regulation SCI).

[401] *See* 17 CFR 242.1002(b). For any SCI event that ''has had, or the SCI entity reasonably estimates would have, no or a de minimis impact on the SCI entity's operations or on market participants,'' Rule 1002(b)(5) provides an exception to the general Commission notification requirements under Rule 1002(b). Instead, an SCI entity must make, keep, and preserve records relating to all such SCI events, and submit a quarterly report to the Commission regarding any such events that are systems disruptions or systems intrusions.

[402] *See* 17 CFR 242.1002(c).

[403] *See id.*

[404] *See* 17 CFR 242.1003(a) (Rule 1003(a) of Regulation SCI).

[405] *See* 17 CFR 242.1003(b).

[406] *See* 17 CFR 242.1000. Rule 1003(b)(1) of Regulation SCI also states that penetration test reviews of an SCI entity's network, firewalls, and production systems must be conducted at a frequency of not less than once every three years, and assessments of SCI systems directly supporting market regulation or market surveillance must be conducted at a frequency based upon the risk assessment conducted as part of the SCI review, but in no case less than once every three years. *See* 17 CFR 242.1003(b)(1)(i)–(ii).

[407] *See* 17 CFR 242.1003(b)(2)–(3).

[408] *See* 17 CFR 242.1004 (Rule 1004 of Regulation SCI).

[409] *See* 17 CFR 242.1005 (Rule 1005 of Regulation SCI). Rule 1005(a) of Regulation SCI relates to recordkeeping provisions for SCI SROs, whereas Rule 1005(b) relates to the recordkeeping provision for SCI entities other than SCI SROs.

[410] *See* 17 CFR 242.1006 (Rule 1006 of Regulation SCI).

[411] *See* 17 CFR 242.1007 (Rule 1007 of Regulation SCI).

Communication Protocol Systems, as proposed), as significant markets for trading in U.S. Treasury Securities or Agency Securities? If commenters believe that there should be a percent threshold for a subset of U.S. Treasury Securities, such as on-the-run U.S. Treasury Securities or off-the-run U.S. Treasury Securities, what should that threshold be?

47. Should the Commission adopt a percent volume threshold that is lower than five percent for U.S. Treasury Securities, Agency Securities, or both? If so, what percent threshold should the Commission adopt for U.S. Treasury Securities and Agency Securities? For example, should the Commission adopt a threshold that is four percent, three percent, two percent, or one percent for U.S. Treasury Securities? Should the Commission adopt a threshold that is four percent, three percent, two percent, or one percent for Agency Securities? Should there be no threshold for U.S. Treasury Securities? Should there be no threshold for Agency Securities? Please support your views.

48. Should the Commission adopt a percent volume threshold that is higher than five percent for U.S. Treasury Securities, Agency Securities, or both? For example, should the Commission adopt a threshold that is 7.5 percent, 10 percent, 15 percent, or 20 percent for U.S. Treasury Securities? Should the Commission adopt a threshold that is 7.5 percent, 10 percent, 15 percent, or 20 percent for Agency Securities?

49. Is it appropriate to use five percent of average weekly dollar volume traded in the United States as a threshold for application of Regulation SCI requirements to U.S. Treasury Securities? If the average weekly dollar volumes were to include transactions in the secondary cash market for U.S Treasury Securities by non-FINRA members, which currently are not reported to, or collected by, the SRO that makes public average weekly dollar volume statistics, should the Regulation SCI threshold change? If so, what should be the appropriate threshold? Please support your views.

50. Is it appropriate to use five percent of average daily dollar volume traded in the United States as a threshold for the application of Regulation SCI requirements to Agency Securities?

51. Would the proposed four out of six month period be an appropriate period to measure the volume thresholds for U.S. Treasury Securities and Agency Securities for purposes of Regulation SCI? With respect to calculating the appropriate thresholds, would Government Securities ATSs have available appropriate data with which to determine whether the proposed thresholds have been met? Would ATSs that trade U.S. Treasury Securities be able to readily calculate whether they meet the volume thresholds in at least four out of the preceding six months, given that U.S. Treasury Securities are disseminated on a weekly, rather than daily basis? If not, what data or information is missing? Would it be appropriate for the Commission to change the proposed four out of six month period to a time period measured in weeks (*e.g.,* at least 16 out of the preceding 24 weeks) with respect to U.S. Treasury Securities? What effect would any such change have on the likelihood that ATSs trading U.S. Treasury Securities would meet the volume thresholds?

52. Should the proposed Regulation SCI volume threshold measurement for Government Securities ATSs take into account whether Government Securities ATSs are operated by a common broker-dealer, or operated by affiliated broker-dealers?[412] For example, should the Commission aggregate the Treasury volume of two Government Securities ATSs that are each operated by a common broker-dealer, or operated by affiliated broker-dealers, for purposes of determining whether the threshold test has been satisfied and, if it has, apply Regulation SCI to each ATS? Why or why not?

53. Should only certain provisions of Regulation SCI apply to Government Securities ATSs that meet the proposed definition of SCI ATS? For example, should they only be subject to certain aspects of Regulation SCI? If so, which provisions should apply? Do commenters believe that different or unique requirements should apply to the systems of such Government Securities ATSs? What should they be and why?

54. In what instances, if at all, should the systems of Government Securities ATSs that meet the proposed definition of SCI ATS be defined as ''critical SCI systems''? Please describe.

55. Which subscribers or types of subscribers should Government Securities ATSs that meet the proposed definition of SCI ATS consider as ''designated members or participants'' that should be required to participate in the annual mandatory business continuity and disaster recovery testing? Please describe.

56. Should Government Securities ATSs that meet the proposed definition of SCI ATS not be defined as SCI entities but instead be required to comply with provisions comparable to provisions of Regulation SCI?

57. What are the current practices of Government Securities ATSs with respect to the subject matter covered by Regulation SCI? To what extent do Government Securities ATSs have practices that are consistent or inconsistent with the requirements under Regulation SCI? Please describe and be specific. Would the application of Regulation SCI or the Capacity, Integrity, and Security Rule weaken ATSs' existing capacity, integrity, and security programs?

58. Are there characteristics specific to the government securities market that would make applying Regulation SCI broadly or any specific provision of Regulation SCI to Government Securities ATSs unduly burdensome or inappropriate?

59. As commenters think about whether and how to apply Regulation SCI to Government Securities ATSs, are there any lessons commenters can draw from the market stress during Spring 2020, including, for example, lessons learned regarding business continuity or capacity planning?

60. Are there characteristics specific to Communication Protocol Systems that would make applying Regulation SCI broadly or any specific provision of Regulation SCI to such systems unduly burdensome or inappropriate? For these entities, do commenters believe that Communication Protocol Systems would have systems that meet the definition of ''SCI systems''? Why or why not? Are there certain types of Communication Protocol Systems that would have systems that meet the definition while others would not, for example, RFQ, BWIC, or conditional order systems? Please describe. Are there certain features or systems functionalities of Communication Protocol Systems that would not meet the definition of SCI systems, but that should be subject to Regulation SCI as SCI systems? Please describe. Should only certain provisions of Regulation SCI apply to Communication Protocol Systems? If so, which provisions should apply? Do commenters believe that different or unique requirements should apply to Communication Protocol Systems? What should they be and why?

[412] *See* Section V.A.2, *infra,* discussing the proposed aggregation of volume of affiliated ATSs for purposes of application of the Fair Access Rule.

IV. Revised Form ATS–N: Changes Applicable to Government Securities ATSs and NMS Stock ATSs

A. Proposed Filing and Effectiveness Requirements for Government Securities ATSs and NMS Stock ATSs

The Commission is re-proposing to amend Rule 304(a) to require that a Covered ATS, which would include a Government Securities ATS, must comply with Rules 300 through 304 of Regulation ATS, as applicable, to be exempt from the definition of ''exchange'' pursuant to Rule 3a1–1(a)(2).[413] Rule 304, as proposed to be amended, would require all Government Securities ATSs to file Form ATS–N, as revised. In addition, Communication Protocol Systems that choose to comply with Regulation ATS would be required to meet all applicable requirements of Regulation ATS, including filing a Form ATS–N if they trade NMS stocks, government securities, or repos. The Commission is proposing to make changes to current Form ATS–N, including by adding questions about interaction with related markets, liquidity providers, and surveillance and monitoring, and by making organizational and other changes that would make the form more relevant for Government Securities ATSs inclusive of Communication Protocol Systems, as proposed.[414] These changes would be applicable to both Government Securities ATSs and NMS Stock ATSs and would require NMS Stock ATSs to file amendments to their existing form.[415]

Each Form ATS–N would be subject to an effectiveness process, which would allow the Commission to review disclosures on Form ATS–N and declare the Form ATS–N ineffective if the Commission finds, after notice and opportunity for hearing, that such action is necessary and appropriate in the public interest and the protection of investors. The effectiveness process is not merit-based, but is designed to facilitate the Commission's oversight of Covered ATSs, and address, for example, material deficiencies with respect to the accuracy, currency, and completeness of disclosures on Form ATS–N.[416] The Commission is proposing to apply the same filing and effectiveness process to Government Securities ATSs that is applicable to NMS Stock ATSs filing Form ATS–N. However, the Commission is proposing changes, as described below, to the processes that would apply to both NMS Stock ATSs and Government Securities ATSs, including with regard to extensions of the Commission review period for initial Form ATS–N and Form ATS–N amendments and the filing of amendments related to fees.

Commenters on the 2020 Proposal generally supported the requirement that Government Securities ATSs file Form ATS–G.[417] Although one commenter stated that the requirement to file Form ATS–G is unnecessarily burdensome for Government Securities ATSs with limited volume,[418] another commenter stated it does not support requiring different levels of public disclosure by Government Securities ATSs depending on their trading volume, as it could result in a complex and confusing system of disclosure for market participants.[419] The Commission is proposing the requirement to file a public Form ATS–N, as revised, for all Government Securities ATSs, regardless of their volume, as this requirement is designed to allow market participants to compare Government Securities ATSs, and excluding low volume Government Securities ATSs from this requirement would undermine the goal of transparency and the ability of market participants to use Form ATS–N to assess Government Securities ATSs to select the most appropriate trading venue for their needs.

The Commission is proposing to apply to Government Securities ATSs the existing provisions of current Rule 304(a) for the filing and Commission review of an initial Form ATS–N with a modification to the circumstances under which the Commission can extend the review period for an initial Form ATS–N.[420] The Commission believes that the review process is appropriate for the same reasons stated in the NMS Stock ATS Adopting Release,[421] will facilitate the Commission's oversight of Government Securities ATSs, and will help ensure that information is disclosed in a complete and comprehensible manner. The differences between Form ATS–N filed by Government Securities ATSs and Form ATS–N filed by NMS Stock ATSs should not warrant a different review and effectiveness process and hence the Commission is proposing to apply the same provisions that are applicable to NMS Stock ATSs to Government Securities ATSs, which include the following:

- No exemption is available to a Government Securities ATS pursuant to Exchange Act Rule 3a1–1(a)(2) unless the Government Securities ATS files with the Commission an initial Form ATS–N,[422] and the initial Form ATS–N is effective.[423]
- The Commission will, by order, declare ineffective an initial Form ATS–N no later than 120 calendar days from the date of filing with the Commission, or, if applicable, the end of the extended Commission review period.[424] During the Commission review period, the Government Securities ATS shall amend its initial Form ATS–N by filing updating amendments, correcting amendments, and fee amendments[425] as applicable.[426]
- An initial Form ATS–N will become effective, unless declared ineffective, upon the earlier of: (1) The completion of review by the Commission and publication pursuant to Rule 304(b)(2)(i); or (2) the expiration of the Commission review period, or, if applicable, the end of the extended review period.[427]
- The Commission will, by order, declare an initial Form ATS–N

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[413] As proposed, references to ''NMS Stock ATSs'' throughout Rule 304 would be changed to refer to ''Covered ATSs,'' which would encompass Government Securities ATSs. *See supra* Section III.B.

[414] *See infra* Section IV.D.

[415] *See infra* Section IV.D.1.

[416] In the NMS Stock ATS Adopting Release, the Commission stated that, while it will review Form ATS–N filings, its review ''is not designed to verify the accuracy of the disclosures nor designed as an independent investigation of whether all aspects of the NMS Stock ATS operations or the ATS-related activities of the broker-dealer operator are disclosed on Form ATS–N.'' *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38851. This would equally apply to the Commission's review of Forms ATS–N filed by Government Securities ATSs, as proposed.

[417] *See, e.g.,* MFA Letter at 5; AFREF Letter, at 3; BrokerTec Letter at 2. One commenter, which expressed general support for the enhanced filing requirements and urged the Commission to move forward with finalization and implementation of the proposal, stated that applying Regulation ATS to Government Securities ATSs that meet certain volume thresholds would increase public operational transparency. *See* FIA PTG Letter at 2.

[418] *See* ICE Bonds Letter I at 4–5.

[419] *See* MFA Letter at 5.

[420] *See infra* notes 430–432 and accompanying text. The proposed amendment to Rule 304(a) would also apply to the review of initial Form ATS–N filed by NMS Stock ATSs.

[421] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38782.

[422] The Commission staff may reject a Form ATS–N filing that is defective because, for example, it is missing sections or missing responses to any sub-questions, or does not comply with the electronic filing requirements. This is a separate process from the determination to declare a Form ATS–N ineffective. *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38791.

[423] *See* Rule 304(a)(1)(i).

[424] *See* proposed Rule 304(a)(1)(ii). *See* also *infra* note 430.

[425] *See infra* note 451.

[426] As proposed, to make material changes to its initial Form ATS–N during the Commission review period, the Government Securities ATS shall withdraw its filed initial Form ATS–N and may refile an initial Form ATS–N pursuant to Rule 304(a)(1). *See* Rule 304(a)(1)(ii)(B).

[427] *See* proposed Rule 304(a)(1)(iii)(A).

ineffective if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[428] If the Commission declares an initial Form ATS–N ineffective, the Government Securities ATS shall be prohibited from operating as a Government Securities ATS pursuant to Exchange Act Rule 3a1–1(a)(2). An initial Form ATS–N declared ineffective does not prevent the Government Securities ATS from subsequently filing a new Form ATS–N.[429]

The Commission is re-proposing to amend Rule 304(a)(1)(ii)(A)(*1*), which currently provides that the Commission may extend the initial Form ATS–N review period for an additional 90 calendar days if the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, to provide that the Commission may extend the review period if it finds that an extension is appropriate.[430] The proposed standard is the same standard for extending the Commission review period for SRO rule filings under Section 19 of the Exchange Act.[431] This would apply to Form ATS–N filed by Government Securities ATSs as well as NMS Stock ATSs. The Commission believes that extending the Commission review period for Form ATS–N if it finds that an extension is appropriate would facilitate an effective review process.[432] For example, if an ATS's disclosures on an initial Form ATS–N are difficult to understand or appear to be incomplete, the Commission may need additional time to discuss the disclosures with the ATS to ascertain whether to declare the Form ATS–N ineffective, even if the form is not unusually lengthy or does not raise novel or complex issues. Rather than moving to declare an initial Form ATS–N ineffective because of material deficiencies with respect to completeness and comprehensibility, the Commission could extend the review period to allow the filer to resolve the deficiencies. As under current Rule 304(a)(1)(ii)(A)(*1*), in such case, the Commission will notify the Covered ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required.

The Commission is also re-proposing a process for Legacy Government Securities ATSs that have a Form ATS on file with the Commission as of the effective date of any final rule to continue to operate during the Commission's review period.[433] In addition, to allow a Currently Exempted Government Securities ATS or Covered Newly Designated ATS to continue to operate without disruption while its initial Form ATS–N is under Commission review, the Commission is proposing to amend Rule 304(a)(1)(i) to provide that a Currently Exempted Government Securities ATS or Covered Newly Designated ATS may continue to operate pursuant to Regulation ATS until its initial Form ATS–N becomes effective. The Commission believes that all Legacy Government Securities ATSs—whether they are operating pursuant to a Form ATS or whether they have operated as a Currently Exempted Government Securities ATS—should be permitted to continue to operate during the Commission review period. The Commission further believes Covered Newly Designated ATSs should be permitted to operate without disruption to their participants and the market. A Government Securities ATS or Covered Newly Designated ATS would file with the Commission an initial Form ATS–N no later than the date 90 calendar days after the effective date of any final rule. An initial Form ATS–N filed by a Legacy Government Securities ATS would supersede and replace a previously filed Form ATS of the Legacy Government Securities ATS. A Legacy Government Securities ATS that fails to comply with the requirements of Regulation ATS by filing Form ATS–N by the 90th calendar day from the effective date of any final rule and continues operating as a Government Securities ATS would no longer qualify for the exemption provided under Rule 3a1–1(a)(2), and thus, risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act. If a Legacy Government Securities ATS that has a Form ATS on file with the Commission seeks to trade, for example, government securities and corporate bonds fails to file a Form ATS–N by the 90th calendar day, the ATS must either file a cessation of operations report on Form ATS or file a material amendment on Form ATS to remove information related to government securities. A Legacy Government Securities ATS or Newly Designated Covered ATS would be permitted to operate, on a provisional basis, pursuant to the filed initial Form ATS–N, and any amendments thereto, while the Commission reviews the initial Form ATS–N.

The Commission is proposing the initial Commission review period (not including any extension) for an initial Form ATS–N filed by a Legacy Government Securities ATS or Newly Designated Covered ATS to be 180 calendar days. Based on Commission staff experience reviewing initial Form ATS–N filings during the transition period for Form ATS–N, the Commission believes it would be appropriate to provide a 180 calendar day review period rather than the 120 calendar day review period that was applicable to initial filings by Legacy NMS Stock ATSs and that would be applicable to a new Covered ATSs under Rule 304(a)(1)(ii)(A).[434] The 180 calendar day review period is designed to provide Commission staff with adequate time to review filings, discuss

[428] Like the review process for Form ATS–N for NMS Stock ATSs, the Commission's review of Form ATS–N for Government Securities ATSs would not be merit-based; instead it would focus on the completeness and comprehensibility of the disclosures. *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38790. In the NMS Stock ATS Adopting Release, the Commission discussed the circumstances under which the Commission would declare a Form ATS–N amendment ineffective. Such circumstances would also apply to the Commission's review of an amendment to Form ATS–N filed by a Government Securities ATS. For example, the Commission believes it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if, for example, the Commission finds, after notice and opportunity for a hearing, the Form ATS–N was filed by an entity that does not meet the definition of a Government Securities ATS; one or more disclosures reveal non-compliance with Federal securities laws, or the rules or regulations thereunder, including Regulation ATS; or one or more disclosures on Form ATS–N are materially deficient with respect to their completeness or comprehensibility. For further discussion, *see infra* Section IV.B.2.

[429] *See* Rule 304(a)(1)(iii)(B).

[430] *See* Rule 304(a)(1)(ii)(A)(*1*). The rule provides that the Commission extends the review period, it will notify the Government Securities ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required. The Commission may also extend the initial Form ATS–N review period for any extended review period to which a duly authorized representative of the Form ATS–N agrees in writing. *See* Rule 304(a)(1)(ii)(A)(*2*).

[431] *See* 15 U.S.C. 78s(b)(2)(A)(ii).

[432] In the Commission staff's experience reviewing Form ATS–N filed by NMS Stock ATSs, the Commission review period was extended (either by the Commission or by the agreement of a duly authorized representative of the ATS) for 33 of the 43 Forms ATS–N that the Commission has reviewed and published. In its review of each Form ATS–N, the Commission staff engaged in extensive conversations with the NMS Stock ATS with regard to the NMS Stock ATS's disclosures on its initial Form ATS–N.

[433] *See* proposed Rule 304(a)(1)(iv). Other than the differences discussed below, the proposed process is similar to the process currently provided under Rule 304(a)(1)(iv) for Legacy NMS Stock ATSs. ''Legacy NMS Stock ATSs'' are NMS Stock ATSs that were operating pursuant to an initial operation report on Form ATS on file with the Commission as of January 7, 2019. The Commission is proposing to delete references to Legacy NMS Stock ATSs throughout the rule text, as the transition period for such ATSs has ended.

[434] *See supra* note 424 and accompanying text.

disclosures with Covered ATSs, and address any deficiencies.

For the same reasons discussed above,[435] the Commission is proposing to amend Rule 304(a)(1)(iv)(B) to provide that the Commission can extend the initial Form ATS–N review period for Legacy Government Securities ATSs by an additional 120 calendar days[436] if it determines that a longer period is appropriate.

Other than the proposed changes to the circumstances under which the Commission may extend the Commission review period, the Commission is also proposing that the process for the Commission to review and declare ineffective, if necessary, an initial Form ATS–N filed by a Legacy Government Securities ATS would be the same as the process for an initial Form ATS–N filed by a Legacy NMS Stock ATS.[437] Given the proposed intended uses of Form ATS–N to allow the Commission to monitor developments and carry out its oversight functions over Government Securities ATSs and to enable market participants to make more informed decisions about how their trading interest will be handled by the ATSs, the Commission believes that it is important for a Government Securities ATS to maintain an accurate, current, and complete Form ATS–N.[438] Providing the Commission with the opportunity to review Form ATS–N disclosures helps ensure that information is disclosed in a complete and comprehensible manner.[439]

As the intended uses of Form ATS–N filed by Government Securities ATS and Form ATS–N disclosures filed by NMS Stock ATSs are similar, the Commission is proposing the same filing requirements that are currently applicable to Form ATS–N amendments filed by NMS Stock ATSs to Form ATS–N amendments filed by Government Securities ATSs. Like an NMS Stock ATS, a Government Securities ATS would be required to amend Form ATS–N:

- At least 30 calendar days, or the length of any extended review period, prior to the date of implementation of a material change to the operations of the Government Securities ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on the Form ATS–N, other than changes related to order display or fair access, which will be contingent amendments reported pursuant to Rule 304(a)(2)(i)(D), or fees, which will be fee amendments reported pursuant to Rule 304(a)(2)(E) (''material amendment'').[440]
- No later than 30 calendar days after the end of each calendar quarter to correct information that has become inaccurate or incomplete for any reason and was not required to be reported to the Commission as a material amendment, correcting amendment, contingent amendment, or fee amendment (''updating amendment'').[441]
- Promptly to correct information in any previous disclosure on the Form ATS–N, after discovery that any information previously filed on a Form ATS–N was materially inaccurate or incomplete when filed (''correcting amendment'').[442]
- No later than the date that information required to be disclosed in Part III, Item 23 on Form ATS–N, which addresses fair access, has become inaccurate or incomplete (''contingent amendment''). Because the order display and execution access rule under Rule 301(b)(3) does not apply to Government Securities ATSs, Government Securities ATSs would not be required to disclose information pertaining to order display and execution access. Accordingly, for Government Securities ATSs, Rule 304(a)(2)(i)(D) would only apply to the fair access disclosure on Form ATS–N.[443]
- No later than after the date that information required to be disclosed in Part III, Item 18 on Form ATS–N has become inaccurate or incomplete (''fee amendment'').

In the NMS Stock ATS Adopting Release, the Commission provided examples of scenarios that are particularly likely to implicate a material change.[444] In consideration of Commission staff's experience with Form ATS–N, the proposed change to include Communication Protocol Systems in the definition of ''exchange,'' and the proposed changes to Form ATS–N, the Commission is reiterating and adding to the list of scenarios particularly likely to implicate a material change, which would include, but are not limited to: (1) A broker-dealer operator or its affiliates beginning to trade on the Covered ATS; (2) a change to the broker-dealer operator's policies and procedures governing the written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10)(i) of Regulation ATS, including types of persons that have access to confidential trading information;[445] (3) a change to the types of participants on the Covered ATS or the eligibility to participate in the ATS; (4) the introduction or removal of, or change to, an order type or type of message that subscribers can receive or send; (5) the introduction of, or change to, requirements, conditions, or restrictions to send, receive, or view trading interest; (6) a change to the interaction of trading interest (including, for example, procedures related to how participants send, receive, respond to, counter, and firm-up trading interest) and priority

[435] *See supra* notes 430–432 and accompanying text.

[436] Consistent with the process for Legacy NMS Stock ATSs today, Rule 304(a)(1)(iv) would permit the Commission to extend the initial Form ATS–N review period for Legacy Government Securities ATSs for an additional 120-calendar days. *See infra* note 437.

[437] *See* Rule 301(b)(2)(viii). Rule 304(a)(1)(iv)(B), as proposed, would provide that the Commission may, by order, as provided in Rule 304(a)(1)(iii), declare an initial Form ATS–N filed by a Legacy Government Securities ATS or Covered Newly Designated ATS ineffective no later than 180 calendar days from the date of filing with the Commission, or, if applicable, the end of the extended review period. As proposed, the Commission may extend the initial Form ATS–N review period for a Legacy Government Securities ATS or Covered Newly Designated ATS for: An additional 120 calendar days if the Commission determines that a longer period is appropriate, in which case the Commission will notify the Legacy Government Securities ATS or Covered Newly Designated ATS in writing within the initial 180-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required; or any extended review period to which a duly-authorized representative of the Legacy Government Securities ATS agrees in writing.

[438] *See* NMS Stock ATS Proposing Release, *supra* note 29 (discussing the proposed process for amendments to, and Commission review of, Form ATS–N filed by NMS Stock ATSs).

[439] *See* NMS Stock ATS Adopting Release, *supra* note 2, Section IV.A.3.

[440] *See* Rule 304(a)(2)(i)(A). The Commission is proposing revisions to Rule 304(a)(2)(i)(A) to reference fee amendments and to clarify the language of the provision. *See also infra* note 451.

[441] *See* Rule 304(a)(2)(i)(B). *See also infra* note 451.

[442] *See* Rule 304(a)(2)(i)(C). For a discussion of when an ATS should file a correcting amendment, *see* NMS Stock ATS Adopting Release, *supra* note 2, at 38806.

[443] The Commission is re-proposing to revise Rule 304 to replace references to ''Order Display and Fair Access Amendments'' with ''Contingent Amendments.'' The term ''Contingent Amendment'' would apply to amendments related to Form ATS–N disclosures regarding order display and fair access, as applicable, under Rule 304(a)(2)(i)(D) to Form ATS–N filed by both NMS Stock ATSs and Government Securities ATSs.

[444] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38803.

[445] In the Commission's experience, a change in ownership of the broker-dealer operator that does not result in the change in the registered entity nevertheless may be likely to implicate a material change, in that, among other things, it may result in a change to the persons who have access to confidential trading information. A change in the broker-dealer operator, however, would require the Covered ATS to cease operations and file a new Form ATS–N. *See infra* notes 527–528 and accompanying text.

procedures; (7) any change to ATS functionalities or procedures that affect pricing of trading interest; (8) a change that would impact a subscriber's ability to send or interact with trading interest, including a change to the segmentation of orders and participants; (9) a change to the manner in which the Covered ATS displays or makes known trading interest, including to limit or expand the trading interest that subscribers can view or interact with; (10) a change of a service provider to the operations of the Covered ATS that has access to subscribers' confidential trading information; and (11) a change to introduce or stop routing or sending away trading interest. A Covered ATS that notifies subscribers, or certain subscribers, about potential changes to ATS operations or ATS activities of the broker-dealer operator or its affiliates in advance of filing a Form ATS–N amendment demonstrates that the ATS determines such information to be important to subscribers and may likely be material. In addition, from the Commission staff's experience, if a Covered ATS removes an important functionality or no longer makes a functionality available to subscribers or certain groups of subscribers, the removal of such functionality could be a material change.

This list is not intended to be exhaustive, and does not mean to imply that other changes to the operations of a Covered ATS or the activities of the broker-dealer operator or its affiliates would not constitute material changes. Further, the Covered ATS should generally consider whether the cumulative effect of a series of changes to the operations of the Covered ATS or the activities of the broker-dealer operator or its affiliates with regard to the Covered ATS is material. In addition, in determining whether a change is material, an ATS generally should consider whether such change would affect: (1) The competitive dynamics among ATS subscribers; (2) the execution quality or performance of the orders of any subscriber or category of subscribers; (3) the nature or composition of counterparties with which any subscriber or category of subscribers interact; and (4) the relative speed of access or execution of any subscriber or group of subscribers.[446]

The Commission is proposing a new amendment type—fee amendments—that is not currently provided for under Rule 304(a)(2), but would be filed by both NMS Stock ATSs and Government Securities ATSs. The Covered ATS would be required to file a fee amendment no later than the date it makes a change that makes information reported on Part III, Item 18, inaccurate or incomplete.[447] Part III, Item 18 of Form ATS–N would require disclosure of fee-related information, including, among other things, a description of the types of fees, structure of fees, variables that impact fees, differentiation among fees among types of subscribers, the range of fees, and rebates or discounts, for use of ATS services or services that are bundled with the subscriber's use of non-ATS services or products offered by the broker-dealer operator or its affiliates.[448] Changes that would trigger a fee amendment would include, among other things, a change to the range of fees, a change to the factors that affect the fees that the ATS charges, or any other change to the fee disclosure in Part III, Item 18. In the Commission staff's experience reviewing Form ATS–N amendments, NMS Stock ATSs have taken varied approaches to the reporting of fees. In some cases, NMS Stock ATSs have treated fee changes as material changes, and filed amendments on Form ATS–N at least 30 calendar days before implementing the changes. In other cases, NMS Stock ATSs have filed updating amendments no later than 30 days from the end of the calendar quarter in which the ATS implemented the fee change. The Commission believes that fee changes should be transparent and that both potential and current subscribers and customers of subscribers, generally, should be timely informed of a change to a Covered ATS's fees, as required to be reported on Form ATS–N. The Commission notes that today, pursuant to Section 19(b) of the Exchange Act,[449] national securities exchanges file proposed rule changes with the Commission that may take effect upon filing with the Commission if the rule change is ''establishing or changing a due, fee, or other charge applicable only to a member,'' no matter the materiality of the rule change.[450] NMS Stock ATSs, which compete with national securities exchanges, are not subject to this provision to the Exchange Act, and are required to file a material amendment to Form ATS–N, and thus wait 30 calendar days before implementing a fee change, if the fee change is material. Given this difference between national securities exchanges and NMS Stock ATSs, the Commission believes that requiring Covered ATSs to file a fee amendment no later than the date it makes a change to a fee or fee disclosure would provide the public with sufficient notice about a fee change while allowing the ATS to act nimbly to make fee changes to respond to, for example, competitive pressures from other trading venues. The Commission is also making conforming changes in Rule 304 that would, among other things, allow Covered ATSs to file fee amendments to initial Form ATS–N while the initial Form ATS–N is under Commission review.[451]

Like Form ATS–N filed by NMS Stock ATSs, the Commission would, by order, declare ineffective any Form ATS–N amendment filed by Government Securities ATSs pursuant to Rule 304(a)(2)(i)(A) through (E) if it finds that such action is necessary or appropriate in the public interest and is consistent with the protection of investors.[452] However, the Commission is proposing to amend Rule 304(a)(2)(ii), which currently provides that the Commission would declare any Form ATS–N amendment ineffective no later than 30 calendar days from filing with the Commission, to permit the Commission to extend the Form ATS–N amendment review period by an additional 30 calendar days if the Commission finds that a longer period is appropriate. The ability to extend the review period for amendments to Form ATS–N by an additional 30 calendar days would allow the Commission additional time to review and discuss the amendment with the filer, and, if necessary, declare the Form ATS–N amendment

[446] For further discussion, *see* NMS Stock ATS Adopting Release, *supra* note 2, Section IV.B.1.a. In the NMS Stock ATS Adopting Release, the Commission stated that in determining whether a change is material, an ATS should generally consider whether such change would affect ''the fees that any subscriber or category of subscribers would pay to access and/or use the ATS.'' *See id.* at 38803. As discussed below, the Commission is proposing a new amendment type for fee amendments, and as a result, changes to information in the fee disclosure in Part III, Item 18 would not be material changes for purposes of Rule 304(a)(2).

[447] If the Covered ATS files a fee amendment in advance to notice a change of a fee, for example, the Covered ATS should provide the effective date for the fee so that subscribers can understand when the fee will be effective and thus impact them. The Covered ATS must subsequently file an updating amendment on Form ATS–N to remove the outdated effective date and any fees no longer in effect to ensure that the disclosures on Form ATS–N are current and accurate.

[448] *See infra* Section IV.D.5.r.

[449] 15 U.S.C. 78s(b).

[450] 17 CFR 240.19b–4(f)(2).

[451] *See* proposed changes to Rule 304(a)(1)(ii)(B) and Rule 304(a)(1)(iv)(C). In addition, the Commission is proposing to revise the definition of ''Material Amendment'' to state that it would not include a fee amendment required to be filed pursuant to Rule 304(a)(2)(i)(E) and to reorder the language in Rule 304(a)(1)(ii)(A) to improve the readability of the provision. *See* Rule 304(a)(2)(i)(A). The Commission is also proposing to revise the definition of ''Updating Amendment'' to state that it would not include a fee amendment. *See* Rule 304(a)(2)(i)(B).

[452] *See* Rule 304(a)(2)(ii).

ineffective. Based on the Commission staff's experience reviewing Form ATS–N amendments, amendments on Form ATS–N vary in length, complexity, as well as comprehensibility and clarity. The Commission staff frequently engages in extensive discussions with NMS Stock ATSs about their disclosures in an amendment, and as a result of these discussions, ATSs often amend a filed amendment to address deficiencies within the Commission review period. To date, NMS Stock ATSs have resolved such deficiencies within the Commission review period, and the Commission has not declared a Form ATS–N amendment ineffective. However, in several circumstances, NMS Stock ATSs have submitted draft amendments to the Commission staff, which has provided the staff and NMS Stock ATSs with additional time to resolve potential deficiencies. NMS Stock ATSs, however, have no obligation to provide such a draft to the Commission, nor does the Commission staff have any obligation to review such a draft.

In the event a Covered ATS is unable to address deficiencies within the initial 30-day review period, the Commission believes that, rather than moving to declare a Form ATS–N amendment ineffective, it would be appropriate to extend the review period and allow the filer more time to address such deficiencies. The Commission believes that 30 additional calendar days will give the Covered ATS sufficient time to address any such concerns. If the Covered ATS is unable to resolve the deficiencies within the extended review period, the Commission will declare the Form ATS–N amendment ineffective if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission is therefore proposing that the Commission may extend the Form ATS–N amendment review period by an additional 30 calendar days if the Commission finds that a longer period is appropriate, or to any extended review period to which a duly-authorized representative of the ATS agrees in writing. The Commission is also proposing to amend Rule 304(a)(2)(i)(A) to provide that a Covered ATS may not implement a material change before the end of the 30 calendar day review period or the length of any extended review period under proposed Rule 301(a)(2)(ii)(A).[453] Today, an NMS Stock ATS may not implement a material change until the expiration of the 30-calendar day Commission review period. Likewise, as a result of the proposed change, in the event of an extension of the Commission review period, the Covered ATS would therefore not implement the material change until the review period has expired. As discussed below, the Commission would disseminate the material amendment following the expiration of the review period or any extended review period.[454]

The Commission is also re-proposing to apply current Rule 304(a)(3) to require a Government Securities ATS to notice its cessation of operations on a Form ATS–N at least 10 business days prior to the date it will cease to operate as a Government Securities ATS.[455] Filing such a notice would cause the Form ATS–N to become ineffective on the date designated by the Government Securities ATS. In addition, the Commission is re-proposing to apply Rule 304(a)(4) to Government Securities ATSs, which would allow the Commission to order to suspend (for a period not exceeding twelve months),[456] limit, or revoke a Covered ATS's exemption pursuant to Rule 3a1–1(a)(2) if the Commission finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest.[457] Rule 304(a)(4)(ii) would provide that if the exemption for a Government Securities ATS is suspended or revoked pursuant to Rule 304(a)(4)(i), the Government Securities ATS would be prohibited from operating pursuant to the Rule 3a1–1(a)(2) exemption.[458] If the exemption for a Government Securities ATS is limited pursuant to Rule 304(a)(4)(i), the Government Securities ATS shall be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order.

In addition, Rule 304(a)(4) would provide that prior to issuing an order suspending, limiting, or revoking a Government Securities ATS's exemption pursuant to Rule 304(a)(4)(i), the Commission will provide notice and opportunity for hearing to the Government Securities ATS, and make the findings specified in Rule 304(a)(4)(i) described above, that, in the Commission's opinion, the suspension, limitation, or revocation is necessary or appropriate in the public interest and is consistent with the protection of investors.[459]

Request for Comment

61. Should Government Securities ATSs be required to file Form ATS–N, as revised, instead of Form ATS? Should Government Securities ATSs be required to file a form different from Form ATS–N?

62. As an alternative to requiring Government Securities ATSs to file Form ATS–N, should Form ATS, or parts thereof, for Government Securities ATSs be made available to the public? If made available to the public, is current Form ATS sufficient to provide information to the public about the operations of Government Securities ATSs?

63. Do commenters believe that broker-dealers operators of ATS that trade only government securities or repos might choose to modify their business models so that they would not be required to comply with enhanced regulatory or operational transparency requirements for Government Securities ATSs?

64. Should Government Securities ATSs be subject to Rule 304(a), in whole or in part?

65. Should Rule 304(a) be amended to provide that an initial Form ATS–N be made effective by Commission order or any other means instead of upon publication by the Commission?

66. Should Rule 304(a) only apply to Government Securities ATSs that trade a certain type of government security

[453] *See* proposed Rule 304(a)(2)(i)(A) (stating that a Covered ATS shall amend a Form ATS–N at least 30 calendar days, or the length of any extended review period pursuant to Rule 304(a)(2)(ii)(A), prior to the date of implementation of a material change (other than a correcting amendment) to the operations of the Covered ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on the Form ATS–N).

[454] *See infra* note 463 and accompanying text.

[455] *See* Rule 304(a)(3).

[456] The proposed limitation on the time frame for suspension is consistent with Federal securities law provisions pursuant to which the Commission may suspend the activities or registration of a regulated entity. *See, e.g.,* Exchange Act Section 15(b)(4) (15 U.S.C. 78o(b)(4)) and 15B(c)(2) (15 U.S.C. 78o–4(c)(2)). *See* NMS Stock ATS Proposing Release, *supra* note 29, at 81031 n.322.

[457] *See* proposed Rule 304(a)(4)(i).

[458] *See* Rule 304(a)(4). In making a determination as to whether suspension, limitation, or revocation of a Government Securities ATS's exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors, the Commission would, for example, take into account whether the entity no longer meets the definition of Government Securities ATS under Rule 300(l), does not comply with the conditions to the exemption (in that it fails to comply with any part of Regulation ATS, including Rule 304), or otherwise violates any provision of Federal securities laws. For further discussion of such examples as applied to NMS Stock ATSs, *see* NMS Stock ATS Proposing Release, *supra* note 29, at 81032.

[459] Pursuant to the Commission's current information sharing practices with the Department of the Treasury, the Commission expects to provide the Department of the Treasury with prompt notice in certain cases, such as when the Commission is declaring a Form ATS–N ineffective under Rule 304(a)(1)(iii)(b), or suspending, limiting, or revoking the exemption of a Government Securities ATS under Rule 304(a)(4).

(*e.g.,* U.S. Treasury Securities, Agency Securities)? If so, to which type of Government Securities ATS should Rule 304 apply (*e.g.,* Government Securities ATSs that trade U.S. Treasury Securities or Government Securities ATSs that trade Agency Securities)?

67. Should the Commission require a Currently Exempted Government Securities ATS to file Form ATS–N and comply with the requirements of Rule 304 to qualify for the exemption from the definition of exchange?

68. Would the proposal to require a Currently Exempted Government Securities ATS or Covered Newly Designated ATS to file Form ATS–N by the date 90 calendar days after the effective date of any final rule provide the ATS sufficient time to transition to compliance with Regulation ATS and the proposed requirements under Rule 304? If the Commission were to provide more time for a Covered Newly Designated ATS and/or Currently Exempted Government Securities ATS to file Form ATS–N, should the Commission require the Covered Newly Designated ATS and/or Currently Exempted Government Securities ATS to file an initial operation report on Form ATS to provide notice of its operations to the Commission before it is required to file a Form ATS–N? Would the proposal to require a Current Government Securities ATS to file a Form ATS–N by the date 90 calendar days after the effective date of any final rule provide the ATS sufficient time to transition to compliance with Rule 304?

69. Should the Commission be permitted to extend the initial Form ATS–N review period if it finds that it is appropriate to extend such review period?

70. Should a Legacy Government Securities ATS or Covered Newly Designated ATS be allowed to continue operations during the Commission's review of its initial Form ATS–N?

71. Should the Commission require amendments to Part III, Item 18 of Form ATS–N to be filed no later than the date that the information on such item becomes inaccurate or incomplete? Or should the Commission require amendments to Part III, Item 18, or any specific required disclosure on such Item to be required in advance of implementation of the change? And if so, how far in advance of implementation and why? Alternatively, should the Commission allow Covered ATSs more or less time to file a fee amendment?

72. Should the rule provide that the Commission may extend the Form ATS–N amendment review period by an additional 30 calendar days if the Commission finds that a longer period is appropriate? Should such extended review period be longer or shorter? Should the Commission only extend such review period under certain circumstances? If so, under what circumstances should the Commission extend the review period for a Form ATS–N amendment?

73. Are there any aspects of Rule 304(a)(2) relating to the filing and review of amendments that should be modified specifically for Form ATS–N amendments filed by Government Securities ATSs?

74. What changes or types of changes to a Covered ATS's operations or the activities of the broker-dealer operator or its affiliates do commenters believe are particularly likely to be material so as to require a material amendment to Form ATS–N?

75. Should the Commission consider any other factors in determining whether a Form ATS–N filed by a Government Securities ATS should become effective or ineffective? If so, what are they and why?

76. Should the Commission adopt the current process for the Commission to suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of ''exchange'' for Government Securities ATSs?

B. Public Disclosure of Form ATS–N for Government Securities ATSs and Related Commission Orders

The Commission would make public certain Form ATS–N reports filed by Government Securities ATSs pursuant to Rule 304(b).[460] Commission orders related to the effectiveness of revised Form ATS–N would also be publicly posted on the Commission's website. The Commission would apply to Government Securities ATSs the same rules regarding public disclosure that are currently applicable to NMS Stock ATSs. Applying existing Rule 304(b) to Government Securities ATSs would mandate greater public disclosure of the operations of these ATSs through the publication of Form ATS–N and related filings available on the Commission's website. Accordingly, the Commission is proposing that Form ATS–N filed by Government Securities ATSs would be subject to the following:

- Every Form ATS–N filed pursuant to Rule 304 shall constitute a ''report'' within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act.[461]
- The Commission will make public via posting on the Commission's website, each: (1) Effective initial Form ATS–N, as amended; (2) order of ineffective initial Form ATS–N; (3) Form ATS–N amendment to an effective Form ATS–N; (4) order of ineffective Form ATS–N amendment; (5) notice of cessation; and (6) order suspending, limiting, or revoking the exemption for a Government Securities ATS from the definition of an ''exchange'' pursuant to Exchange Act Rule 3a1–1(a)(2).[462]

The Commission is proposing to make amendments to current Rule 304(b), which would apply to all Covered ATSs. As the Commission is proposing to amend Rule 304(a)(2)(i)(A) to allow extensions of the Commission review period, the Commission is proposing to amend Rule 304(b)(2)(iii) to state that material amendments would be made public following the expiration of the review period ''or any extended review period.'' [463] As a result, the entire Form ATS–N amendment would not be made public until the review period has expired, at which time the ATS may implement the change described in the amendment. The Commission is also proposing to amend Rule 304(b)(2)(iii)(B) to provide that fee amendments would be made public by the Commission upon filing, consistent with the treatment of updating, correcting, and contingent amendments, all of which are intended to describe the ATS as it currently operates.

The Commission received several comments on the 2020 Proposal supporting public disclosure of Form ATS–G and amendments thereto.[464] For example, one commenter stated that public disclosure could improve investors' ability to select trading venues and as a result, lower trading costs and increase execution quality.[465] Another commenter, however, stated that Government Securities ATSs should not be required to make public commercially sensitive information on Form ATS–G, and that similar investor protection benefits can be achieved without negative impact by requiring a

[460] *See* Rule 304(b)(1) (providing that every Form ATS–N filed pursuant to Rule 304 shall constitute a ''report'' within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act).

[461] *See* Rule 304(b)(1).

[462] *See* Rule 304(b)(2).

[463] *See* proposed Rule 304(b)(2)(iii).

[464] *See, e.g.,* SIFMA Letter at 3–4; BrokerTec Letter at 2; AFREF Letter at 3; Bloomberg Letter at 7; Healthy Markets Association Letter at 7; MFA Letter at 5 (stating that any alternative that would limit disclosure requirements would be detrimental to achieving the Commission's transparency goals and that requiring different levels of disclosure among Government Securities ATSs based on their trading volume could result in a complex and confusing system of disclosure).

[465] *See* FINRA Letter at 2.

Government Securities ATS to make such information available upon request to subscribers, potential subscribers, and the Commission.[466] The Commission believes that the vast majority of information responsive to Form ATS–N would not be proprietary or commercially sensitive for ATSs to disclose.[467]

The Commission is re-proposing to make Form ATS–N publicly available for all Government Securities ATSs, regardless of their volume. The Commission believes that most market participants have limited access to information to adequately assess ATSs that trade government securities and understand how different ATSs operate. Today, Government Securities ATSs that are currently subject to Regulation ATS file a Form ATS that is deemed confidential when filed under Rule 301(b)(2)(vii) of Regulation ATS,[468] and Currently Exempted Government Securities ATSs are not subject to Regulation ATS and not required to file a Form ATS. The only information the Commission currently makes publicly available regarding Government Securities ATSs that are currently subject to Regulation ATS is a monthly list of the names and locations of ATSs with a Form ATS on file with the Commission.[469] In the case Government Securities ATSs make information about their operations voluntarily available, such information is limited, and the lack of uniformity or standardization makes it difficult to compare disclosures across ATSs. Accordingly, through Form ATS–N, the Commission is proposing disclosures that will provide information that market participants can use to evaluate an ATS as a potential trading venue. Requiring public disclosure, rather than Government Securities ATSs responding to individual disclosure requests from subscribers or potential subscribers, will help to ensure uniformity and standardization of the information Government Securities ATSs make available.

As proposed, Government Securities ATSs would also be subject to Rule 304(b)(3), which would require each Government Securities ATS that has a website to post a direct URL hyperlink to the Commission's website that contains the documents enumerated in Rule 304(b)(2), which would include the Government Securities ATS's Form ATS–N filings.[470]

Request for Comment

77. Should the requirements of Rule 304(b) apply to Form ATS–N reports filed by Government Securities ATSs, in whole or in part? Should the Commission modify Rule 304(b) in any way for all Covered ATSs?

78. Should Rule 304(b) only apply to Government Securities ATSs that trade a type of government securities (*e.g.,* U.S. Treasury Securities, Agency Securities)? If so, to which type of Government Securities ATS should Rule 304 apply?

79. Are there any other requirements that should apply to making public a Form ATS–N report filed by a Government Securities ATS? Please support your arguments, and if so, please list and explain such procedures in detail.

80. Should Rule 304(b) apply to Form ATS–N reports filed by a Currently Exempted Government Securities ATS? If not, which aspects of Rule 304(b) should not apply and why?

C. Form ATS–N Requirements

The Commission is not re-proposing the use of Form ATS–G for Government Securities ATSs but is proposing that all Covered ATSs file Form ATS–N as revised. The Commission believes that, instead of proposing Form ATS–G for Government Securities ATSs, given the significant overlap between proposed Form ATS–G and existing Form ATS–N, it is appropriate to require all Covered ATSs to file Form ATS–N, and thus limit the number of unique forms and simplify filing requirements. Accordingly, the Commission is proposing to apply existing Rule 304(c) to Government Securities ATSs, which would require Government Securities ATSs to file a Form ATS–N, as revised, in accordance with the form's instructions. The Commission is proposing to revise the current Form ATS–N instructions by including references to Government Securities ATSs or Covered ATSs, as applicable, replacing references to order display and fair access amendments with references to contingent amendments, revising the relevant compliance dates, adding instructions related to fee amendments, and revising the instructions regarding describing the applicability of amendments. The instructions require, among other things, that a Covered ATS provide all the information required by Form ATS–N, including responses to each Item, as applicable, and the Exhibits, and disclose information that is accurate, current, and complete.[471] Given that the Commission expects market participants to use Form ATS–N to decide which trading venue is best for them, it is important that Form ATS–N filings comply with the instructions and that the information provided on Form ATS–N is accurate, current, and complete. As it is today, Form ATS–N[472] would be required to be filed electronically through EDGAR.

The Commission is proposing to apply Rule 304(c)(2) to Government Securities ATSs, which provides that any report required under Rule 304 shall be filed on a Form ATS–N, and include all information as prescribed in the Form ATS–N and the instructions to Form ATS–N. Rule 304(c)(2) would provide that a Form ATS–N be executed at, or prior to, the time the Form ATS–N is filed and shall be retained by the Government Securities ATS in accordance with Rules 302 and 303, and the instructions in Form ATS–N. In the Regulation ATS Adopting Release, the Commission stated that the requirements to make and preserve records set forth in Regulation ATS are necessary to make and keep certain records for an audit trail of trading activity and permit surveillance and examination to help ensure fair and orderly markets.[473] Expanding Rule 304(c) to encompass Government Securities ATSs would further these goals.

[466] *See* Tradeweb Letter at 11.

[467] In the Commission staff's experience reviewing disclosures on current Form ATS–N for NMS Stock ATSs and discussing ATS operations and the requirements of the form with NMS Stock ATSs, the Commission staff has observed that the information responsive to the form is not proprietary or commercially sensitive. In the NMS Stock ATS Adopting Release, the Commission stated that it designed Form ATS–N to not seek disclosure of certain information that could be proprietary or commercially sensitive. *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38812. In response to commenter concerns regarding disclosure of proprietary or commercially sensitive information, the Commission revised the wording of relevant requests in originally proposed Form ATS–N to mitigate such concerns or provided guidance regarding the scope of certain disclosure requests and to require ''summary'' information. *See id.* at 38825. The Commission stated that, in a vast majority of cases, the level of detail required by Form ATS–N should not require the public disclosure of commercially sensitive information. *See id.* at 38825. *See also, e.g., infra* Section IV.D.4.d (describing that Form ATS–N requires a ''summary'' narrative of products and services to avoid disclosure of commercially sensitive information).

[468] *See* 17 CFR 240.301(b)(2)(vii).

[469] *See* Alternative Trading System List, *https://www.sec.gov/foia/docs/atslist.htm.*

[470] Unlike the 2020 Proposal, the Commission is not proposing to amend Rule 304(b)(3) to require each Covered ATS to post on its website the most recently disseminated Form ATS–N within one business day after publication on the Commission's website.

[471] *See* Item A.3 of the Instructions to Form ATS–N (as revised).

[472] *See* NMS Stock ATS Adopting Release, *supra* note 2, Section VII.

[473] *See* Regulation ATS Adopting Release, *supra* note 31, at 70877–78.

Request for Comment

81. Should Rule 304(c) be applied, in whole or in part, to Government Securities ATSs?

82. Should Rule 304(c) only apply to Government Securities ATSs that trade a certain type of government security (*e.g.,* U.S. Treasury Securities, Agency Securities)? If so, to which type of Government Securities ATS should it apply and why?

D. Form ATS–N Disclosures

Form ATS–N is a public report that provides detailed information about the ATS-related activities of the broker-dealer operator and its affiliates and the manner of operations of the ATS. Because the Commission is proposing to require Government Securities ATSs to file a Form ATS–N instead of previously proposed Form ATS–G,[474] the Commission is proposing amendments to Form ATS–N to solicit disclosures that may be most relevant to market participants that trade government securities on these markets. In addition, because the Commission is amending Exchange Act Rule 3b–16 to include Communication Protocol Systems, the Commission is proposing to amend Form ATS–N to solicit disclosures about unique operational aspects to those systems. The Commission believes that it is important to revise Form ATS–N to provide investors with important information about the operations of all ATSs that trade NMS stocks and, as proposed, government securities.

The Commission is proposing that the amendments to Form ATS–N be applicable to both NMS Stock ATSs and Government Securities ATSs, and any differences between how the form requirements would apply to these ATSs are noted below. Given the similar level of complexity/sophistication between NMS Stock ATSs and Government Securities ATSs, the Commission believes that requiring both types of ATSs to file Form ATS–N is appropriate; however, as described below, certain requests have been tailored for the differences between NMS Stock ATSs and Government Securities ATSs. The Commission is proposing to revise Form ATS–N to include information it previously proposed on Form ATS–G, including a question requiring information about interaction with related markets.[475] The Commission is also proposing to reorganize certain questions on Form ATS–N and to require disclosure about any surveillance and monitoring that is conducted with respect to the ATS.[476] In response to the 2020 Proposal, one commenter stated that the proposed Form ATS–G disclosures were similar to those on Form ATS–N, in that they would be categorized in a more standardized manner than Form ATS, which would allow for better comparisons between ATSs, and enhance the Commission's and SRO's regulatory oversight of Government Securities ATSs.[477] The proposed revisions to Form ATS–N would continue to allow such comparisons, and applying Form ATS–N to Government Securities ATSs would better help enable market participants to compare Government Securities ATSs.

The Commission is proposing certain amendments to Form ATS–N that would apply globally to Form ATS–N unless otherwise noted below. First, as Form ATS–N would be applicable to both Government Securities ATSs and NMS Stock ATSs, the Commission is proposing to replace references to ''NMS Stock ATSs'' throughout the form to ''Covered ATSs'' or ''ATSs.'' [478] Second, the Commission is proposing to replace references to ''orders'' throughout Form ATS–N to reference ''trading interest,'' which would encompass non-firm trading interest.[479] Third, Form ATS–N would include an instruction at the beginning of Part III to require that the Covered ATS identify and explain any differences among and between subscribers, persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator, the broker-dealer operator, and any affiliates of the broker-dealer.[480] Because this disclosure would be integrated in each Item, the Commission is proposing to delete the separate sub-questions in Part III that ask about whether services and functionalities and conditions or requirements related to such services and functionalities are the same for all subscribers and the broker-dealer operator.[481] Fourth, the Commission is proposing to change references to ''Trading Centers'' to ''trading venues,'' which would include trading centers, but also include venues relevant to the trading of government securities and repos and Communication Protocol Systems.[482] The term ''trading venue'' encompasses a broader group of entities that could, for example, result in an execution or affect the handling of a subscriber's trading interest. The Commission explains below each requirement of Form ATS–N and why the Commission is proposing to apply that requirement to Government Securities ATSs. To the extent that the Commission is proposing a change to the requirement of Form ATS–N that would affect the reporting obligation of an NMS Stock ATS, the Commission identifies that change and the information the NMS Stock ATS would be required to disclose. In addition, to use consistent terminology throughout Form ATS–N, the Commission is proposing to change certain references to activity ''in'' the ATS to activity ''on'' the ATS.[483]

The Commission believes that Form ATS–N's public disclosures would provide important information to market participants that would help them better understand these operational facets of Covered ATSs and select the best trading venue based on their needs. The Commission believes that the vast majority of responsive information in Form ATS–N, as proposed to be revised, would not be proprietary or commercially sensitive.[484]

1. Amendments to Form ATS–N for NMS Stock ATSs

If the revisions to Form ATS–N were adopted and become effective, an NMS Stock ATS with an effective Form ATS–N or a Form ATS–N that is under Commission review would be required to file an amendment to its Form ATS–N so that its disclosures, as amended, meet all the requirements of Form ATS–N, as revised. If the proposed revisions to Form ATS–N become effective, a NMS Stock ATS would be required, in accordance with the instructions of the form, to amend its Form ATS–N so that it is complete.[485] An NMS Stock ATS is required, pursuant to Rule 304(a)(2)(B), to file an updating amendment no later than 30 days after the end of each calendar quarter to correct information that has become inaccurate or incomplete for any reason. Specifically,

[474] *See* 2020 Proposal, *supra* note 4.

[475] *See infra* Section IV.D.5.k.

[476] *See infra* Section IV.D.5.i.

[477] *See* FINRA Letter at 4.

[478] The Form ATS–N Cover Page (Type of Covered ATS), Part I, Item 8.a, and Part III, Items 23, 24(a), and 24(d)(i) will refer to ''NMS Stock ATSs'' because such requests are applicable only to NMS Stock ATSs.

[479] *See infra* note 496 and accompanying text. *See* proposed revisions to Form ATS–N, Part II, Items 1(a), 1(c), 2(a), 2(c), 3(a), 3(b), 4(a), 5(a), and 5(c); Part III, Items 4, 5(a), 5(b), 10(a), 12, 13(a), 13(c), 13(d), 14(a), 15, 16(a), 16(b), 17, and 22.

[480] *See supra* notes 563–564 and accompanying text.

[481] *See infra* note 565.

[482] *See infra* note 497 and accompanying text. *See* proposed revisions to Form ATS–N Part II, Item 4 and Part III, Item 7.

[483] *See* proposed changes to Part II, Items 1 and 2 and Part III, Items 4(a), Item 22(a), Item 24(d)(ii).

[484] *See infra* Section IV. *See also supra* note 467.

[485] *See* Instruction A.3 of Form ATS–N (requiring that a Form ATS–N filing is accurate, current, and complete).

an NMS Stock ATS with an effective Form ATS–N, or an NMS Stock ATS whose Form ATS–N is under Commission review, would be required to, among other things, amend its Form ATS–N to disclose new identifying information and types of securities traded required by Part I, and to provide information responsive to new requests regarding new categories of types of subscribers (Part III, Item 1), monitoring and surveillance (proposed Part III, Item 9), interaction with related markets (proposed Part III, Item 11), the identity of liquidity providers (Part III, Item 12), and post-trade processing (proposed Part III, Item 21).

In addition, the NMS Stock ATS would be required to amend its Form ATS–N to reorganize responses, including, among others, to move disclosures related to the activities of employees of the broker-dealer operator or its affiliates that service the operations of the ATS and another business unit of the broker-dealer operator or affiliate to proposed Part II, Item 7(a), and move discussion of after-hours use of orders from current Part III, Item 18 to proposed Part III, Item 4(b)–(c). In addition, the NMS Stock ATS would be required to separately discuss information relevant to trading facilities or rules for bringing together orders of buyers and sellers in proposed Part III, Item 7 and information related to use of non-firm trading interest in proposed Part III, Item 8. The NMS Stock ATS would also be required to amend its responses to disclose any differences in treatment among subscribers, persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator, the broker-dealer operator, and any affiliates of the broker-dealer operator as relevant throughout the responses to Part III rather than disclosing differences in treatment between any subscribers and the broker-dealer in specific sub-parts of Part III, as required by current Form ATS–N.

2. Definitions

The Commission is proposing to amend certain definitions in the instructions to Form ATS–N. The Commission is re-proposing to replace the current definition of ''person'' in Form ATS–N, which is provided by the Investment Advisers Act of 1940 (''Advisers Act'') [486] with the different definition of ''person'' as defined under the Exchange Act.[487] Because Regulation ATS is a Commission regulation under the Exchange Act, the Commission believes that it is more appropriate to apply the definition of ''person'' under the Exchange Act than the Advisers Act, which is not applicable to ATSs. Although the definitions are not identical, the Commission believes the differences between the definitions are unlikely to result in differences to the disclosures required by Form ATS–N.[488] To the extent ATSs might have found ambiguous the Commission's use of the Advisers Act definition in the context of an Exchange Act rule, the Commission believes that this proposed change will mitigate any such concerns.

The Commission is also proposing to change the definition of ''NMS Stock ATS'' in the instructions to the form to conform to the proposed changes to the definition in Rule 300 and state that NMS Stock ATSs shall not trade securities other than NMS stocks.[489] The Commission is also proposing to add definitions of ''Agency Security,'' [490] ''Government Security,'' [491] ''Government Securities ATS,'' [492] ''Legacy Government Securities ATS,'' [493] and ''Trading Interest'' [494] and conform the definition of ''Broker-Dealer Operator'' to the proposed revisions in Rule 301(b)(1).[495] As proposed, the term ''Trading Interest'' would be the same definition provided in proposed Rule 300(q) and Rule 3b–16(e), which would include both orders as defined under Rule 3b–16(c) and non-firm trading interest.[496] In addition, the Commission is proposing to replace the term ''Trading Center'' with ''trading venue.'' A ''trading venue'' would mean a national securities exchange or national securities association that operates an SRO trading facility, an ATS, an exchange market maker, an OTC market maker, a futures or options market, or any other broker- or dealer-operated platform for executing trading interest internally by trading as principal or crossing orders as agent.[497] The proposed definition of ''trading venue'' would encompass ''trading centers'' as defined under 17 CFR 242.600(b)(78) (Rule 600(b)(78) of Regulation NMS), futures and options markets, which the Commission believes may be relevant to the trading of government securities and repos, and also would encompass broker- or dealer-operated platforms for executing trading interest by trading as a principal or crossing orders as an agent.[498]

3. Cover Page and Part I; Information About the Broker-Dealer Operator

To make clear that the Commission would not be conducting a merit-based review of Form ATS–N disclosures filed with the Commission, the Form ATS–N cover page states that the Commission has not passed upon the merits or accuracy of the disclosures in the filing. On the cover page of Form ATS–N, the Covered ATS would be required to identify whether it is an NMS Stock ATS or a Government Securities ATS. To indicate whether the ATS is subject to the transitional rules for Legacy Government Securities ATSs and Newly Designated ATSs,[499] the ATS would be required to disclose whether it is a Legacy Government Securities ATS or Newly Designated ATS.[500] In addition, the Covered ATS would indicate the type of filing by marking the appropriate checkbox.[501]

If the Covered ATS is filing an amendment, the ATS would be required to indicate the Part and Item number of the Form ATS–N that is the subject of the change(s), provide a brief summary of the substance of the change(s), and state whether or not the change(s) applies to (1) all subscribers and the

[486] 15 U.S.C. 80a–2(a)(28) (defining ''person'' as ''a natural person or a company'').

[487] 15 U.S.C. 78c(a)(9) (defining the term ''person'' as a natural person, company, government, or political subdivision, agency, or instrumentality of a government).

[488] The Exchange Act's inclusion of a ''government, or political subdivision, agency or instrumentality of a government'' under the definition of ''person'' is unlikely to result in any changes to the disclosures required by the items in Form ATS–N that use the word ''Person'' as, in the Commission's experience, these entities are generally not involved in the operations of ATSs as subscribers or otherwise.

[489] *See supra* note 254 and accompanying text.

[490] *See supra* note 242 and accompanying text.

[491] *See supra* note 259 and accompanying text.

[492] *See id.*

[493] *See supra* note 256 and accompanying text.

[494] *See supra* Section II.C.1.

[495] *See supra* note 273 and accompanying text.

[496] *See* proposed Rule 3b–16(e) and Rule 300(q).

[497] *See* revised Form ATS–N, Explanation of Terms.

[498] This is broader than the definition of ''trading center'' under Rule 600(b)(78), which includes ''any other broker or dealer than executes orders internally by trading as principal orders as agent.''

[499] *See* Rule 304(a)(1)(iv), as proposed to be revised.

[500] The Commission is proposing to delete the checkbox on the cover page of Form ATS–N that requires an NMS Stock ATS to select whether the NMS Stock ATS currently operates pursuant to a Form ATS. Rules 304 and 301(b)(2)(viii) required an NMS Stock ATS to file a Form ATS–N no later than January 7, 2019. After January 7, 2019, this checkbox became obsolete.

[501] The proposed cover page for Form ATS–N would provide that a filing may be an initial Form ATS–N, or a Form ATS–N material amendment, updating amendment, correcting amendment, contingent amendment, or fee amendment. The Commission is proposing to rename ''order display and fair access amendments'' to ''contingent amendments'' throughout the form. In addition, the Commission is proposing a new fee amendment type. *See supra* Section IV.A.

broker-dealer operator; (2) only the broker-dealer operator; (3) only subscribers; (4) only certain subscribers, subsets of subscribers, or customers of subscribers and the broker-dealer operator; or (5) only certain subscribers, subsets of subscribers, or customers of subscribers.[502] In addition, the Covered ATS would be required to provide the EDGAR accession number for the Form ATS–N filing to be amended so that market participants can identify the filing that is being amended. Pursuant to Rule 304(b)(2)(iii), the Commission would make public the cover page of a filed Form ATS–N material amendment upon filing and then make public the entirety of the material amendment following the expiration of the review period pursuant to Rule 304(a)(2)(ii). For updating, correcting, contingent, and fee amendments, which would be made public upon filing, the Commission believes that the information in the narrative could assist market participants in understanding the general nature of the change that the Covered ATS is implementing.

If the filing is a cessation of operations, the cover page of Form ATS–N would require the Covered ATS to provide the date that the ATS will cease to operate. The cover page includes a checkbox where the ATS could indicate whether it wishes to withdraw a previously-filed Form ATS–N filing and provide the EDGAR accession number for the filing to be withdrawn. The instructions to Form ATS–N state that an ATS may withdraw an initial Form ATS–N or an amendment before the end of the applicable Commission review period. In addition, a Covered ATS could withdraw a notice of cessation of operations at any time before the date that the ATS indicated it intended to cease operating.[503]

Part I of revised Form ATS–N would be substantively the same as that for current Form ATS–N with certain exceptions, as described below. Form ATS–N would require a Covered ATS to identify the registered broker-dealer that operates the ATS and state whether the filer is a broker-dealer registered with the Commission. The Commission is proposing new Part I, Item 1(b) of Form ATS–N to require the Covered ATS to indicate whether the registered broker-dealer is authorized by a national securities association to operate an ATS under the rules of the national securities association. Proposed Part I, Item 1(b) would facilitate compliance with and Commission oversight of the requirement that an ATS must register as a broker-dealer and become a member of an SRO.[504] The Commission is also proposing that the Covered ATS provide the name of the registered broker-dealer or government securities broker or government securities dealer for the ATS (*i.e.,* the broker-dealer operator), as it is stated on Form BD, in Part I, Item 2 of Form ATS–N.[505]

To the extent that a commercial or ''DBA'' (doing business as) name or names are used to identify the Covered ATS to the public, the Commission, or its SRO, or if a registered broker-dealer operates multiple Covered ATSs, Form ATS–N would require the full name(s) of the Covered ATS under which business is conducted, if different, in Part I, Item 3 of Form ATS–N. Part I, Item 4 of Form ATS–N would require the Covered ATS to provide the broker-dealer operator's SEC File Number and Central Registration Depository (''CRD'') Number.

In addition, the Commission is proposing to require Covered ATSs to provide the broker-dealer operator's Legal Entity Identifier (''LEI'') in Part I, Item 4, if the broker-dealer operator has an LEI.[506] If a broker-dealer operator of the ATS has an LEI, the information may be useful to market participants as a globally standardized identifier. The Commission, however, is not proposing to require broker-dealer operators that do not have an LEI to obtain such an identifier. In addition, the Commission is proposing to add a question to Part I, Item 4(d) that would require the ATS to provide the MPID of its broker-dealer operator. Although Part I, Item 5(c) of Form ATS–N requires the *ATS* to disclose the MPID of the ATS, the Commission is also requiring the ATS to provide the MPID of the broker-dealer operator because a broker-dealer operator may have a unique MPID. Because the broker-dealer operator could potentially use such a unique MPID to conduct trading and routing activity that affects the ATS, it would be useful to market participants and regulators to require the ATS to state the broker-dealer operator's MPID as it will help them identify the broker-dealer operator and better understand the scope of activities of the broker-dealer operator.[507]

Part I, Item 5 of Form ATS–N would require the Covered ATS to provide the full name of the national securities association of which the broker-dealer operator is a member, the effective date of the broker-dealer operator's membership with the national securities

[502] *See* Instruction A.7.h of Form ATS–N. If a change subject to the amendment would equally apply to all subscribers and the broker-dealer operator, the Covered ATS would indicate that the change applies to all subscribers and the broker-dealer operator equally. If a change would apply differently among subscribers or types of subscribers, between subscribers and the broker-dealer operator, or between the broker-dealer operator and its affiliates (which may be subscribers to the ATS), the Covered ATS would state so and describe the differences in treatment. This is the same as how NMS Stock ATSs currently describe in Form ATS–N and would be required to describe in Form ATS–N whether or not a change applies to all subscribers and the broker-dealer operator in amendments on Form ATS–N. As required by the instruction, a filer must provide a brief summary of *all* changes to the form. Such summary should enable market participants to understand the nature of the changes being made. For example, if the ATS is adding a new order type, the ATS should state that it is adding a new order type *and* provide a brief description of unique aspects of the order type. The Commission is proposing to clarify in Instruction A.7.h that changes made in Part IV of Form ATS–N should not be described, as Part IV is non-public. *See infra* Section IV.D.6.

[503] *See* Instruction A.9 of Form ATS–N.

[504] *See* 15 U.S.C. 78o(b)(8). *See also* NMS Stock ATS Adopting Release, *supra* note 2, at 38773.

[505] As discussed above, Rule 301(b)(1) currently requires that the ATS register as a broker-dealer under Section 15 of the Exchange Act. As proposed, Rule 301(b)(1) would require an ATS to register as a broker-dealer under Exchange Act Section 15 or a government securities broker or government securities dealer under Exchange Act Section 15C(a)(1)(A). *See supra* note 273 and accompanying text.

[506] Current Form ATS–N does not include this Item, and as proposed, NMS Stock ATSs would also be subject to this proposed requirement. An LEI is a 20-character reference code that uniquely identifies legally distinct entities that engage in financial transactions and is used by numerous domestic and international regulatory regimes. *See* Securities Act Release No. 10425, 82 FR 50988, 51005 (November 2, 2017) (stating that LEIs are intended to improve market transparency by providing clear identification of participants). Although several existing ATS broker-dealer operators currently have an LEI, not all broker-dealer operators have an LEI. In the 2020 Proposal, the Commission asked commenters whether they believe a Government Securities ATS should be required to disclose the broker-dealer operator's LEI. One commenter supported requiring disclosure of the LEI on Form ATS, Form ATS–R, Form ATS–N, and previously proposed Form ATS–G, stating, among other things, that it is a global standard for legal entity identification and that it enables publicly accessible information about an entity's ownership structure. This commenter stated that LEI should not replace the CRD, which serves a purpose in identifying broker-dealers and their affiliates, but should serve as a complimentary identifier. *See* letter from Stephan Wolf, CEO, Global Legal Entity Identifier Foundation, dated March 1, 2021 (''GLEIF Letter''). Another commenter stated that the utility of asking brokers to obtain another identification number is unclear if the LEI does not replace FINRA assigned identification numbers. *See* Bloomberg Letter at 7.

[507] The Commission understands that, in certain instances, a broker-dealer operator for an ATS may use the ATS MPID in connection with its routing activities when the routing functionality is within the ATS. *See* FINRA Trade Reporting Guidance, Example 7, *available at https://www.finra.org/sites/default/files/ATS%20OATS%20and%20Trade%20Reporting%20Guidance%209-2-14_0_0_0_0.pdf.* To the extent that the broker-dealer uses the ATS MPID in connection with its routing activities, or its routing functionality is inside the ATS, such activities and functionality would be subject to Regulation ATS, including the disclosure requirements of Form ATS–N.

association, and the MPID of the ATS. Pursuant to FINRA rules, each ATS is required to use a unique MPID in its reporting to FINRA, such that its volume reporting is distinguishable from other transaction volume reported by the broker-dealer operator of the ATS, including volume reported for other ATSs or trading desks operated by the broker-dealer operator.[508] The broker-dealer operator would provide the unique MPID for the Covered ATS and assess the functionalities related to trading under that MPID and describe them, as applicable, in response to the information requests on Form ATS–N. Providing the name of the Covered ATS or DBAs and its MPID would identify the ATS to the public and the Commission. The name, identity of the broker-dealer operator, any ''DBA'' name, and the ATS's MPID are basic information critical to market participants for identifying the ATS and should be disclosed.

Proposed Part I, Item 6 of Form ATS–N would require the Covered ATS to provide a URL address for the website of the ATS. Proposed Part I, Item 7 of Form ATS–N would require the ATS to provide the primary physical street address of the ATS matching system and indicate whether the ATS has a secondary matching system that may be used in the event that the primary matching system is not available. If yes, the ATS would be required to provide the secondary address of the matching system.

To inform market participants about the types of securities that a Covered ATS makes available for trading, the Commission is proposing to require a Covered ATS to disclose in Part I, Item 8 of Form ATS–N the types of securities it trades. Part I, Item 8(a) would require an NMS Stock ATS, but not a Government Securities ATS, to indicate whether the ATS makes available for trading all NMS stocks.[509] If not, the ATS would identify the securities or types of securities that it does not make available for trading.[510] Part I, Item 8(b) would require a Government Securities ATS, but not an NMS Stock ATS, to select the categorical types of government securities the ATS trades (*i.e.,* U.S. Treasury Securities, Agency Securities, repos, or other).[511] If the Government Securities ATS trades U.S. Treasury Securities, it would be required to select whether it trades bills,[512] notes,[513] bonds,[514] TIPS,[515] STRIPS,[516] and/or floating rate notes [517] and indicate whether each type of security traded is on-the-run, off-the-run, and/or when-issued.[518] If the Government Securities ATS trades Agency Securities, it would be required to indicate whether it trades Agency Mortgage-Backed Securities [519] and/or Federal Agency Securities.[520] In addition, if the Government Securities ATS trades repos, the ATS would indicate whether it trades triparty [521] and/or bilateral repos,[522] and whether such securities are repurchase agreements or reverse repurchase agreements and are centrally cleared [523] or non-centrally cleared.[524] If the Government Securities ATS trades any other government securities, it would be required to mark ''other'' via checkbox and identify the types of government securities that the ATS makes available for trading. Requiring a Covered ATS to publicly disclose the types of securities that it trades would identify to potential subscribers and regulators the securities that the ATS offers for trading and help potential subscribers decide whether they would want to engage the ATS.

Proposed Part I, Items 9 and 10 [525] would require a Covered ATS to attach the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers, and the most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners as Exhibits 1 and 2, respectively. In lieu of attaching those schedules, the Covered ATS can indicate, via a checkbox, that the information under those schedules is available on its website and is accurate as of the date of the filing of the Form

[508] *See* FINRA Rules 6160, 6170, 6480, and 6720.

[509] If the NMS Stock ATS suspends trading in securities under certain circumstances, the ATS should indicate so under Part III, Item 19. *See infra* Section IV.D.5.r.

[510] The Commission notes that most, if not all, NMS Stock ATSs currently disclose whether they trade all NMS stocks in Part III, Item 11(a) of Form ATS–N.

[511] The types of securities traded would be limited to government securities (15 U.S.C. 78c(a)(42)) and repos. *See* proposed Rule 300(l).

[512] Treasury bills are short-term securities that mature in one year or less from their issue date. Bills are purchased for a price less than or equal to their par (face) value, and when they mature, Treasury Department pays their par value. *See* TreasuryDirect, The Basics of Treasury Securities, *available at https://www.treasurydirect.gov/instit/research/faqs/faqs_basics.htm#tbills* (last visited September 15, 2021).

[513] Treasury notes are securities that pay a fixed rate of interest every six months until the security matures, which is when Treasury Department pays the par value. Treasury notes mature in more than a year, but not more than 10 years from their issue date. *See id.*

[514] Treasury bonds are securities that pay a fixed rate of interest every six months until the security matures, which is when Treasury Department pays the par value. Bonds mature in more than 10 years from their issue date. *See id.*

[515] Treasury Inflation-Protected Securities (''TIPS'') pay interest every six months and the principal value of TIPS is adjusted to reflect inflation or deflation as measured by the Consumer Price Index. The semi-annual interest payments and maturity payment are calculated based on the inflation-adjusted principal value of the security. *See id.*

[516] *See supra* 191.

[517] A floating rate note security that has an interest payment that can change over time. As interest rates rise, the security's interest payments will increase. Similarly, as interest rates fall, the security's interest payments will decrease. This security makes use of an index (or reference) rate (in this case, tied to the most recent 13-week bill rate, prior to the lockout period) and spread (determined at auction) to calculate an interest rate. The index rate changes periodically, in this instance every week, causing the interest rate to change or ''float.'' The notes may be of varying original maturities. *See* TreasuryDirect, Frequently Asked Questions, *available at https://www.treasurydirect.gov/indiv/help/TDHelp/faq.htm.*

[518] A ''when-issued'' transaction is a transaction in a U.S. Treasury Security that is executed before the issuance of the security.

[519] Agency Mortgage-Backed Securities include (i) a type of securitized product issued in conformity with a program of a U.S. executive agency, as defined in 5 U.S.C. 105 or a government-sponsored enterprise, as defined in 2 U.S.C. 622(8), for which the timely payment of principal and interest is guaranteed by the executive agency or GSE, representing ownership interest in a pool (or pools) of mortgage loans structured to ''pass through'' the principal and interest payments to the holders of the security on a pro rata basis; and (ii) a type of securitized product backed by a securitized product described in (i). *See also* FINRA Rules 6710(m), 6710(v), 6710(dd).

[520] Federal Agency Securities include all Agency Securities except Agency Mortgage-Backed Securities. *See supra* note 519.

[521] A triparty repo involves a third party, which is a clearing bank that provides support to both parties in the trade by settling the repo on its books and ensuring that the details of the repo agreement are met. *See* Viktoria Baklanova, Adam Copeland & Rebecca McCaughrin, Federal Reserve Bank of New York Staff Reports, Reference Guide to U.S. Repo and Securities Lending Markets (September 2015) at 5–6, 8–10, *available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr740.pdf* (''New York Fed Staff Report'').

[522] A bilateral repo involves two parties agreeing on the terms of trade, including the principal amount of the repo, the interest rate paid by the collateral provider, the type of securities delivered, the haircut to be applied for the collateral pledged, and the maturity of the repo, and each counterparty's custodian bank clears and settles the trade. *See* New York Fed Staff Report, *supra* note 521, at 5–7.

[523] Centrally cleared would mean any transaction that uses a central counterparty, as defined in 17 CFR 240.17Ad–22(a)(2) (Rule 17Ad–22(a)(2) under the Exchange Act).

[524] Non-centrally cleared would mean any transaction that does not use a central counterparty, as defined in Rule 17Ad–22(a)(2) under the Exchange Act. *See id.*

[525] These items are numbered as Part I, Items 8 and 9 in current Form ATS–N, but would be renumbered as Items 9 and 10.

ATS–N.[526] The Commission is proposing to include in Part I, Items 9 and 10 that, if the ATS selects to make the information available on its website in lieu of attaching it to its filing, the ATS will maintain its website in accordance with the rules for amending Form ATS–N pursuant to Rule 304(a)(2)(i) to reflect any changes to Schedule A or Schedule B, as applicable, to the Form BD of the broker-dealer operator. This would require an ATS checking the box to update its website as if it were Form ATS–N, and therefore, to update the information no later than 30 calendar days after the end of any calendar quarter in which its broker-dealer operator's Schedule A or Schedule B of Form BD becomes inaccurate or incomplete.

When an ATS is purchased by another entity and operated by a broker-dealer that is not the ATS's current broker-dealer operator, the new broker-dealer typically commences operating the ATS using its personnel, processes, and procedures. To avoid disruptions to operations of the ATS or its subscribers, the existing Covered ATS would file a Notice of Cessation at least 10 business days prior to the official change of broker-dealer operator (*e.g.,* the date of closing for an acquisition) pursuant to Rule 304(a)(3) [527] and the new broker-dealer operator would file an initial Form ATS–N in advance of the Notice of Cessation, which must become effective before it may operate the Covered ATS pursuant to Rule 304(a)(1)(i).[528]

In addition, Part I, Item 11 of Form ATS–N would require the Covered ATS, for filings made pursuant to Rule 304(a)(2)(i) (*i.e.,* Form ATS–N amendments), to attach as Exhibit 3 a marked document to indicate changes to ''yes'' or ''no'' answers and additions or deletions from any Item in Part I, Part II, and Part III, as applicable.[529] The Commission is proposing to revise Part I, Item 11 to state that the ATS must include in such marked document any changes to Exhibits 1, 2, and 5. The requirement for the ATS to provide a marked document or ''redline'' showing changes helps market participants and regulators easily review changes the ATS is making in an amendment. The Commission is not proposing Form ATS–N to require a marked document showing changes to Exhibit 4, which includes aggregate platform-wide order flow and execution statistics of the ATS, because such statistics may frequently change, and showing such changes could be burdensome for ATSs and would not be particularly useful for market participants or regulators. However, the ATS should be required to provide a marked document to show changes to the list and explanation of categories or metrics for such aggregate platform-wide order flow and execution statistics on Exhibit 5, as highlighting such changes would be useful for market participants in understanding any aggregate platform-wide order flow and execution statistics the ATS provides. In addition, to ensure the changes in the marked document are clear and readily identifiable, the Commission is proposing to clarify that the ATS must indicate the Part and Item number for all Items that are changing.

Request for Comment

83. Should Covered ATSs be required to provide any additional identifying information on Part I of Form ATS–N? Are the proposed information requests on Part I of Form ATS–N necessary, or are certain information requests not necessary and why?

84. Should the Commission require Covered ATSs to provide types of securities that they trade (or do not trade) in Part I, Item 8 of Form ATS–N? Would the proposed categories and classifications of government securities in Part III, Item 8(b) be helpful to market participants? What, if any, additional or alternative categories or classifications would commenters suggest? Is there any other information about types of securities an ATS trades that should be required by Form ATS–N?

4. Part II: Broker-Dealer Operator and Its Affiliates Activities

The Commission believes that the disclosures on Form ATS–N about the conflicts of interest that might arise from the business structures of the Covered ATS and the ATS-related activities of the broker-dealer operator and its affiliates are designed to help participants protect their interests when using the services of the ATS.[530] As the Commission has previously stated, the broker-dealer operator controls all aspects of the ATS's operations and the broker-dealer operator's non-ATS and ATS functions may overlap.[531] Currently, market participants have limited information about conflicts of interest that might arise from the non-ATS activities of the broker-dealer operator of a Government Securities ATS or a Communication Protocol System, and different classes of participants may have different levels of information about the operations of the ATS or the Communication Protocol System.[532] Because of potential overlap between a broker-dealer's ATS operations and its other operations, there is a risk of information leakage of subscribers' confidential trading information to other business units of the broker-dealer operator or its affiliates. The Commission believes that some market participants would want to consider the trading activity of the broker-dealer operator, or its affiliates, when evaluating potential conflicts of interest on a Covered ATS and may also want to be aware of the range of services and products that the broker-dealer operator or its affiliates offer for use in the ATS because such services or products may have an impact on access to, or trading on, the ATS. In addition, disclosures on Form ATS–N would better inform the Commission and other regulators about the activities of Covered ATSs and their role in the government securities and NMS stock markets, which would facilitate better oversight of these ATSs to the benefit of investors.

The Commission continues to believe that the interests of the broker-dealer operator or its affiliates can sometimes compete against the interests of those that use the Covered ATS's services. These competing interests, at times, may give rise to conflicts of interest for the broker-dealer operator and its affiliates or the potential for information leakage of subscribers' confidential trading information. For example, trading by the broker-dealer operator or its affiliates on a Covered ATS controlled and operated by the broker-dealer operator presents a conflict of interest whereby the broker-dealer operator has the opportunity to place its interest ahead of participants

[526] Part I, Items 9 and 10 and Part III, Item 25 (*see infra* Section IV.D.5.y) are the only requests for information that would allow a Covered ATS to cross-reference to information on the ATS's website instead of providing it in the form disclosures. Form ATS–N disclosures would be the vehicle for disseminating to the public information about the operations of the ATS and the ATS-related activities of the broker-dealer operator and its affiliates under Rule 304, which are required to be kept current, accurate, and complete by the ATS. Accordingly, ATSs would be required to provide information required by the form in the Form ATS–N disclosures and not cross-reference to other sources.

[527] *See supra* note 455 and accompanying text.

[528] *See supra* Section IV.A. To facilitate the review of the initial Form ATS–N for the new Covered ATS, the broker-dealer operator for the new ATS may provide a draft initial Form ATS–N to the staff for consideration.

[529] This Item is currently numbered as Part I, Item 10, but would be renumbered as Item 11. The Commission proposes to make a minor change to this Item to clarify that ''II'' refers to Part II.

[530] *See infra* Section IV.D.4.

[531] *See* NMS Stock ATS Proposing Release, *supra* note 29, at 81010, 81041.

[532] *See id.* at 81010.

trading in the ATS that the broker-dealer controls and operates. Part II of Form ATS–N is designed to provide market participants with information about these competing interests, and inform them about: (1) The operation of the Covered ATS—regardless of the corporate structure of the ATS—and of its broker-dealer operator, or any arrangements the broker-dealer operator may have made, whether contractual or otherwise, pertaining to the operation of its ATS; and (2) ATS-related activities of the broker-dealer operator and its affiliates that may give rise to conflicts of interest for the broker-dealer operator and its affiliates or the potential for information leakage of subscribers' confidential trading information. The public disclosure about potential conflicts of interest on Covered ATSs would advance the same policy and investor protection objectives.

Furthermore, Part II of Form ATS–N does not require public disclosure of activities or affiliate relationships of the broker-dealer operator that do not relate to the Covered ATS. Many broker-dealer operators of NMS Stock ATSs, and, to a lesser extent, Government Securities ATSs, engage in broker-dealer or other activities that are unrelated to their operations of the ATS. The Commission believes that Form ATS–N should exclude requests that would solicit information about a broker-dealer operator's activities unrelated to its ATS operations.

The Commission is proposing to use the same definitions of ''affiliate'' and ''control'' in revised Form ATS–N as are used in current Form ATS–N.[533] These terms are intended to encompass all relevant affiliate relationships between the broker-dealer operator and other entities that the Commission believes would help market participants' evaluation of potential conflicts of interest.[534]

a. Items 1 and 2: Broker-Dealer Operator and Its Affiliate Trading Activities in the Covered ATS

Part II, Items 1(a) and 2(a) of Form ATS–N are designed to disclose information about whether business units of the broker-dealer operator or its affiliates,[535] respectively, are permitted to enter or direct the entry of trading interest into the Covered ATS. If the person that operates and controls a Covered ATS is also able to trade on that ATS, there may be an incentive to design the operations of the ATS to favor the trading activity of the operator of the ATS or affiliates of the operator. An operator of a Covered ATS that also trades in the ATS it operates would likely have informational advantages over others trading in the ATS, such as a better understanding of the manner in which the system operates or who is trading in the ATS. In the most egregious case, the operator of the ATS might use the confidential trading information of other traders to advantage its own trading on or off of the ATS.[536]

If a Covered ATS permits the broker-dealer operator or its affiliates to enter trading interest in the ATS, whether on an agency, principal, or riskless principal basis, the ATS would be required to only list the business units or affiliates that actually enter or direct the entry of trading interest into the ATS. Part II, Items 1(a) and 2(a) of Form ATS–N would require the ATS to list the business unit or affiliate if, for example, a trading desk of the broker-dealer operator or an affiliate uses a direct connection to the ATS or algorithm to submit trading interest into the ATS. Likewise, if an affiliated asset manager of the broker-dealer operator uses the services of a third-party broker-dealer to direct trading interest to the ATS (*i.e.,* the asset manager instructs the third-party broker-dealer to send its trading interest to the ATS), the ATS would be required to list that affiliated asset manager under Item 2(a). However, if that affiliated asset manager submits trading interest to a third-party broker-dealer, and that third-party broker-dealer, using its own discretion, directs the trading interest of the asset manager into the affiliated ATS, the ATS would not be required to list the affiliated asset manager under Item 2(a); under such circumstances, the affiliate would not be ''directing'' trading interest to the ATS because the third-party broker-dealer is using its discretion to direct the affiliate's trading interest.

Currently, Part II, Items 1(a) and 2(a) only require an NMS Stock ATS to list business units or affiliates, respectively, that enter or direct the entry of orders and trading interest into the ATS.[537] Based on the Commission staff's experience, some NMS Stock ATSs have opted to list all of the internal business units and affiliates that could trade in the ATS and not only the internal business units and affiliates that actively enter orders and trading interest into the ATS. This additional information can also help market participants evaluate the types of potential conflicts of interest on an NMS Stock ATS by providing the entire universe of potential contra-side trading interest that users of the ATS might view as a conflict of interest. Accordingly, while not required to do so, a Covered ATS would meet the respective requirements of Part II, Items 1(a) and 2(a) by listing all of the internal business units and affiliates that could trade in the ATS.

The Commission is proposing that Form ATS–N specify the types of information that a Covered ATS must provide with regard to business units or affiliates of the broker-dealer operator. Specifically, Item 1(a) would require the ATS to name and describe each type of business unit of the broker-dealer operator that enters or directs the entry of trading interest into the ATS (*e.g.,* another Covered ATS, type of trading desks, market maker, sales or client desk) and, for each business unit, to provide the applicable MPID and list the capacity of its trading interest (*e.g.,* principal, agency, riskless principal). Item 2(a) would require the Covered ATS to name and describe each type of affiliate that enters or directs the entry of trading interest into the ATS (*e.g.,* broker-dealers, another Covered ATS, investment companies, hedge funds, market makers, PTFs) and, for each of those affiliates, provide the applicable MPID and list the capacity of its trading interest (*e.g.,* principal, agency, riskless principal). The disclosures in Items 1(a) and 2(a) would help market participants understand both the types of broker-

[533] Form ATS–N would define ''affiliate'' as, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person. ''Control'' would be defined to mean the power, directly or indirectly, to direct the management or policies of the broker-dealer operator of an alternative trading system, whether through ownership of securities, by contract, or otherwise. In this proposal, the Commission is proposing to update the definition of ''person'' for the purposes of Form ATS–N. A ''person'' is presumed to control the broker-dealer operator of an alternative trading system if that person: Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer operator of the alternative trading system; or in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker-dealer operator of the alternative trading system. *See infra* Section V.D.

[534] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38818–19.

[535] In Part II, Item 1(a), the Commission is proposing to delete examples of trading interest—quotes, conditional orders, and indications of interest—as the proposed definition of trading interest would encompass these examples.

[536] For a further discussion about how a conflict of interest related to trading by the broker-dealer operator on its own ATS could be harmful to other subscribers, *see* NMS Stock ATS Adopting Release, *supra* note 2, at 38771, 38824–29.

[537] As explained above, Form ATS–N will remove references to ''orders,'' and its disclosures will focus on ''trading interest.''

dealer operator business units and affiliates that can trade in a Covered ATS, and their trading activities.[538]

In addition to what is required under current Form ATS–N, the Commission proposes to add an additional disclosure request to Part II, Items 1(a) and 2(a) of Form ATS–N that would require a Covered ATS to explain any circumstance when the broker-dealer operator or an affiliate, respectively, would be a counterparty to an ATS trade. Based on Commission experience, the broker-dealer operator may act as a counterparty to both sides of a trade to maintain the anonymity of each counterparty or to facilitate clearance and settlement of the trade. To the extent the broker-dealer operator or affiliate of the broker-dealer operator of a Covered ATS intermediates between two counterparties, the ATS should publicly disclose to its subscribers when and how it does so and the capacity of the broker-dealer operator or its affiliates.[539]

Part II, Items 1(b) and 2(b) of Form ATS–N would require a Covered ATS to disclose whether the services that the ATS offers and provides to the business units or affiliates required to be identified in Item 1(a) and 2(a), respectively, are the same for all subscribers and persons whose trading interest is entered into the ATS by a subscriber.[540] This request would be in the form of a ''yes'' or ''no'' question, and if the ATS answers ''no,'' it would be required to explain any differences in response to the applicable Item number(s) in Part III of Form ATS–N and list the applicable Item number(s). If there are differences that are not applicable to Part III of Form ATS–N, the ATS must explain those differences in detail under Part II, Items 1 and 2.

Part II, Items 1(c) and 2(c) would require a Covered ATS to disclose the broker-dealer operator's or any of its affiliates' role as a liquidity provider in the ATS, if applicable. These Items would require the ATS to disclose—in the form of a ''yes'' or ''no'' response—whether there are any formal or informal arrangements with any of the sources of trading interest of the broker-dealer operator or affiliates identified in Item 1(a) and Item 2(a), respectively, to provide trading interest to the ATS (*e.g.,* undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). If the ATS answers ''yes,'' it must identify the business unit(s) or affiliate(s) and respond to the Item with information about liquidity providers in the ATS.[541] Based on the Commission staff's experience with Form ATS–N filed by NMS Stock ATSs, highlighting whether the broker-dealer operator or affiliate acts as a liquidity provider on a Covered ATS would help market participants evaluate the potential for conflicts of interest or information leakage on the trading platform.

Finally, the Commission proposes to relocate the Part II, Items 1(d) and 2(d) disclosure requests to proposed Part III, Item 16(c). Currently, these request an NMS Stock ATS to disclose information about sending orders and trading interest to a trading center operated or controlled by the broker-dealer operator or any of its affiliates, respectively in the form of a ''yes'' or ''no'' question. The related narrative is currently required to be provided in Part III, Item 16, which requires disclosures about external routing from the NMS Stock ATS. The Commission continues to believe that this disclosure is important when evaluating potential conflicts of interest and how trading interest may be handled in the ATS. The Commission originally included subpart (d) in Part II, Items 1 and 2 to highlight conflicts of interest related to routing. The Commission believes that it would be more efficient for market participants and filers to consolidate this disclosure with the responses to the request soliciting information about the routing or sending of trading interest from the ATS. As such, the Commission is proposing to delete Items 1(d) and 2(d) from Part II, and relocate the disclosure requirements therein to Part III, Item 16(c).

Request for Comment

85. What information about trading by the broker-dealer operator and its affiliates related to Government Securities ATSs is important to market participants? Are there any additional relevant points of information about NMS Stock ATSs that Form ATS–N does not solicit and should be asked?

86. Are there potential conflicts of interest for broker-dealer operators of Government Securities ATSs or their affiliates that may justify greater operational transparency for Government Securities ATSs than for NMS Stock ATSs, or vice versa?

87. Should the Commission require separate disclosures for different types of trading by the broker-dealer operator on the Covered ATS, such as trading by the broker-dealer operator for the purpose of correcting error trades executed in the ATS, as compared to other types of principal trading? If so, what types of principal trading should be addressed separately and why? What disclosures should the Commission require about principal trading and why?

88. Should the Commission limit or expand in any way the proposed disclosure requirements to require disclosure of arrangements regarding access by the broker-dealer operator or its affiliates to both other trading venues and affiliates of those other trading venues?

89. Should the Commission require ATSs to provide information about when the broker-dealer or affiliate of the broker-dealer would be a counterparty to an ATS trade? What type of information about such arrangements would be useful to market participants?

90. Form ATS–N currently requires that an NMS Stock ATS name the affiliate(s) of the broker-dealer operator permitted to enter or direct the entry of trading interest into the ATS. A Government Securities ATS would also be required to describe the type of affiliates on Form ATS–N. Should the Commission continue to require NMS Stock ATSs, but not Government Securities ATSs, to disclose the name(s) of affiliate(s) in Form ATS–N?

91. Should the Commission require Covered ATSs to disclose the percentage of trading in the ATS attributable to

[538] Although the narrative responses to Items 1(a) and 2(a) could typically be kept up-to-date via updating amendments to Form ATS–N, the Commission also notes that in most cases, if the ''yes'' or ''no'' response to Items 1(a) or 2(a) changes (*e.g.,* the Covered ATS changes its operations to allow affiliates to trade whereas they could not do so prior, or vice versa), the ATS would be required to file a material amendment. *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38826.

[539] Depending on how the Covered ATS operates, it is possible that disclosures about the broker-dealer operator's (or its affiliate's) role as an intermediary between two other counterparties would be required disclosures elsewhere on the Form ATS–N *(e.g.,* Part III, Item 7 (Order Types and Sizes; Trading Facilities), Part III, Item 21 (Post-Trade Processing, Clearance, and Settlement)). Accordingly, the Commission is proposing that this information would be required to be publicly disclosed in Part II. However, to decrease redundancy in the form, the ATS could note in Part II, Item 1(a) and/or 2(a) disclosures that the broker-dealer operator or its affiliates could be counterparties to a trade, state the capacity in which broker-dealer operator or its affiliate is a counterparty to the trade, and provide a more detailed responses to other requests for information as required in the form.

[540] The Commission is proposing to revise Part II, Items 1(b) and 2(b) to specifically ask about treatment of persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator. In the Commission's experience, ATS services could vary among not only subscribers, but also non-subscriber participants to the ATS. The Commission is therefore proposing to broaden the scope of these questions to apply to differing treatment among non-subscriber participants whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator.

[541] This request is contained in Part III, Item 12. *See infra* Section V.D.5.l.

each or all of the broker-dealer operator's business units, affiliates or both? Should Form ATS–N require a Covered ATS to disclose specific trade volume data for its trading with business units of the broker-dealer operator or its affiliates? If so, how should that volume be measured (*e.g.,* executed trades, dollar volume)?

92. Would the disclosure of information about trading by the broker-dealer operator and its affiliates in the Covered ATS be sufficient to address potential conflicts of interest? If disclosure alone is insufficient, are there other measures the Commission could take to mitigate potential conflicts of interest regarding trading? Should the Commission prohibit some or all trading by the broker-dealer operator and its affiliates in the ATS to address potential conflicts of interest?

b. Item 3: Interaction of Trading Interest With Broker-Dealer Operator; Affiliates

Proposed Part II, Item 3 of Form ATS–N is designed to solicit information about the interaction of trading interest between unaffiliated subscribers to a Covered ATS and trading interest of the broker-dealer operator and its affiliates in the ATS. As proposed, Part II, Item 3(a) of Form ATS–N would require a Covered ATS to disclose whether a subscriber can opt out of interacting with trading interest of the broker-dealer operator in the ATS, and Part II, Item 3(b) would require the ATS to disclose whether a subscriber can opt out of interacting with the trading interest of an affiliate of the broker-dealer operator in the ATS.[542] Part II, Item 3(c) of Form ATS–N would require the ATS to disclose whether the requirements [543] of the opt-out processes for the broker-dealer operator and affiliates required to be identified in Items 3(a) and (b) are the same for all subscribers. Proposed Part II, Item 3 would be important to unaffiliated market participants trading on an ATS because, given the potential for informational advantages by the broker-dealer operator or its affiliates,[544] some unaffiliated subscribers may not wish to interact with the order flow of the broker-dealer operator or its affiliates. This disclosure could also help subscribers understand whether and how they may avoid trading with the broker-dealer operator and its affiliates should they elect to use the services of the Covered ATS.

Request for Comment

93. Should Form ATS–N request more or less information about how a market participant can limit its interaction on a Covered ATS with the broker-dealer operator or its affiliates? If commenters believe Form ATS–N should request more information, please provide specific information that would be useful along with an explanation of its utility.

c. Item 4: Arrangements With Other Trading Venues

Part II, Item 4 of Form ATS–N is designed to disclose information about formal or informal arrangements (*e.g.,* mutual, reciprocal, or preferential access arrangements) [545] between the broker-dealer operator or an affiliate of the broker-dealer operator and a trading venue (*e.g.,* ATS, broker-dealer, exchange, OTC market maker, futures or options market) to access the ATS services (*e.g.,* arrangements to effect transactions or to submit, disseminate, or display orders and trading interest in the ATS).

Part II, Item 4 would require a Covered ATS to disclose an arrangement between the broker-dealer operator for the ATS or affiliate of the broker-dealer operator and a broker-dealer operator of an unaffiliated ATS under which the broker-dealer operator would send trading interest to the unaffiliated ATS for possible execution before sending it to any other destination. Item 4 would also require disclosure of the inverse arrangement pursuant to which any subscriber trading interest sent out of the unaffiliated Covered ATS would be sent first to the ATS before any other trading venue. In addition, Item 4 would require a summary of the terms and conditions of the arrangement such as, for example, whether the broker-dealer operator of the Covered ATS is providing monetary compensation or some other brokerage service to the unaffiliated ATS.[546] If a broker-dealer operator has an arrangement with another trading venue operated by the broker-dealer operator or an affiliate, or an unaffiliated trading venue, market participants are likely to consider information about such arrangements relevant to their evaluation of an ATS as a potential trading venue and such an arrangement may raise concerns about conflicts of interest or information leakage. The Commission is therefore proposing disclosure of such arrangements in Part II, Item 4 of Form ATS–N.[547]

Request for Comment

94. What type of arrangements might a broker-dealer operator of a Covered ATS have with a trading venue for government securities or repos? Please explain and describe what information, if any, market participants may wish to know about such an arrangement.

d. Item 5: Other Products and Services

Part II, Item 5(a) is designed to disclose whether the broker-dealer operator offers any products or services for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in the Covered ATS (*e.g.,* algorithmic trading products that send orders to the ATS, order management or order execution systems, data feeds regarding orders and trading interest in, or executions occurring on, the ATS, order hedging or aggregation functionality, post-trade processing),[548] and if applicable, to

[542] For example, if a broker-dealer operator uses algorithms to submit subscriber orders into the Covered ATS, any steps that either the broker-dealer operator or the subscriber needs to take so that the ATS prevents those orders from trading with the broker-dealer operator or its affiliates would be required disclosures under Items 3(a) and 3(b), respectively.

[543] The Commission is proposing to replace the phrase ''terms and conditions'' with ''requirements.'' In the Commission staff's experience reviewing Form ATS–N and discussing the requirements of the form with NMS Stock ATSs, the Commission has observed that some NMS Stock ATSs have read ''terms and conditions'' to mean all legal or contractual terms, rather than terms relevant to the scope of the question (*i.e.,* what is required for a subscriber to opt out). Using the term ''requirements'' will clarify that the Item is soliciting information specifically related to requirements related to the opt-out process. Substantively, the Commission does not believe that the proposed change would change information that is being solicited in this Item.

[544] *See supra* Section IV.D.3.a.

[545] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38831 nn.769–70 and accompanying text. As the Commission discussed in the NMS Stock ATS Adopting Release, the disclosures required by Part II, Item 4 of revised Form ATS–N are not so broad as to require the Covered ATS to list each unaffiliated subscriber that accesses its system. *See id.* at 38831.

[546] In addition, in Part II, Item 4(b) of Form ATS–N, the Commission is proposing to delete the phrase ''if yes to Item 4(a).'' This phrase was included in Form ATS–N in error. The NMS Stock ATS would be required to respond to Part II, Item 4(b) regardless of its response to Part II, Item 4(a).

[547] In the NMS Stock ATS Adopting Release, the Commission provided examples of when potential conflicts of interest and information leakage could occur as a result of preferential routing arrangements (*e.g.,* an affiliate is contractually obligated to route all unexecuted orders to ATS) or routing arrangements with affiliates (*e.g.,* all orders routed by the NMS Stock ATS must first be routed to an the affiliate(s)). Specifically, the former might result in information leakage should the arrangement provide that all orders not executed by the affiliate are to be sent to the NMS Stock ATS and the latter could provide incentive for the NMS Stock ATS to route orders to an affiliate instead of trying to execute the order in the ATS. These issues could arise in the government securities markets, as well, so those examples are also applicable to both NMS Stock ATSs and Government Securities ATSs. *See id.* at 38831 n.771.

[548] In Part II, Item 5, the Commission is proposing to add ''order hedging or aggregation functionality'' and ''post-trade processing'' as examples of

indicate whether the requirements of use [549] for these services or products required to be identified in Part II, Item 5(a) are the same for all subscribers, persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator, and the broker-dealer operator.[550]

Customers of a broker-dealer operator could be both subscribers to its ATS and customers of the broker-dealer operator and the broker-dealer operator may offer its customers trading products and services in addition to its ATS services. In certain cases, the product or service offered might be used by the customer in conjunction with the customer's use of the ATS. Broker-dealer operators may, directly or indirectly through an affiliate, offer products or services for the purpose of, for example, submitting trading interest, or receiving information about displayed interest, in the ATS.[551] The Commission is proposing to delete the term ''Subscribers'' from Items 5(a) and 5(c) so that all products and services that the broker-dealer operator or affiliate of the broker-dealer operator offers for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in the ATS, would be required to be disclosed on Form ATS–N, regardless of whether they are offered to subscribers or non-subscribers (*e.g.,* customers of ATS subscribers). For example, a Government Securities ATS would be required to disclose any aggregation functionality that the broker-dealer operator or its affiliate(s) offers, which, for example, could be used by subscribers to interface with the ATS to send or receive trading interest to and from other markets, including U.S. Treasury Securities markets, over-the-counter spot markets, or futures markets. The Commission believes that participants would be interested in understanding the use of an aggregation functionality with the ATS and how it can help achieve their trading strategies. If the broker-dealer operator or its affiliate offered a product for effecting transactions or submitting, disseminating, or displaying trading interest in the Government Securities ATS using related financial markets for non-government securities (*e.g.,* futures, currencies, swaps, corporate bonds), the ATS could summarize the requirements for use of such a product in this Item and explain the product's use under proposed Part III, Item 11.[552]

The Commission believes the information required by Part II, Item 5 of revised Form ATS–N is important because participants want to know the products or services that the broker-dealer operator or its affiliates may offer for the purpose of effecting transactions, or submitting, disseminating, or displaying trading interest in the ATS because such products or services may impact the participants' access to, or trading on, the ATS.[553] In some cases, if subscribers also use other products or services that the broker-dealer operator offers, they could receive more favorable terms from the broker-dealer operator with respect to their use of the ATS. For example, if a participant purchases a service offered by the broker-dealer operator of a Covered ATS, the broker-dealer operator might also provide that subscriber more favorable terms for its use of the ATS than other participants who do not purchase the service. Such favorable terms could include fee discounts or access to a faster connection line to the ATS. Additionally, a broker-dealer operator of a Covered ATS may offer certain products and services only to certain participants or may offer products and services on different terms to different categories of participants. The Commission believes that participants would want to know, when assessing a Covered ATS as a potential trading venue, the range of services or products that the broker-dealer operator or its affiliates offers participants of the ATS, and any differences in treatment among participants, because such services or products may impact the participants' access to, or trading on, the ATS.

To the extent that a participant on a Covered ATS is offered use of products and services by the broker-dealer operator or its affiliate for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in the ATS, Part II, Item 5 of Form ATS–N would require disclosures about those products or services. For example, if a broker-dealer operator offers its customers an order management system that can also be used by participants to the ATS to manage orders in the ATS (*e.g.,* adjust the pricing or size of trading interest in relation to trading interest resting in or outside the ATS, or modify order instructions to execute or cancel at a specified time or under certain market conditions), the ATS would be required to identify the order management system, provide a summary of the requirements for its use, and identify the Part and Item number in Form ATS–N where the order management system is explained. In addition, any services offered by the broker-dealer operator for subscribers to mitigate risk, such as limits on gross or net notional exposures by a subscriber, identification of duplicative orders in the ATS, or other checks offered related to order entry or authorizations to trade in the ATS, would be identified in this Item and explained further in proposed Part III, Items 7(b) and 8(b), as applicable. However, the requests in Part II, Item 5 would not encompass trading products or services offered by the broker-dealer operator to customers that are not for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in the ATS.

To alleviate any concerns regarding the potential disclosure of commercially sensitive information in this disclosure request, the proposed disclosure request

products or services for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in a Covered ATS, and which could be particularly relevant to Government Securities ATSs. ''Order hedging or aggregation functionality'' would include any aggregation functionality that, for example, could be used by subscribers to interface with the ATS to send or receive orders and trading interest to and from other markets, including U.S. Treasury Securities markets, over-the-counter spot markets, or futures markets. ''Post-trade processing'' would include any functionality that could be used by subscribers in connection with post-trade processing to manage routing, enrichment, allocations, matching, confirmation, affirmation, or notification of ATS trades.

[549] The Commission is proposing to replace the phrase ''terms and conditions'' with the phrase ''requirements'' throughout this Item. *See* note 543 and accompanying text. The Commission is also proposing to require the Covered ATS to disclose any differences in treatment as they apply to persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator. In the Commission staff's experience, broker-dealer operators and their affiliates may, for example, disclose products and services offered to customers of subscribers. *See* proposed revisions to Part II, Items 5(b) and 5(d).

[550] For example, if a broker-dealer operator offers subscribers alternative algorithms to handle orders, including sending such orders to the Covered ATS, and there is a difference in the latency in which each of the alternatives transmits information, such differences in latency would need to be disclosed in Part II, Item 5 of revised Form ATS–N.

[551] *See* NMS Stock ATS Proposing Release, *supra* note 29, at 81048. *See also* NMS Stock ATS Adopting Release, *supra* note 2, at 38832 n.779. For example, order hedging functionalities could encompass a product or service offered by the broker-dealer operator to a customer that the customer may use as a subscriber to the broker-dealer operator's ATS to hedge exposures of trading interest in or outside the ATS. A broker-dealer operator that offers such a functionality for use with the ATS would describe the requirements for a subscriber to use the functionality in Part II, Item 5 and explain its use with regard to the ATS in Part III of Form ATS–N. For example, if the order hedging functionality affects order interaction in the ATS, the ATS would explain the functionality in proposed Part III, Item 7. If the order hedging functionality involves futures and trading interest in the ATS, the ATS would explain the related procedures under proposed Part III, Item 11.

[552] *See infra* Section IV.D.5.l.

[553] Services for the purpose of effecting transactions, or submitting, disseminating, or displaying trading interest in the ATS that are offered by a person other than the broker-dealer operator would also be responsive to this Item.

would require only a summary of the requirements for the products and services disclosed and an explanation of how the product or service is used with the ATS in the applicable Item number in Part III of Form ATS–N. The Commission believes that requiring only a summary narrative would normally not require the broker-dealer operator to disclose commercially sensitive information.

Request for Comment

95. What types of products and services do broker-dealer operators of Covered ATSs or affiliates of broker-dealer operators offer to subscribers and how are such products and services used in connection with the ATSs?

96. What information about the products and services offered by broker-dealer operators would be helpful to market participants?

97. Should the Commission expand Part II, Item 5 of Form ATS–N to require disclosure of products or services offered by the broker-dealer operator or its affiliates to subscribers, but not necessarily offered in connection with transacting on the Covered ATS?

98. Would the information required by Part II, Item 5 require disclosure of commercially sensitive information? If so, how could the Commission revise the information request to limit the disclosure of commercially sensitive information?

e. Item 6: Activities of Service Providers

Part II, Item 6(a) of Form ATS–N is designed to provide disclosures relating to any entity, other than the broker-dealer operator, that supports the services or functionalities of the Covered ATS.[554] Information about the roles and responsibilities of service providers to the ATS is important because it could inform market participants about the potential for information leakage on the ATS.[555] The Commission is not proposing that the third-party service provider requests encompass purely administrative items, such as human resources support, or basic overhead items, such as phone services and other utilities. As it is with Part II, Item 6(b) in current Form ATS–N, the information solicited in this disclosure is meant to provide information about the extent to which a third party may be able to influence or control the operations of the ATS through involvement with its operations (such as operating the ATS's proprietary data feeds sent to subscribers) and allow the Commission to monitor the third party's role and operations in the ATS.[556] For example, any service provider for clearance and settlement of transactions in the ATS, consulting relating to the trading systems or functionality, regulatory compliance, and recordkeeping for the ATS would be responsive to this request.[557]

The Commission recognizes that an ATS may engage an entity other than the broker-dealer operator to perform an operation or function of the ATS or a subscriber may be directed to use an entity to access a service of the ATS, such as order entry, disseminating market data, or display, for example. In such instances, the ATS must ensure that the entity performing the ATS function complies with Regulation ATS with respect to the ATS activities performed. For example, with respect to an ATS that is subject to the Fair Access Rule, if participants are required to enter orders in the ATS through an order entry firm or to access displayed orders from another entity, the ATS must ensure that its written fair access standards address these entities' activities because of the affect these entities' activities can have on participants' ability to access the ATS services.[558] Likewise, to the extent an entity, such as a service provider, performs a function of the ATS, and as a result has access to subscriber confidential trading information, the ATS's written safeguards and procedures to protect its subscribers' confidential trading information would also include the service provider's safeguards and procedures to protect the ATS's subscriber confidential trading information that is accessible to the service provider.[559] In addition, as part of the ATS's oversight procedures, the ATS must ensure that the service provider, for example, follows the service provider's safeguards and procedures to protect the ATS's subscriber confidential trading information.

Disclosures about the activities of service providers, for example, would inform the Commission about the scope of the ATS's operations and therefore the extent to which the ATS's Regulation ATS obligations would apply to the service provider's activities. In addition, as discussed above, the Commission will consider as part of its review of the Form ATS–N whether the entity filing Form ATS–N, or entities involved in the operations of the ATS, meets the definition of a Covered ATS, including whether the Covered ATS meets the criteria of Exchange Act Rule 3b–16.[560] The information provided on Form ATS–N about the role of service providers with regard to the ATS's operations would help inform the Commission's review.

Furthermore, the requests under Part II, Items 6(b) through (c) would require disclosure about whether any service providers or their affiliates use the services of the ATS. If they do, the Covered ATS would be required to identify the service providers, the service(s) used, and whether there is any disparate treatment between those service providers and other subscribers. Thus, for example, a Covered ATS would only be required to obtain and disclose information about third-party vendors and their affiliates that actively use the services of the ATS; the ATS should be aware of all parties that use its services under its current recordkeeping obligations. The Commission believes that market participants, when analyzing potential conflicts of interest or information leakage, would find it very useful to understand whether potential counterparties with whom they are trading, and who also service the operation of the ATS, have access to different or unique ATS-related services. Part II, Item 6(c) of Form ATS–N would require the Covered ATS to

[554] As explained further below, the Commission is relocating the disclosure request about shared employees in Part II, Item 6(a) of current Form ATS–N to Part II, Item 7(a) of revised Form ATS–N. Accordingly, Part II, Item 6(a) of revised Form ATS–N corresponds to Part II, Item 6(b) of current Form ATS–N.

[555] Legacy Government Securities ATSs that operate pursuant to a Form ATS on file with the Commission are currently subject to the disclosure requirement of Exhibit E of Form ATS, which requires ATSs to disclose the name of any entity other than the ATS that will be involved in the operation of the ATS, including the execution, trading, clearing, and settling of transactions on behalf of the ATS; and to provide a description of the role and responsibilities of each entity. *See* Item 7 of Form ATS (describing the requirements for Exhibit E of Form ATS). Proposed Part II, Item 6(b) would expand upon this requirement.

[556] *See* Bloomberg Letter at 8 (stating, in response to the 2020 Proposal, that disclosure of outsourced technology provider relationships is appropriate for the Commission and FINRA to determine that the regulated entity, the broker-dealer operator, is monitoring its third-party service provider(s)).

[557] If a summary of the role and responsibilities of the service provider is disclosed in response to Part III of Form ATS–N, the ATS need only list the applicable Item number in response to this Item. If there are services or functionalities that are not applicable to Part III, the ATS would identify the service provider, the services and functionalities, and also provide a summary of the role and responsibilities of the service provider in proposed Part II, Item 6(a).

[558] *See* Regulation ATS Adopting Release, *supra* note 31, 63 FR 70873 n.252. *See also infra* Section V.A.

[559] In such a case, a description of the written safeguards and procedures to protect subscribers' confidential trading information of the ATS and service provider would be required to be disclosed in Part II, Item 7 of Form ATS–N. *See infra* Section IV.D.4.f.

[560] See *supra* note 109.

identify and explain any differences in ATS services to a service provider and all other subscribers and persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator.[561] Additionally, depending on the role and responsibilities of the service provider, market participants may wish to consider evaluating the robustness of the ATS's safeguards and procedures to protect confidential subscriber information.

This request for summary information is designed to provide market participants with a general understanding of the types of technology or hardware provided by the service provider as part of its responsibilities, and how that hardware or technology is used by the ATS. The purpose of this disclosure is to provide information that subscribers can use to better understand whether the service provider might be able to access subscriber confidential trading information, so ATSs should draft their disclosure with the goal of conveying such information. Simply stating that a third party provides technology or hardware to the ATS would not be responsive to the required summary of the service provider's role, but, on the other hand, the ATS would not have to provide information about the manufacturer of its hardware components.

Request for Comment

99. Are there any critical services or functionalities (*e.g.,* matching engine, market data) that, if provided by a third party, should be required to be described in a higher level of detail than the proposed ''summary'' level? If so, which services and functionalities?

f. Item 7: Protection of Confidential Trading Information

Part II, Item 7(a) of Form ATS–N is designed to provide information about a Covered ATS's written safeguards and written procedures to protect the confidential trading information of subscribers to the ATS, including, (1) a summary of the roles and responsibilities of any persons that have access to confidential trading information, the confidential trading information that is accessible by them, the basis for the access, and whether any shared employees (defined below) have access to confidential trading information; (2) written standards controlling employees of the ATS that trade for employees' accounts; and (3) written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed.

The protection of confidential trading information is an important component of the regulation of ATSs and is essential to ensuring the integrity of ATSs as execution venues. The Commission believes that disclosures about any employee of the ATS's broker-dealer operator or employee of its affiliate that provides services for both the operations of the ATS and any other business unit or any affiliate of the broker-dealer operator (''shared employee'') with access to subscriber confidential trading information would help market participants evaluate circumstances when there is the potential for information leakage. For example, the Commission believes that market participants would likely want to know if an employee of the broker-dealer operator (or employee of an affiliate of the broker-dealer operator) that is responsible for the operations of a system containing subscriber confidential trading information from the ATS is also responsible for supporting, for instance, the principal trading activity of the broker-dealer operator, or another trading venue operated by the broker-dealer, or a trading venue that is an affiliate of the broker-dealer operator. In addition, if confidential trading information is not protected, many of the advantages or purposes for which a subscriber may choose to send its trading interest to an ATS (*e.g.,* to trade anonymously and/or to mitigate the impact of trading in large positions) are eliminated. In cases where the confidential trading information of a subscriber is impermissibly shared with the personnel of the broker-dealer operator or any of its affiliates, such an abuse is also compounded by the conflicting interests of the broker-dealer operator. That is, in such a case, the broker-dealer operator has invited subscribers to trade on its ATS and may have abused that relationship to provide itself or its affiliates with a direct competitive advantage over that subscriber. Accordingly, the Commission believes that disclosures informing market participants about broker-dealer operators' written safeguards and written procedures to protect confidential trading information are necessary so market participants can independently evaluate the robustness of the safeguards and procedures and decide for themselves whether they wish to do business with a particular Covered ATS.

Part II, Item 7(a) of revised Form ATS–N contains, in part, the same disclosure requests as Part II, Item 7(a) of current Form ATS–N. The Commission is proposing to amend Part II, Item 7(a) of Form ATS–N by adding the disclosure requests in Part II, Items 6(a) and 7(d) of current Form ATS–N. Item 6(a) of current Form ATS–N solicits information about ''shared employees.'' Part II, Item 7(d) of current Form ATS–N requires an ATS to provide a summary of the roles and responsibilities of any persons that have access to confidential trading information, the confidential trading information that is accessible by them, and the basis for the access.

The Commission is relocating and consolidating these disclosure requests based on its experience with Form ATS–N filings by NMS Stock ATSs. In the Commission staff's experience, the disclosures in Part II, Items 6(a), 7(a), and 7(d) in current Form ATS–N solicit similar information and thus, the structure of Form ATS–N often resulted in redundant disclosures within these Items. For example, in responding to Part II, Item 7(d) of current Form ATS–N, the ATS initially needs to describe what it considers to be confidential trading information, such as whether only pre-trade order information would be considered confidential trading information, or whether post-trade information would also be treated as confidential trading information, and for what period of time. To explain the basis for the access, the ATS currently needs to explain why the person would have access to the confidential trading information in Part II, Item 7(d). Similarly, Part II, Item 6(a) of current Form ATS–N requires the ATS to disclose whether and how shared employees can access confidential trading information. The Commission believes that consolidating these information requests into a single Item request in Part II, Item 7(a) on Form ATS–N would make the form easier to use because the reader will be able to find all the information previously spread across three items in a single item.

Part II, Items 7(b) and (c) of Form ATS–N are designed to disclose information about whether a subscriber can consent and withdraw consent, respectively, to the disclosure of its confidential trading information to any person (not including those employees of the ATS who are operating the system or responsible for its compliance with applicable rules). Subscribers should be

[561] The Commission is also proposing to require the Covered ATS to disclose any differences in services as they apply to persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator (*e.g.,* customers of subscribers). *See* proposed revisions to Part II, Item 6(c).

able to give consent if they so choose to share their confidential trading information.[562] Covered ATSs vary in terms of the types of orders, indications of interest (IOIs), or other forms of trading interest that are confidential on their systems and what information about such trading interest may be shared. For example, an ATS might provide that no IOIs submitted by subscribers will be considered confidential, but may provide subscribers with the option to restrict the information in the IOI message to just the symbol and side (*i.e.,* buy or sell). For this example, Part II, Items 7(b) and 7(c) of Form ATS–N would require the Covered ATS to describe the means by which a subscriber could control some of the information contained in the IOI message by providing consent or withdrawing such consent for the sharing of its confidential trading information.[563] For example, a subscriber can consent to its open trading interest being displayed to certain subscribers that the subscriber believes are less likely to misuse or exploit such information, or that have open trading interest on the contra side in the same symbol. If the Covered ATS allows subscribers to consent in this manner, the ATS would mark ''yes'' to Part II, Item 7(b). Continuing the example, if the subscriber can subsequently withdraw its consent to this display of its open trading interest, the Covered ATS would mark ''yes'' to Part II, Item 7(c).

Request for Comment—Part II

100. Should the Commission expand the proposed disclosures in proposed Part II, Item 7(a)(i) to other employees, personnel, or independent contractors of the broker-dealer operator? If so, which employees, personnel, or independent contractors should be included and what information about such persons should be solicited?

101. Should the Commission require Covered ATSs to disclose the information in Part II of Form ATS–N? If so, what level of detail should be disclosed?

102. Would Part II of Form ATS–N capture the information that is most relevant to understanding the Covered ATS and its relationship with the broker-dealer operator and the broker-dealer operator's affiliates? Please support your arguments.

103. Would the proposed disclosures in Part II require broker-dealer operators of Covered ATSs to reveal too much (or not enough) information about their structure and operations?

104. Is there other information about the activities of the broker-dealer operator and its affiliates that market participants might find relevant or useful in their assessment or use of the Covered ATS? If so, describe such information and explain whether or not such information should be required to be provided on Form ATS–N.

105. Should Covered ATSs not be required to provide the proposed disclosures in Part II on Form ATS–N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why?

106. Are there ways to obtain the same information as would be required from Covered ATSs by Part II other than through disclosure on Form ATS–N? If so, how else could this information be obtained and would such alternative means be preferable to the disclosures in Part II?

107. Should Covered ATSs be required to publicly disclose in their entirety on Form ATS–N their written safeguards and written procedures to protect the confidential trading information of subscribers? Should the Commission require less information be disclosed about the written safeguards and procedures?

108. Would the information about written safeguards and written procedures to protect the confidential trading information of subscribers described in Form ATS–N be sufficient for subscribers to independently evaluate such safeguards and procedures and thus evaluate the ATS as a destination for their orders? Should the Commission prohibit the disclosure of confidential subscriber information in some circumstances? If so, please describe.

5. Part III: Manner of Operations

Part III of Form ATS–N is designed to provide public disclosures to help market participants understand, among other things, how they may use a Covered ATS to buy and sell securities and find a counterparty to a trade. The Commission is proposing amendments to Part III that would apply to both NMS Stock ATSs and Government Securities ATSs. Government Securities ATSs would be required to respond to Part III of Form ATS–N in the same manner as NMS Stock ATSs, and the below description summarizes the types of disclosures Form ATS–N would solicit for both NMS Stock ATSs and Government Securities ATSs.

As proposed, Form ATS–N would include an instruction at the beginning of Part III to require that the Covered ATS identify and explain any differences among and between subscribers, persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator, the broker-dealer operator, and any affiliates of the broker-dealer.[564] Current Form ATS–N is structured to include separate questions throughout the Items that require the ATS to identify and explain any differences in the treatment of subscribers and the broker-dealer operator. Based on its experience reviewing Form ATS–N filed by NMS Stock ATSs, the Commission believes that discussion of these differences is integral to the responses to each of the Items, and that requiring the discussion to be included in the response to each Item, rather than requiring separate, potentially disjointed disclosures, would improve the readability of the disclosures. By requiring Covered ATSs to disclose differences in treatment of persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator, which would include, for example, sponsored access clients of subscribers, and affiliates of the broker-dealer operator, market participants will be able to discern any benefit or disadvantage they may receive in comparison to a broader, more comprehensive group of potential users of the ATS.[565] The disclosure about differences in treatment of subscribers, other persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator, the broker-dealer operator, and the broker-dealer operator's affiliates is important to market participants and would better allow them to decide whether submitting trading interest to the Covered ATS aligns with their trading objectives. Accordingly, the Commission is proposing to restructure Part III to delete separate questions regarding whether subscribers and the

[562] *See* Regulation ATS Adopting Release, *supra* note 31, at 70879.

[563] *See id.* The Commission believes that there may be some Covered ATSs that might not offer any means by which a subscriber could consent to the dissemination of its confidential trading information. A Covered ATS would be required to disclose this fact pursuant to Item 7(a). *See id.* at 70891 n.437.

[564] For example, in Part III, Item 5, if a Covered ATS designed its operations to allow only certain types of subscribers to enter trading interest into the ATS through direct means (*e.g.,* Financial Information eXchange (FIX) protocol) and other types of subscribers to enter trading interest into the ATS through indirect means (*e.g.,* SOR or algorithm), the ATS would describe these differences in means of entry in Part III, Item 5(a).

[565] *See* current Form ATS–N Part III, Items 2(c), 3(b), 4(b), 5(b), 5(d), 6(b), 6(d), 6(f), 7(b), 8(b), 8(d), 8(f), 9(b), 10(b), 10(d), 11(b), 11(d), 13(b), 13(e), 14(b), 15(c), 17(b), 18(c), 19(b), 21(b), 22(b), and 23(b). The Commission is proposing to delete these Items for Form ATS–N and re-number Items throughout Part III.

broker-dealer operator are treated the same, and instead, proposing to include the instruction for the Covered ATS to disclose any differences in treatment in the applicable responses to Part III. To be clear, this proposed change would not relieve Covered ATSs from their obligation to disclose any differences in treatment that were required to be disclosed in current Form ATS–N.

a. Item 1: Types of ATS Subscribers

Part III, Item 1 of Form ATS–N is designed to provide information on the type(s) of subscribers that can use the Covered ATS services. The Item would provide market participants with information about the type of trading interest in the Covered ATS based on the types of subscribers that use it. Covered ATSs may design their system for trading by retail investors, institutional investors, dealers, or any other type of market participant.

The Commission is proposing to revise the list of types of market participants in Part III, Item 1 of Form ATS–N that, in the Commission staff's experience, are commonly used for Government Securities ATSs and NMS Stock ATSs.[566] The list would include: Retail investors, issuers, asset managers, brokers, dealers, investment companies, hedge funds, market makers, PTFs, insurance companies, pension funds, corporations, and banks. The list is non-exhaustive and a Covered ATS would be required to list any type of subscriber that can use the ATS's services.[567] In addition to disclosing its subscribers, a Covered ATS may use Part III, Item 1 to disclose any types of participants whose trading interest may reach the ATS. For example, for an ATS that only allows brokers or dealers as subscribers, the ATS could identify the types of customers from which the brokers or dealers send trading interest to the ATS.

Request for Comment

109. Should Form ATS–N require a Covered ATS to include information about the types of subscribers to the ATS? Based on Commission staff experience, some ATSs only accept broker-dealers as subscribers to the ATS and various types of market participants send trading interest into the ATS through the broker-dealer subscriber. Should the Commission require the identification of the types of market participants whose trading interest may be sent to the ATS, whether directly or indirectly, by a broker-dealer subscriber to a Covered ATS? Would this information be useful to understanding the type of trading interest in the ATS?

110. Should the Commission add any other categories of subscribers commonly applicable to Government Securities ATSs or NMS Stock ATSs, or both, to Form ATS–N?

b. Item 2: Eligibility for ATS Services

Part III, Item 2 of Form ATS–N is designed to provide market participants with information about whether the Covered ATS requires subscribers to be registered broker-dealers or enter a written agreement to use the ATS services, and whether there are any conditions that the ATS requires a person to satisfy before accessing the ATS services.[568] This Item would require disclosure of the conditions a person must satisfy ''*before* accessing the ATS services'' (emphasis added). On the other hand, Part III, Item 3 of Form ATS–N (discussed *infra*), would require disclosures about any conditions that would exclude a subscriber, in whole or in part, from using the Covered ATS as a result of subscriber behavior while already actively participating in the ATS.[569]

The disclosures required by Part III, Item 2 would allow market participants to understand the conditions that they would need to satisfy to participate on the Covered ATS. If the Covered ATS indicates that it does have conditions that a person must satisfy before accessing the ATS services, the request would require the ATS to list and provide a ''summary'' of those conditions. Some Covered ATSs may only have the eligibility requirement that a person be a client of the broker-dealer operator. In that case, any eligibility requirements to become a client of the broker-dealer operator would be responsive to this Item. For example, if a subscriber must be a customer of the broker-dealer operator, the Covered ATS would provide a summary of conditions the subscriber, as a customer, would need to satisfy (*e.g.,* know your customer) before its trading interest can be entered into the ATS. If the Covered ATS requires subscribers to contract with or become a member of a third party, for example, for purposes of clearance and settlement, such as, for Government Securities ATSs, the Fixed Income Clearing Corporation's Government Securities Division, such information would be responsive.

Request for Comment

111. What eligibility requirements to access a Covered ATS are important to a potential subscriber or participant to the ATS and why? Are there any eligibility requirements that are particularly relevant to Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed) or Communication Protocol Systems that trade NMS stock that should also be required to be disclosed on Form ATS–N?

c. Item 3: Exclusion From ATS Services

Based on Commission staff's experience, ATSs often disclose rules governing subscribers' participation in the ATS, and if a subscriber fails to comply with these rules, the ATS may limit or deny access to the ATS.[570] Part III, Item 3 of Form ATS–N would require information about whether a Covered ATS can exclude, in whole or in part, any subscriber from the ATS services, and if so, to list and provide a summary of the conditions for excluding (or limiting) a subscriber from using the ATS. The disclosures are designed to provide information about when the Covered ATS can exclude, in whole or in part, a subscriber from the services of the ATSs and help subscribers reasonably anticipate the

[566] In Part III, Item 1 of Form ATS–N, the Commission is modifying the checkboxes listing types of subscribers to add insurance companies, pension funds, and corporations. The Commission believes that adding these checkboxes will provide more granular information on the types of subscribers participating on an ATS in an easier-to-read format. The Commission is also proposing to remove the checkbox ''NMS Stock ATS'' under the list of types of subscriber in Form ATS–N. A broker-dealer operator of an NMS Stock ATS seeking to access another NMS Stock ATS would involve the broker-dealer operator for the NMS Stock ATS becoming a subscriber to the ATS, not the ATS that the broker-dealer operates. In this scenario, an NMS Stock ATS that accepts a broker-dealer operator for another NMS Stock ATS would mark the checkbox for broker and/or dealer in Part III, Item 1 on Form ATS–N as appropriate.

[567] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38820–21 (discussing the definition of ''subscriber'' and the persons encompassed thereunder).

[568] In Part III, Item 2(b), the Commission is proposing to delete the word ''other'' and ask whether there any conditions, rather than any ''other'' conditions, that the ATS requires a person to satisfy before accessing the ATS services. The Commission believes it would be accurate to use the phrase ''any conditions'' rather than ''any other conditions'' in circumstances where a Covered ATS indicates that the ATS does not require subscribers to be registered broker-dealers in Part III, Item 2(a).

[569] For example, if a Covered ATS has a practice of excluding subscribers that do not meet certain percentage thresholds for submitting firm-up orders in response to receiving an IOI, conditional order, or RFQ sent to them by the ATS, then this practice would be subject to disclosure under Part III, Item 3 of Form ATS–N (''Exclusion from ATS Services'') and not Part III, Item 2 (''Eligibility for ATS Services'').

[570] These limitations can result in some subscribers having different levels of functionality or more favorable terms of access than others. For example, in the Commission staff's experience, some ATSs exclude subscribers that frequently fail to respond with a firm-up order after receiving an IOI or request for quote.

types of activities that may cause them to be excluded (or limited) from using the services of the ATS. The question, which allows Covered ATSs to provide a ''summary'' of conditions for excluding (or limiting) a subscriber, is designed to solicit information to alert subscribers about the types of activities that may cause them to be excluded (or limited) from using the services of the ATS while protecting sensitive information to allow the ATS to reasonably control the activities and quality of flow on its platform and prevent subscribers from using the disclosures to potentially misuse or game the system. To the extent that the ATS monitors and surveils trading activity on the ATS that could result in excluding subscribers from ATS services, to avoid duplicative disclosures, the response to this Item could reference the monitoring and surveillance practices described in response to Part III, Item 9.[571]

Request for Comment

112. Is there any subscriber behavior for which Covered ATSs, particularly Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed) or Communication Protocol Systems that trade NMS stock, commonly exclude a subscriber in whole or in part? What is that behavior(s) and what form of exclusion is commonly employed (*e.g.,* disqualification from ATS, limitation of services)?

d. Item 4: Hours of Operations and Trading Outside of Regular Trading Hours

Part III, Item 4 is intended to provide market participants with information about the days and hours of operation of the Covered ATS, including the times when trading interest can be entered in the ATS, and ATS services available outside of the ATS's regular trading hours. Part III, Item 4(a) would require a Covered ATS to provide the hours when it is operating, which would include functions such as accepting trading interest or allowing participants to use communication protocols to message other participants.[572] The disclosure required is not limited to only those hours when the ATS matches trading interest or allows participants to submit trading interest.

The Commission is proposing to revise Part III, Item 4 to include as Part III, Item 4(b) a question about whether the ATS services are available outside of the ATS's regular trading hours (*e.g.,* after-hours trading) and with respect to services available outside of the ATS's regular trading hours, whether there are any differences between the services during the ATS's regular trading hours and outside of the ATS's regular hours. Part III, Item 4(a) of current Form ATS–N asks about hours of operations outside of regular trading hours, and Part III, Item 18 of current Form ATS–N asks about whether the ATS conducts trading outside of regular trading hours, and whether there are any differences between trading outside regular trading hours and trading during regular trading hours. The Commission is proposing to streamline and combine the current questions, and, recognizing that ATSs, including Communication Protocol Systems, may provide other services beyond ''conduct[ing] trading,'' to ask about ATS services available outside of the ATS's regular trading hours. The Commission believes that it is important for market participants and the Commission to understand when a Covered ATS operates, when trading interest can be entered, including when the ATS will accept trading interest outside of its regular trading hours, and whether any other ATS services are available outside the ATS's regular hours of operations.

To the extent that there are differences with respect to any services the Covered ATS provides during and outside of its regular trading hours, the Covered ATS must describe those differences. Similar to Item 17 (requesting differences between any closing session(s) and regular trading hours), a Covered ATS would be required to disclose differences between trading outside of its regular trading hours and during regular trading hours with respect to the relevant information disclosed in Part III Items, including, among others, order types and sizes, and trading facilities (Item 7), use of non-firm trading interest, and communication protocols and negotiation functionality (Item 8), segmentation and notice (Item 13), and display and visibility of trading interest (Item 15). Many of the disclosures discussed elsewhere in Form ATS–N will relate to the ATS's regular trading hours so the ATS can simply discuss any differences between trading during its regular hours and trading outside its regular trading hours in Part III, Item 4(c), if applicable.

e. Item 5: Means of Entry

Part III, Item 5 of Form ATS–N is intended to disclose the means that can be used to directly enter trading interest into the Covered ATS and any other means of entering trading interest into the ATS (*e.g.,* smart order router, algorithm, order management system, sales desk, direct market access, web-enabled system, or aggregation functionality). The Commission is proposing to revise Part III, Item 5 of Form ATS–N to include examples of means of entry that it believes may be relevant to Government Securities ATSs, as well as Communication Protocol Systems. These examples, which are not exhaustive, would include direct market access, web-enabled systems, and aggregation functionalities. Part III, Item 5 of Form ATS–N would require the Covered ATS to identify and explain means of entering trading interest, including whether the means are provided through the broker-dealer operator itself, through a third-party contracting with the broker-dealer operator, or through an affiliate of the broker-dealer operator,[573] and list and provide a summary of the requirements[574] for entering trading interest into the ATS through these means.

Based on Commission staff experience, trading interest may be submitted into the Covered ATS both directly and indirectly. A direct method of sending trading interest to an ATS, for example, may include the use of a direct market access platform or FIX protocol connection, which allows subscribers to enter trading interest into the ATS without an intermediary. An example of an indirect method of submitting trading interest to an ATS could include the use of a smart order

[571] *See infra* Section IV.D.5.i.

[572] The Commission is proposing to make minor changes to this Item in Form ATS–N to replace ''operation'' with ''operations'' and to clarify that ''regular trading hours'' refers to the ATS's regular trading hours.

[573] In Part III, Item 5(b), the Commission is proposing to make a minor revision to this Item and change the word ''indicate'' to ''including,'' so the Covered ATSs would identify and explain the means for entering trading interest, ''including'' who provides the means, rather than identify and explain the means for entering trading interest and ''indicate'' who provides the means. The Commission believes identifying and explaining the means for entering trading interest encompasses describing who is providing the means of entry, and for that reason, this revision would clarify what information this Item is requesting. The Commission is also proposing to add clarifying text to Part III, Item 5(b) of Form ATS–N (renumbered from Part III, Item 5(c) of current Form ATS–N) to more clearly contrast such question from Part III, Item 5(a). The question would read whether there are ''means of entering trading interest into the ATS not otherwise disclosed in Part III, Item 5(a)'' rather than asking whether there are any ''other means for entering orders and trading interest into the NMS Stock ATS.''

[574] Current Form ATS–N requires a summary of the ''terms and conditions'' for entering orders or trading interest into the ATS through these means. The Commission is proposing to revise the question to require a summary of the ''requirements'' for entering trading interest in the ATS. *See supra* note 543 and accompanying text.

router (''SOR''), algorithm or similar functionality, website, graphical user interface (''GUI''), aggregation interface, or front-end system. The means of entry into an ATS (*e.g.,* direct or indirect) could impact the speed with which a subscriber's trading interest is handled and potentially executed and could increase the risk of information leakage. Today, the government securities markets are not interconnected markets like those for NMS stocks and therefore SOR technology may not be applied in the same manner by broker-dealer operators of Government Securities ATSs as it may for broker-dealer operators of NMS Stock ATSs. The Commission believes, however, that similar functionality may be used to send or receive trading interest to and from a Government Securities ATS to reduce latency or send trading interest to markets with better prices for certain government securities, and to the extent it does, the ATS should be required to provide information about that functionality as required.

The Commission believes that the disclosures regarding the direct or indirect means of trading interest entry would inform market participants about the functionalities that their trading interest pass through on their way to the ATS and help them assess any potential advantages that trading interest sent through the broker-dealer operator may have as opposed to other methods used by other subscribers. A Covered ATS would be required to identify the functionality that directly connects to the ATS (*e.g.,* algorithm, GUI, aggregation interface) and, if present, any intermediate functionality that trading interest passes through on its way to the functionality that directly connects to the ATS.[575] Conversely, if ATS trading interest submitted through an algorithm is sent to another intermediate functionality, and then submitted to the ATS by that functionality, such information would need to be disclosed pursuant to this Item.[576]

The proposed disclosure requirements would only require the Covered ATS to ''list and provide a summary of the requirements for entering trading interest into the ATS'' through these sources. Therefore, the Covered ATS would not need to provide a detailed description of the programming of the indirect means for entering trading interest that could put the ATS at a competitive disadvantage with competitors. However, if, for example, an ATS ''throttled'' the number of messages allowed for a given type of connection, that information would be responsive to this Item.

Although the Commission is proposing to delete Part III, Items 5(b) and 5(d) of current Form ATS–N, which asks the Covered ATS to disclose whether the protocols required to be identified in Part III, Item 5 and the requirements for any means of entry are the same for all subscribers and the broker-dealer operator, a Covered ATS would be required to disclose such differences in Part III, Item 5 pursuant to the proposed instruction in Part III in Form ATS–N.[577] For example, a Covered ATS would be required to disclose any differences in the latency of the alternative means for entering trading interest into the ATS. The Commission understands that there might be different latencies associated with each alternative. For instance, in some cases, a direct connection to the ATS may have reduced latencies as compared to indirect means where trading interest passes through an intermediate functionality. A broker-dealer operator could also, for example, configure the ATS to provide reduced latencies for certain means of entry used by itself or its affiliates.[578]

The Commission also believes that it is important for subscribers to understand if a means of entry is provided by an affiliate, even if it does not provide an advantage to a particular entity.

Disclosures about a broker-dealer operator's use of its or an affiliate's direct or indirect functionality to enter trading interest into the Covered ATS are important to market participants to allow them to assess the potential for information leakage. The indirect means of access (*e.g.,* SOR or algorithm) may obtain information about subscriber trading interest that is sent to the ATS (and may now be resting in the ATS) and subscriber trading interest that is sent out of the ATS. The potential that an indirect means of accessing the Covered ATS could lead to leakage of subscribers' confidential trading information necessitates disclosure of certain information about the use of such indirect means to send subscriber trading interest in or out of the ATS. In addition, there may be instances where an ATS uses an intermediate functionality or entity as the means to bring together buyers and sellers or provide established methods (such as providing means to enter, display, communicate, or execute trading interest) and that intermediate functionality or entity would be considered part of the ATS for purposes of Regulation ATS and Form ATS–N.[579] For example, if the broker-dealer operator arranges for trading interest to be entered into the ATS by another party, the activities of that party with respect to the ATS would be subject to the disclosure requirements of Form ATS–N. Likewise, if an ATS is subject to the Fair Access Rule under Regulation ATS and its participants must use an entity other than the broker-dealer operator to enter or receive information about trading interest in the ATS, the ATS must establish reasonable written standards governing the granting, denial, or limitation of access to ensure that those participants are not treated in an unfair and unreasonably discriminatory manner by the entity.[580]

Request for Comment

113. Are there any means of entering trading interest into the Covered ATS where more or should be required to explain their operation? Are there any aspects of those means of entry that are particularly important?

f. Item 6: Connectivity and Co-Location

Part III, Item 6(a) of Form ATS–N would request information about whether the Covered ATS offers co-location and related services, and if so, would require a summary of the requirements for use of such services, including the speed and connection (*e.g.,* fiber, copper) options offered. Part

[575] If an intermediate application or functionality has access to information related to a subscriber's trading interest, the Covered ATS must take appropriate measures to protect the confidentiality of such information pursuant to Rule 301(b)(10) of Regulation ATS. If the ATS arranges for an intermediate application to be provided by another party, the Covered ATS's obligations under Rule 301(b)(10) would apply to the activities that that party is performing for the ATS and the ATS's written safeguards and procedures should be designed to protect subscriber confidential trading information with regard to that party.

[576] If a broker-dealer operator permits subscribers to send trading interest to the ATS by excluding all other trading venues from where such trading interest could be sent, this procedure in effect allows a subscriber to direct an order to the ATS and would be responsive to Part III, Item 5.

[577] *See supra* note 564 and accompanying text.

[578] Covered ATSs would not be required to calculate and disclose precise latencies for each means of entry for purposes of Form ATS–N.

[579] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38832 and 38844. Depending on the activities of the persons involved with the market place, a group of persons can together provide, constitute, or maintain a market place or facilities for bringing together purchasers and sellers of securities and together meet the definition of exchange. In such a case, the group of persons would have the regulatory responsibility for the exchange.

[580] *See* Regulation ATS Adopting Release, *supra* note 31, at 70873. *See infra* Section V.A.3.a.

III, Item 6(b) of Form ATS–N[581] would require a Covered ATS to indicate whether it provides any other means besides co-location and related services described in the Item 6(a) to increase the speed of communication with the ATS, and if so, to explain the means and provide a summary of the requirements for its use. Part III, Item 6(c) would require the Covered ATS to indicate whether it offers any means to reduce the speed of communication with the ATS and if so, to provide a summary of the requirements for its use.[582]

Latency is an important feature of trading in certain government securities and NMS stocks, and market participants are interested in understanding the functionalities employed by Covered ATSs to influence it.[583] The Item would require a summary of the requirements where a trading venue employs mechanisms to increase the latency or the length of time for trading interest or other information to travel from a user to the system. Users of co-location services can experience faster or slower connection speeds to a Covered ATS depending on factors such as the distance of the customer servers from the matching engine, or the use or non-use of ''coiling'' to its matching engine to equalize connection speeds among subscribers, among others. Such differences in connection speed or latency would be required to be disclosed under Part III, Item 6. If, for example, the ATS offers means that would allow certain subscribers a competitive advantage, then the ATS should disclose such means on the Form ATS–N. The Commission believes that the information disclosed in Item 6 would help market participants understand their connectivity options to the ATS and expedite the order entry process for subscribers.

Request for Comment

114. Are there any aspects of the means for increasing or reducing the speed of communication with Covered ATSs that the Commission should specifically require under this Item?

g. Item 7: Order Types and Sizes; Trading Facilities

Part III, Item 7 of Form ATS–N is designed to disclose whether the Covered ATS provides trading facilities or sets rules for bringing together orders of buyers and sellers (*e.g.,* crossing system, auction market, limit order matching book, click-to-trade functionality). The request is intended to capture Covered ATSs that offer the use of firm trading interest and a trading facility or rules for buyers and sellers to interact and agree upon the terms of a trade. The Commission believes that systems that typically offer the use of orders and trading facilities and systems that offer the use of non-firm trading interest and communication protocols operate distinctively. Systems that offer the use of orders and trading facilities typically match orders of buyers and sellers pursuant to pre-determined rules programmed into an algorithm, while systems that offer the use of trading interest and communication protocols allow buyers and sellers to interact directly to find a counterparty and negotiate a trade. To facilitate market participants' understanding of these systems and their unique aspects, the Commission is proposing that Covered ATSs disclose information about the use of orders and trading facilities or rules in Part III, Item 7 and disclose the use of trading interest and communication protocols in Part III, Item 8. These questions would apply to both NMS Stock ATSs and Government Securities ATSs. If a Covered ATS provides both a trading facility and communication protocol (*e.g.,* provides both a limit order book and RFQ protocol), the Covered ATS would respond affirmatively to and explain the protocols separately under Items 7 and 8. To the extent the trading facility and Communication Protocol Systems interact in any way, the Covered ATS would explain that interaction in response to each question.

A Covered ATS that answers affirmatively to Part III, Item 7 of revised Form ATS–N would be required to explain the trading facilities and rules for bringing together the orders of buyers and sellers in the ATS. In this response, the ATS would be expected to disclose the information responsive to Part III, Items 7 (Order Types and Attributes), 8 (Order Sizes), and 11 (Trading Services, Facilities, and Rules) of current Form ATS–N. Based on Commission staff experience reviewing Form ATS–N filings, and particularly disclosures related to order types, order size, and the ATSs' rules, procedures, and facilities to bring buyers and sellers together, ATS are linked and intertwined. Allowing the Covered ATS to provide a narrative of these topics together in Part III, Item 7 of Form ATS–N would provide for more streamlined disclosures for market participants to understand and reduce redundancy. This proposed change would result in clearer, more readable narrative disclosures, and potentially reduce the burden to Covered ATSs of drafting repetitive disclosures in multiple responses in the form.

Part III, Item 7 of Form ATS–N would require that ATSs provide a description of each order type offered by the Covered ATS, and provide a list of items that the ATS should include in its description. To provide transparency to market participants, the Item would require a complete and detailed description of the order types available on the Covered ATS, their characteristics, operations, and how they are handled.[584] All market participants should have full information about the operations of order types available on a Covered ATS to comprehensively understand how their orders will be handled and executed in the ATS. Order types are a primary means by which users of a Covered ATS communicate their instructions to trade on an ATS. Given the importance, diversity, and complexity of order types, the Commission is proposing to require Covered ATSs to disclose the information called for by Part III, Item 7 on Form ATS–N.

Market participants should have sufficient information about all aspects of the operations of order types

[581] The Commission is proposing to re-number Part III, Item 6(c) of current Form ATS–N to Item 6(b) and Part III, Item 6(e) of current Form ATS–N to Part III, Item 6(c).

[582] To clarify that the Commission is soliciting information about any requirements the ATS imposes on subscribers or persons that submit trading interest to use co-location, related services, and other means to increase or reduce the speed of communication with the ATS, rather than the legal or contractual terms of such services, the Commission is proposing to replace the current requirement for a summary of the ''terms and conditions'' with ''requirements for use'' for such services in Part III, Items 6(a), 6(b), and 6(c). *See supra* note 543.

[583] *See* October 15 Staff Report, *supra* note 188, at 36–37; Treasury Request for Information, *supra* note 193, at 3928. *See also* Letter from Dan Cleaves, Chief Executive Officer, BrokerTec Americas, and Jerald Irving, President, ICAP Securities USA LLC, to David R. Pearl, Office of the Executive Secretary, Treasury Department, dated April 22, 2016 (''BrokerTec/ICAP Letter''), at 3–4, *available at https://www.treasurydirect.gov/instit/statreg/gsareg/ICAPTreasuryRFILetter.pdf;* Letter from C. Thomas Richardson, Managing Director, Head of Electronic Trading Service, Wells Fargo Securities, and Cronin McTigue, Managing Director, Head of Liquid Products, Wells Fargo Securities, to Treasury Department, dated April 21, 2016, at 6–7, *available at https://www.treasurydirect.gov/instit/statreg/gsareg/RFIcommentWellsFargo.pdf.*

[584] In the instruction to Part III, Item 7 of Form ATS–N, the Commission is proposing to make certain changes and clarify the examples provided in this Item regarding order types. Particularly, the Commission proposes to clarify the example provided regarding ''how price conditions affect the rank and price at which it can be executed'' by replacing ''it'' with ''the order type.'' In addition, the Commission is proposing to add ''store orders'' as an example of order types designed not to remove liquidity. The Commission recognizes that ''store orders'' may be more relevant to Government Securities ATSs than to NMS Stock ATSs.

available on a Covered ATS to understand how to use order types to achieve their trading objectives, as well as to understand how order types used by other market participants could affect their trading interest. A detailed description of order type characteristics would assist subscribers in better understanding how their orders would interact with other trading interest in the ATS. It also would allow market participants to see what order types could be used by other market participants, which could affect the probability, timing, and quality of their own executions. For example, if the time priority of a pegged order changes in response to changes in the reference price, that would affect the likelihood of execution for such an order. The Commission is also proposing to require that Covered ATSs disclose any order size requirements (*e.g.,* minimum or maximum size, odd-lot, mixed-lot, trading increments) and related handling procedures (*e.g.,* handling of residual trading interest) in Part III, Item 7 of Form ATS–N. This incorporates the requirements of Part III, Item 8 of current Form ATS–N, with modifications.[585] This information would inform subscribers about the permissible size of orders and trading interest that a subscriber could enter in the ATS. For example, if a Covered ATS has minimum or maximum order sizes, or a minimum increment size requirement for order modifications, those requirements and related handling procedures would be responsive to the Item. The Commission is also proposing to add the example of how residual or unexecuted orders are handled to the types of related handling procedures that a Covered ATS would be required to include in Part III, Item 7. Broker-dealer operators employ market access and risk management controls and procedures that prevent the entry of erroneous orders and orders that are above a subscriber's predetermined threshold. If order size requirements are imposed on subscribers as part of a risk management procedure, an explanation of those procedures as they relate to the ATS would be responsive to this Item. An explanation of how a Covered ATS's requirements and conditions related to the size of trading interest differ among subscribers and persons would also provide a market participant with information regarding how its trading interest would be handled in relation to other market participants.

Covered ATSs may offer the use of various types of trading facilities to bring together the orders of buyers and sellers and for such orders to interact. These types of systems would be disclosed in Part III, Item 7 of Form ATS–N. For example, many Covered ATSs bring together multiple buyers and sellers using limit order matching systems. Other Covered ATSs offer the use of crossing mechanisms that allow participants to enter unpriced orders to buy and sell securities, with the ATS's system crossing orders at specified times at a price derived from another market.[586] Some Covered ATSs offer the use an auction mechanism that matches multiple buyers and sellers by first pausing execution in a certain security for a set amount of time, during which the ATS's system seeks out and/or concentrates liquidity for the auction; after the trading pause, orders will execute at either a single auction price or according to the priority rules for the auction's execution. Certain Covered ATSs may use a voice system to bring together orders as well, or a combination of voice and electronic systems. Part III, Item 7, would require Covered ATSs to provide disclosure of how these facilities operate.

In addition, Part III, Item 7 would require a Covered ATS to disclose its rules and procedures under which orders interact and buyers and sellers agree upon the terms of a trade.[587] Form ATS–N sets forth a non-exhaustive list of such rules and procedures, which includes order interaction, priority,[588] pricing methodologies, allocation, matching, and execution of orders and other procedures for trading, such as price improvement functionality, price protection mechanisms, short sales, functionality to adjust or hedge orders, locked-crossed markets, the handling of execution errors, the time-stamping of messages and executions, and any conditions or processes for terminating a counterparty match.[589]

The Commission is also proposing that a Covered ATS disclose pricing methodologies used for each type of security traded by the ATS under Part III, Item 7.[590] For example, orders may be priced using spreads off a benchmark price, or spreads between two different maturities of a security. A Covered ATS may also restrict the allowable deviation from a benchmark price, or allow for indicative pricing of certain securities. If a transaction has more than one leg, the ATS may price both legs according to a price derived from one of the securities traded. In response to this request, a Covered ATS would be required to describe the ATS's procedures for determining all pricing methodologies and to the extent the pricing methodologies differ among subscribers and the broker-dealer operator, the ATS must disclose those differences.

In addition, Item 7 would require Covered ATSs to disclose how orders may interact with non-firm trading interest or separate trading functionalities within the ATS or offered by the broker-dealer operator. Item 7 would also require Covered ATSs to disclose the various procedures under which orders interact and match. Some Covered ATSs may offer price-time priority to determine how to match orders (potentially with various exceptions), while others may offer midpoint-only matching with time priority. Some Covered ATSs might also take into account other factors to determine priority. For example, a Covered ATS may assign either a lower or higher priority to an order entered by a subscriber in a certain class (*e.g.,* orders of principal traders or retail investors) or sent from a particular source (*e.g.,* orders sent by an algorithm or similar functionality) when compared to an equally priced order entered by a different subscriber or via a different source. Also, if applicable, the Item would require an explanation of which party to a trade would receive any price improvement depending on the priority, order type, and prices of the matched orders and the percentage of price improvement the party would receive. A broker-dealer operator could also act as the counterparty for each side of a transaction that matches on its ATS.

Pursuant to the proposed instruction at the beginning of Part III, Covered ATSs would be required to disclose any differences in treatment among subscribers, the broker-dealer, and other participants in the ATS as they relate to

[585] As discussed above, to streamline the format of responses, the Commission is proposing to consolidate current Form ATS–N Part III, Items 8(a) through (f) in Part III, Item 7 of revised Form ATS–N. The Commission believes that the information requested is the same, and the information requests covered by these sub-items (odd-lot orders and mixed-lot orders) would be covered in Part III, Item 7 of revised Form ATS–N.

[586] *See* Regulation ATS Adopting Release, *supra* note 31, at 70849 n.37.

[587] The Commission is proposing to add examples of functionalities used in the government securities market for which a Government Securities ATS would be required to explain the ATS's rules and procedures, if applicable.

[588] The Commission is making a non-substantive change to Part III, Item 7 of Form ATS–N to state that a Covered ATS would be required to disclose the order type's priority ''in relation to'' (rather than ''vis-à-vis'') other orders on the book due to changes in the NBBO or other reference price.

[589] This non-exhaustive list is the same as what is in current Form ATS–N, Part III, Item 11.

[590] Part III, Item 7 would require Government Securities ATSs and, to the extent applicable, NMS Stock ATSs, to describe any functionality to adjust or hedge orders.

the means and facilities for bringing together the orders of buyers and sellers.

Request for Comment

115. What are the most prevalent order types on Government Securities ATSs? Are there more important means than order types for subscribers to communicate the handling of their trading interest on Government Securities ATSs? Does Form ATS–N capture all of the means for subscribers of Government Securities ATSs to communicate the handling of their orders? Are there any aspects of order types on Government Securities ATSs that should be specifically addressed in the Item? If yes, please explain.

116. Are there any operations or procedures, either of an ATS or a broker-dealer operator, which could limit the entry, or size of, a subscriber's orders submitted to the ATS? If so, please describe these operations or procedures and explain why they are important to subscribers.

117. Are there any specific means or facilities used to bring together multiple buyers and sellers on Covered ATSs that should be specifically included as an example in this Item? Are there any rules and procedures that govern trading of government securities and repos that should be specifically included as examples in this Item?

h. Item 8: Use of Non-Firm Trading Interest; Communication Protocols and Negotiation Functionality

As discussed above, the proposed definition of ''exchange'' would include systems that make available the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities. Form ATS–N currently includes questions about NMS Stock ATSs' use of conditional order functionality and indications of interest,[591] which can be forms of communication protocols. Current Form ATS–N, however, does not contain comprehensive disclosure requests about systems that solely offer the use of non-firm trading interest and communication protocols because, as discussed above, such systems typically do not fall within the criteria of current Exchange Act Rule 3b–16(a) and, therefore, do not operate pursuant to the ATS exemption. The Commission is proposing to revise Part III, Item 8 to request information about the operations of these systems and the requests would be applicable to both NMS Stock ATSs and Government Securities ATSs. With respect to conditional orders and indications of interest, Part III, Item 8 of revised Form ATS–N incorporates and expands on the current disclosure requirements of Part III, Item 9 (Conditional Orders and Indications of Interest) and Part III, Items 7 (Order Types) and 8 (Order Sizes) of current Form ATS–N as they relate to conditional orders and indications of interest in the ATS.

Proposed Part III, Item 8 of revised Form ATS–N would require Covered ATSs to disclose whether they make available communication protocols for buyers and sellers to communicate non-firm trading interest, solicit interest to buy or sell a security, discover prices, find a counterparty, or negotiate a trade. Such systems could offer, for example, RFQ or workup protocols, stream axes, or conditional order functionalities.[592]

If the Covered ATS provides communication protocols and negotiation functionalities, it would be required to identify and explain the protocols and functionalities in the response to Part III, Item 8. The Commission believes that identifying and explaining these functionalities would provide transparency regarding how buyers and sellers can interact with each other on the system. This would require the Covered ATS to provide a narrative description of how participants in the ATS send and receive messages, how such messages interact, and the rules, procedures, and protocols governing the use of non-firm trading interest in the Covered ATS. To facilitate this disclosure, the Commission is proposing to include in Form ATS–N a description of the types of information that should be explained in this Item. The Commission recognizes, however, that each system operates differently and may offer unique protocols, and has designed Part III, Item 8 to allow ATSs the flexibility to provide a narrative response that will help market participants understand the protocols governing their systems.

First, the Covered ATS would be required to explain the use of messages in the ATS. Messaging is a primary tool by which Communication Protocol Systems bring together buyers and sellers. Use of messaging is critical to how buyers and sellers can use the system to find one another and negotiate a transaction. The Commission believes that ATSs offer diverse types of messaging that facilitate communication and negotiation, including non-firm trading interest that subscribers expose to other subscribers, communications that subscribers send to other subscribers to negotiate transactions, messages that subscribers use to communicate to the ATS how they want their trading interest to be handled, as well as messages the ATS sends to subscribers to communicate the presence of trading interest. The Commission believes that this information will help market participants understand how they can use messages in the ATS to interact with potential counterparties and to communicate how they want their trading interest to be handled by the ATS.

The Commission is proposing to provide a non-exhaustive list of what this explanation would include, as applicable to the Covered ATS's protocols and functionalities. The Covered ATS would be required to describe and explain each type of message the ATS permits participants to send and receive and the types of persons that can send and receive each type of messages (*e.g.,* the ATS, types of subscribers, specific subscribers, customers of subscribers, trading venues). The ATS would also be required to disclose the information contained in messages (*e.g.,* symbol, price, direction (*i.e.,* buy or sell), or size minimums) and any other information that a participant may choose to include in a message. If terms in messages can vary based on potential recipients (*e.g.,* different subscribers may receive varying priced messages for the same security), the Covered ATS would be required to disclose that.

The Commission is proposing that the Covered ATS disclose whether messages are attributed to their sender or anonymous, and whether a subscriber may elect to disclose its identity to other participants, and if so, what is disclosed and how, when, and to whom. The Commission understands that some Communication Protocol Systems allow participants to negotiate trades on an attributed basis so that certain counterparties may know the identity of other counterparties pre-trade. In some cases, subscribers on the ATS have established relationships and may choose to share their identity with a pre-selected list of potential counterparties or potential counterparties that meet certain criteria. Even while the subscriber discloses its identity to others, the identity of potential counterparties may be either known or anonymous. The Covered ATS would be required to describe when, and under what conditions, the subscriber or the

[591] Part III, Item 9 of current Form ATS–N asks about conditional orders and indications of interest. Part III, Item 8 of current Form ATS–N asks about order sizes. The Commission is proposing to incorporate the requirements of Part III, Item 8 into Part III, Items 7 and 8. In addition, the Commission is proposing to incorporate the requirements in Part III, Item 9 of current Form ATS–N in Part III, Item 8 of revised Form ATS–N.

[592] *See supra* Section II.B.2.

ATS discloses subscribers' identities and how and when messages are transmitted (*e.g.,* order management system, router, or FIX).

The Covered ATS would be required to describe the processes to respond to a message and any parameters around such responses. In the Commission's experience, on negotiation systems, a subscriber or the Covered ATS makes known the existence of trading interest or an interest in negotiation, and potential counterparties have the opportunity to respond. For example, a Covered ATS would be required to explain how the sender of a message would ''firm-up'' a conditional or other non-firm message to execute a trade. The ATS would also be required to describe the processes to respond to a request to negotiate, and for subscribers who initiate an RFQ to respond to any responses. In addition, if the ATS permits the initiating party or respondents a final opportunity prior to execution to accept or reject the price after the negotiating parties agree to a trading price (*i.e.,* a ''last look''), the ATS must describe such processes.

Part III, Item 8 would require the Covered ATS to describe any time parameters that the ATS sets or permits subscribers to set regarding sending and receiving messages. This would include time-in-force restrictions that a subscriber may place on trading interest in a message (*e.g.,* fill-or-kill, day, good-til-cancel). This would also include time parameters for updating prices or responding to trading interest or requests for negotiation applicable during any negotiation process. In the case of an RFQ, subscribers may provide a specific price with a ''wire time'' during which such price is actionable. Any parameters around such wire times would be required to be disclosed by the Covered ATS. Additionally, if the Covered ATS requires that a subscriber firm-up its conditional orders within, for example, three seconds of receiving a response, the Covered ATS would be required to state so. Any time parameters within which an initiator of a message would have to respond to responses to its messages would also be disclosed under Part III, Item 8.

The Covered ATS would also be required to provide information regarding the contra-party trading interest made available or known on the system, including whether a subscriber may elect whether to display only part of its trading interest. The instruction in Part III, Item 8 would state that, if trading interest is made known on the system, the ATS would be required to describe it in Part III, Item 15. Part III, Item 8 of Form ATS–N would also require a description of the circumstances under which messages may be modified, replaced, canceled, rejected, or removed from the Covered ATS. The Covered ATS would also be required to describe any restrictions or conditions under which the message might result in the match of two counterparties, require a response, or result in an execution in the Covered ATS (*e.g.,* interaction, matching, selection, automatic execution) and any price conditions (*e.g.,* how price conditions affect the rank and price at which the message can result in an execution).

The Covered ATS would also be required to describe the limits or requirements for multiple messages sent at the same time. For example, if the Covered ATS prohibits a subscriber from entering non-firm trading interest to buy and sell the same bond or security at the same time, entering the same price for a buy and sell order in the same bond (*i.e.,* a locked market), or entering a lower-priced sell order than the buy order (*i.e.,* inverted market), it should disclose these. In addition, the ATS would be required to state whether a message containing trading interest is eligible to be sent to destinations outside the Covered ATS, and if so, describe it in Part III, Item 16. The Covered ATS would also be required to disclose information about the availability of message types across all forms of connectivity to the ATS. To the extent there are differences in the availability of message types across forms of connectivity, the ATS would need to describe those differences.

A Covered ATS would also be required to disclose, with respect to non-firm trading interest, any requirements relating to the size of trading interest (*e.g.,* minimum or maximum size, odd-lot, mixed-lot, trading increments, message controls or throttling). This would include the requirements of Part III, Item 8 of current Form ATS–N, and also include examples of limitations, such as message controls or throttling, that the Commission understands a negotiation system, for example, may use to limit the number of messages sent by a subscriber. The Covered ATS would also be required to disclose any related handling procedures, such as, for example, the handling of residual trading interest after an execution on the ATS (*e.g.,* whether it is canceled or remains in the system).

In addition, in its response to Part III, Item 8, the Covered ATS would also be required to disclose in its response the procedures governing communication protocols. These requirements are currently incorporated in Part III, Item 11 of current Form ATS–N. Requiring information about such procedures would provide transparency into how buyers and sellers may interact, and how non-firm trading interest may interact with other trading interest in the ATS. The Commission is proposing to require disclosure of how Covered ATSs prioritize and permit their subscribers to prioritize trading interest, to provide information that market participants can use to choose an appropriate venue at which they can interact with other subscribers or send trading interest. As applicable, the Covered ATS would be required to provide in Part III, Item 8, a description of priority applied to a message upon entry and any subsequent change to priority (if applicable, whether and when the message can receive a new time stamp, the message's priority in relation to other messages in the Covered ATS due to a change to any reference price, and any instance in which a message could lose execution priority to a later arriving message at the same price); whether the Covered ATS permits or provides for subscribers to vary pricing based on the identity of other subscribers (*e.g.,* preferred pricing feeds or tiered pricing); and whether subscribers can select counterparties based on their identity or other factors. If a Covered ATS allows subscribers complete discretion to, for example, select which counterparty to interact with when the prices such counterparties offer are the same, the Covered ATS would be required to disclose that.

In addition, Part III, Item 8 would require a Covered ATS to disclose its rules and procedures under which buyers and sellers interact and agree upon the terms of a trade. Based on Commission staff experience, ATSs disclose various methods, rules, and conditions under which subscribers may interact using trading interest. Form ATS–N would provide a non-exhaustive list of such rules and procedures, which includes those for participant interaction, pricing methodologies, allocation, matching, and execution. This question is designed to provide transparency to those diverse methods, rules, and conditions so that market participants better understand how the ATS will handle non-firm trading interest and how subscribers may interact with others in the ATS. If the Covered ATS auto-executes non-firm trading interest, the ATS would also be required to disclose the functionality or protocols governing such auto-execution. The

Covered ATS would be required to disclose, for example, how the ATS or a subscriber can designate trading interest as automatically executable. Any limitations that subscribers may impose on auto-execution would be responsive to such request.

The Covered ATS would also be required to discuss in Part III, Item 8 how non-firm trading interest may interact with orders or separate trading functionalities in the ATS or functionality offered by the broker-dealer operator. For example, if an IOI can interact with a firm order on the Covered ATS's order book, it should disclose this and any policies and procedures for such interaction. To the extent that the Covered ATS has disclosed this in Part III, Item 7 in its discussion of how firm orders can interact with non-firm trading interest, the ATS should describe how the non-firm trading interest may interact with firm trading interest and may cross-reference the disclosure in Part III, Item 7.

In the Commission's experience, ATSs have adopted other trading procedures governing interaction and execution. The Commission is proposing to include examples of such procedures governing communication protocols that would be required to be disclosed. This would include functionality or protocols that permit the selection of displayed non-firm trading interest to trade against. In the Commission's experience, negotiation systems may allow subscribers to choose the trading interest they interact with; any procedures governing such selection should be disclosed in Part III, Item 8. In addition, the Commission believes that market participants would benefit from transparency regarding procedures that could re-price trading interest or prevent it from interacting with other trading interest under certain conditions. Accordingly, the Form ATS–N would provide a non-exhaustive list of procedures that includes price improvement, price protection mechanisms, procedures related to short sales, functionality to adjust or hedge trading interest, locked-crossed markets, the handling of execution errors, platform and trade controls (*e.g.,* fat finger checks, whether the ATS can employ a global kill switch), the time-stamping of trading interest messages and executions, and any conditions or processes for terminating a counterparty match.

In addition, the Covered ATS would be required to disclose what information is available to subscribers from the ATS about interaction history, counterparty matching, or executions (*e.g.,* pre- and post-trade data, best execution analysis, transaction cost analysis), when such information is made available, the source(s) of such information, and the process for subscribers to access this information. The Commission believes that requiring such information would allow market participants to better assess the information that Covered ATSs provide, including allowing them to analyze or evaluate their performance, resolve potential disputes, and/or understand how their trading interest has historically interacted and been treated in the ATS, among other things.

Request for Comment

118. Are there any aspects of how Covered ATSs permit non-firm trading interest to be sent and/or received that are not covered by this Item? Are there any aspects of how subscribers interact with each other on Covered ATSs by using non-firm trading interest that are not covered by this Item? What information about non-firm trading interest and the process for transmitting non-firm trading interest would be useful to market participants?

i. Item 9: Monitoring and Surveillance of the ATS Market

The Commission is proposing that Part III, Item 9(a) of Form ATS–N require a Covered ATS to disclose information about the activities the ATS undertakes to supervise the trading activity that occurs on or through the ATS (*e.g.,* supervisory systems and procedures to detect, deter, or limit potentially disruptive, manipulative, or non-bona fide quoting and trading activities that occur on or through its system and to ensure that they are reasonably designed to achieve compliance with applicable SRO rules and the Federal securities laws) and to provide a summary of any supervision activities that occur on or through the ATS, the sources of data the ATS uses to supervise trading activity (*e.g.,* internal or external sources), and the activities that the ATS intends to detect, deter, or limit.

As a registered broker-dealer, an ATS must comply with the filing and conduct obligations associated with being a registered broker-dealer, including becoming a member of an SRO, such as FINRA, and compliance with SRO rules.[593] Accordingly, ATSs must comply with SRO rules which, among other things, require each member to maintain a reasonably designed supervisory system.[594] For example, FINRA states it expects an ATS's supervisory system to be reasonably designed to identify ''red flags,'' including potentially manipulative or non-bona fide trading that occurs on or through its systems, and that ATSs must regularly assess and evaluate their supervisory systems and procedures to ensure that they are reasonably defined to achieve compliance with applicable FINRA rules and the Federal securities laws.[595] The Commission believes that the information disclosed in response to this request would help market participants understand the scope of supervision activities that an ATS performs to mitigate potentially manipulative and non-bona fide trading that occurs on or through its system. This information could also help regulators, including the Commission and FINRA, to assess the extent to which an ATS's supervision procedures are designed to facilitate investor protection over activities occurring in the ATS and comply with the applicable rules, including the Exchange Act and FINRA rules.

The Commission is proposing Part III, Item 9(b) of Form ATS–N to request disclosures about whether the ATS monitors for certain types of trading behaviors or activities that may be detrimental to the ATS market place or trading (*e.g.,* anti-gaming technology) and, if so, to provide a summary of the ATS's monitoring activities and the trading behaviors and explain the

[593] Section 15(b)(8) of the Exchange Act requires a broker or dealer to become a member of a registered national securities association, unless it effects transactions in securities solely on an exchange of which it is a member. 15 U.S.C. 78o(b)(8).

[594] *See* Regulatory Notice 18–25, ATS Supervision Obligations, August 13, 2018, *available at https://www.finra.org/sites/default/files/Regulatory-Notice-18-25.pdf* (''FINRA Regulatory Notice'') at 3. In addition, FINRA Rule 3310 requires FINRA members to, among other things: Establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws, regulations, and FINRA rules; establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of associated persons that are reasonably designed to achieve compliance with applicable securities laws, regulations, and FINRA rules; conduct a review, at least annually of the businesses in which it engages reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws, regulations, and FINRA rules and retain a written record of the date upon which each review and inspection is conducted; and include in its supervisory procedures a process for the review of securities transactions that are reasonably designed to identify trades that may violate the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive devices that are effected for certain accounts. *See* FINRA Rule 3310.

[595] *See* FINRA Regulatory Notice, *supra* note 594, at 3.

activities that the ATS intends to detect, deter, or limit. In the NMS Stock ATS Adopting Release, the Commission described that, in response to the proposal of Form ATS–N, commenters requested that information about the monitoring activities the ATS performs be included in Form ATS–N.[596] One commenter suggested that disclosure of certain additional trading services should be required, specifically whether the ATS employs technology designed to detect and deter price manipulation and other disruptive trading practices (*i.e.,* anti-gaming technology), and, if so, the ATSs should include a description of this technology in the form.[597] This commenter stated that existence of such technology can increase market confidence, particularly for market participants that transact in large volumes, such as funds, because it shows that a trading venue is committed to providing a fair and competitive market.[598] This commenter further stated that funds currently have no mechanism to receive standardized information regarding anti-gaming technology or to compare anti-gaming technology across different ATSs.[599] Another commenter stated that anti-gaming technology and other subscriber-related safeguards are among the core attributes of ATSs that are of particular importance to buy-side institutions.[600]

The Commission, however, declined to adopt a request related to anti-gaming technology and subscriber-related safeguards at that time because such descriptions made in a publicly available document could serve to undermine those safeguards by disclosing information that makes evading those safeguards easier.[601] However, the Commission is now proposing this requirement because it believes that market participants would want to know how the ATS may monitor for certain trading behaviors or activities that may be detrimental to the ATS market place or to the participants that use the ATS's services. In addition, the information would help market participants determine which ATSs provide better market quality that the market participants would be more inclined to effect transactions on. In the Commission staff's experience reviewing Forms ATS–N filed by NMS Stock ATSs, some NMS Stock ATSs have described information about their surveillance procedures and other safeguards, which allow market participants to understand their practices, while avoiding the level of detail that would help enable market participants to evade them. Accordingly, the Commission believes that the requests for information proposed would not serve to undermine the ATS's surveillance and monitoring activities because the Commission is requesting summary level information, which would strike the right balance in requiring these important disclosures and avoiding the risk that market participants could use the disclosures on Form ATS–N to evade such tools and controls.

Request for Comment

119. Would requiring summary disclosure regarding the Covered ATS's anti-gaming technology and similar safeguards benefit market participants? What other information regarding monitoring and surveillance of activity in the ATS would be beneficial? Does the proposed summary disclosure strike the right balance in providing disclosure and avoiding the risk that market participants could use the disclosures to evade the ATS's tools and controls?

j. Item 10: Opening and Reopening

Part III, Item 10 of Form ATS–N is designed to provide information about the use of any special processes and procedures related to matching trading interest at the opening, or to set a single opening or reopening price to, for example, maximize liquidity and accurately reflect market conditions at the opening or reopening of trading. The Commission believes that this disclosure requirement is important because market participants would likely want to know about any special opening or reopening processes, including which types of trading interest can participate in the opening or reopening processes or whether there are any protocols at the open for buyers and sellers to send messages and negotiate a trade. To capture processes related to sending, receiving, and viewing trading interest for communication protocols and negotiation systems, the Commission is proposing to specify in Part III, Item 10 that the ATS should disclose when and how trading interest may be sent, received, and viewed at opening, how unexecuted trading interest is handled at the time the ATS begins its regular trading hours or following a stoppage of trading in a security during its regular trading hours, and whether there are any protocols at the open for buyers and sellers to send messages and negotiate a trade.

Based on Commission staff experience with Form ATS–N filings, the Commission is proposing to amend Form ATS–N to incorporate the requirements of Part III, Item 10(c) of current Form ATS–N with the requirements of Part III, Item 10(a). In its experience, the Commission observed significant overlap in the responses to Part III, Item 10(a), which asks about how the ATS opens or re-opens after stoppage, and Part III, Item 10(c), which asks how unexecuted trading interest is handled at the start of regular trading hours or following a stoppage, as the treatment of unexecuted trading interest is an integral part of an ATS's opening and re-opening procedures. Because of this overlap, some NMS Stock ATSs repeat the disclosures in both current Form ATS–N Part III, Items 10(a) and (c). To streamline the disclosure and reduce redundancy, the Commission is proposing to specify in Part III, Item 10(a) of revised Form ATS–N that the Covered ATS describe how unexecuted trading interest is handled at the time the ATS begins its regular trading hours or following a stoppage of trading in a security during its regular trading hours, and to delete the separate disclosure requirements of Part III, Item 10(c) of current Form ATS–N.

Information about when the Covered ATS will price and prioritize trading interest during the opening or reopening of the ATS would provide market participants with the information they need to plan and execute their trading strategies during these periods. The Item would also, for example, require disclosure of any processes or procedures to match trading interest to set a single opening or reopening price to maximize liquidity and accurately reflect market conditions at the opening or reopening of trading. For trading interest allowed to be submitted before an ATS opens for trading, the Item 10(b) would require an explanation of what priority rules would apply to that trading interest.[602] The Commission believes most participants consider important the procedures for the pricing and priority of trading interest, and the

[596] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38850.

[597] *See* Letter from David W. Blass, General Counsel, Investment Company Institute, dated February 25, 2016, at 9–10.

[598] *See id.*

[599] *See id.*

[600] *See* Letter from Phillip S. Gillespie, Executive Vice President, General Counsel, State Street Global Advisors, dated February 26, 2016 at 2–3. *See also* Memorandum from the Office of Commissioner Kara Stein regarding a July 26, 2016 meeting with representatives of Morgan Stanley (including in a presentation that whether an ATS has anti-gaming controls is among the frequently asked questions by clients).

[601] *See* NMS Stock ATS Adopting Release, *supra* note 2, 83 FR 38850.

[602] The Commission is renumbering Part III, Item 10(e) of current Form ATS–N as Part III, Item 10(b) in revised Form ATS–N. The Commission also proposes to clarify in Item 10 that ''regular trading hours'' refer to the ATS's regular trading hours.

types of trading interest allowed because these rules and procedures can directly impact their execution price. The disclosures are also designed to provide information to subscribers about when they may use the systems to send or receive messages or view trading interest at the open or reopen, and the status of any messages or orders that may be pending before the ATS opens or reopens.

Request for Comment

120. Do Government Securities ATSs have any special opening and reopening processes and procedures around Treasury auctions? If so, do commenters believe there any aspects of the opening and reopening processes for Treasury auctions that should be specifically addressed in this Item?

k. Item 11: Interaction With Related Markets

Proposed Part III, Item 11 of Form ATS–N is designed to provide information about any functionality, procedure or protocol used to facilitate trading or communication on, or source pricing for, the Covered ATS that is offered by the broker-dealer operator or its affiliates [603] using markets for financial instruments related to the securities it trades (''Related Markets''). In the 2020 Proposal, the Commission proposed to add a similar question to Form ATS–G; the Commission is now proposing to add this question to Form ATS–N and to make it applicable to both Government Securities ATSs and NMS Stock ATSs. Markets for financial instruments related to government securities could include those non-government securities markets that trade futures, currencies, fixed income, and swaps, for example. Markets for financial instruments related to NMS stocks could include, for example, non-NMS stock markets that trade futures, options, and swaps. If applicable, the Covered ATS would: (1) Identify the functionality, procedures, protocols, and source of pricing and the Related Market; (2) state whether the functionality, procedures, protocols, and source of pricing is provided or operated by the broker-dealer operator or its affiliate, and whether the Related Market is provided or operated by the broker-dealer operator or its affiliate; (3) explain the use of the functionality, procedures, protocols, and source of pricing with regard to the Related Market and the ATS, including how and when the functionality, procedures, protocols, and source of pricing can be used, by whom, and with what markets.

The functionalities, procedures, or protocols required to be disclosed would include, for example, offering order types to facilitate transactions in the ATS and the Related Market, procedures to allow subscribers to perform multi-leg transactions involving another market and the ATS, or a protocol to allow a subscriber to communicate with other persons to negotiate a trade including, for example, a government security and non-government security. A Covered ATS could offer, for example, Exchange-for-Physical (''EFP'') transactions that can involve markets in addition to the ATS. An EFP transaction where ATS subscribers agree to exchange a financial product, such as a futures contract on a government security, for the underlying related government security or NMS stock, would be responsive to this Item. The Commission believes that it would be important to participants to understand functionality, procedures, and protocols made available to them, as they can impact their experience in the ATS.[604]

Information about how the ATS uses market data from a Related Market, through an aggregator or otherwise, to provide the services it offers would also be required by the form.[605] Among other things, for example, the ATS would need to disclose in response to this Item its use of such market data to display, price, prioritize, execute, and remove trading interest in the ATS.[606] As part of this explanation, the ATS would specify, if applicable, when the ATS may change sources of market data to provide its services. In response to proposed Part III, Item 11 of Form ATS–N, the ATS would explain how, for example, market data from a Related Market is received by the ATS, compiled, and delivered to the matching engine. For example, among other possible arrangements, the ATS could explain that market data from a Related Market is received and assembled by the broker-dealer operator, and subsequently delivered to the matching engine, or that market data is sent directly to the matching engine, which normalizes the data for its use. The ATS would disclose, for example, whether it uses market data from the futures market to price and execute EFP transactions and describe how it uses that market data under this Item.

A broker-dealer operator's activities in financial instruments related to the securities that the ATS trades or offerings of a Related Market, such as a futures exchange, along with its operation of an ATS, raise the potential for information leakage of a subscriber's confidential trading information, or the broker-dealer operator could provide certain advantages to subscribers that use a Related Market that it operates. As such, Item 11 would require information about whether the functionality, protocols, procedures, and source of pricing on the Covered ATS or the Related Markets are provided or operated by the broker-dealer operator or its affiliates.

Request for Comment

121. What are commenters' views on the relationship between markets for government securities and Related Markets and between markets for NMS stocks and Related Markets and how investors may use these markets together with a Covered ATS to achieve their trading objectives?

122. What aspects of government securities markets or NMS stock markets and Related Markets, such as the futures markets, do market participants use for trading on a Covered ATS? What information about those markets might be useful to a subscriber and why?

l. Item 12: Liquidity Providers

Part III, Item 12 of Form ATS–N is designed to disclose information about arrangements with liquidity providers. Like national securities exchanges,[607] ATSs might engage firms to provide liquidity on both sides of the market. The Commission has observed that the overwhelming majority of registered national securities exchanges have structured programs for market makers, which generally set forth both obligations (*e.g.,* continuous quoting at or within the NBBO) and often, some benefits (*e.g.,* fee rebates). Similarly, a Covered ATS may want to ensure that there is sufficient contra-side liquidity

[603] Among other things, services to facilitate trading or source pricing for the Government Securities ATS using non-government securities markets that are offered by a third-party by arrangement with the broker-dealer operator or affiliates would also be required to be disclosed under this Item.

[604] To the extent that a Government Securities ATS offers a functionality, procedure, or protocol using a market for government securities (*e.g.,* trading venue for U.S. Treasury Securities or options) or an NMS Stock ATS offers a functionality, procedure, or protocol using a market for NMS stocks, the Covered ATS would disclose information about that functionality, procedure, or protocol in Part III, Item 11 of Form ATS–N.

[605] If a Covered ATS uses market data from another market that trades government securities, that information would be disclosed under Part III, Item 22 of revised Form ATS–N.

[606] Disclosure of any market data used by the Covered ATS, including market data for options and repos on government securities, would be required under Part III, Item 22 of Form ATS–N.

[607] *See, e.g.,* NYSE Guide Rule 104 (Dealings and Responsibilities of DMMs), Nasdaq Rules Equity 2, Section 5 (Market Maker Obligations).

available in the ATS in a particular security to incentivize market participants to send trading interest in that security to the ATS. To do this, the ATS may engage certain market participants to quote in a security or trade against orders in the Covered ATS, performing similar functions to a market maker on a national securities exchange.[608]

To the extent that a Covered ATS and a participant have entered into an arrangement under which that participant undertakes obligations to display, enter, or trade against trading interest on the Covered ATS, the Commission believes that market participants should know both the terms and conditions of such an arrangement and the identity of the liquidity-provider ATS participant. Form ATS–N currently requires an ATS to disclose the terms and conditions of an arrangement with a liquidity provider and the names of any liquidity providers that are either business units of the broker-dealer operator or affiliates of the broker-dealer operator.[609] When it adopted Form ATS–N, the Commission explained that it was requiring disclosure regarding liquidity providers because it believed that market participants would want to know the identity of such liquidity providers to help evaluate potential conflicts of interest or information leakage on the trading platform.[610] The Commission now believes that the names of all liquidity providers should be disclosed to evaluate potential conflicts of interest and the potential for information leakage. Specifically, if a participant is obligated to provide contra-side liquidity and, for example, derives a particular benefit in exchange for undertaking such an obligation, the Commission believes that other users of the ATS should know who that liquidity provider is, how it is expected to trade in the ATS, and the benefit that it is receiving. This disclosure would be similar to Exhibit M of Form 1, which requires national securities exchanges to publicly disclose, among other things, the identity of all market makers and liquidity providers. The Commission believes it appropriate to require a similar level of disclosure for Covered ATSs with regard to the identity of market makers and liquidity providers, given the sizable market share of such entities in their respective sectors.

Additionally, the Commission believes that information about liquidity providers would be useful to ATS participants who, for example, may want their orders to only interact with agency orders (and not with those of a liquidity provider), or, conversely, may themselves want to become liquidity providers on the Covered ATS. Such arrangement could take many forms, and the function of the liquidity provider on an ATS could depend on the structure and trading protocols of the ATS. This Item could cover, for example, arrangements or agreements between the broker-dealer operator and another party to quote or trade on the Covered ATS. The Item does not cover agreements with a subscriber that has no obligation to buy or sell securities in the ATS. Furthermore, to obtain disclosures about activity on Communication Protocol Systems, the Commission is proposing to revise Part III, Item 12 of Form ATS–N, which asks about whether there are arrangements to ''provide'' orders and trading interest, and, instead, to ask about arrangements to ''display, enter, or trade against'' trading interest.

Accordingly, the Commission is proposing that Part III, Item 12 require a Covered ATS to disclose any formal or informal arrangements with any person[611] or the broker-dealer operator to display, enter, or trade against trading interest in the ATS (*e.g.,* undertaking to buy or sell continuously or to meet specified thresholds of trading or quoting activity). This will be in the form of a ''yes'' or ''no'' question, and if the ATS answers yes, it must both identify the liquidity provider(s) and describe the arrangement(s), including the terms and conditions.

Request for Comment

123. Are there any arrangements between Covered ATSs and persons to provide trading interest to the Covered ATS that may not be required by this Item but should be? If any, what is the nature of those arrangements, and why are they important to disclose publicly on Form ATS–N?

124. Should Covered ATSs be required to identify liquidity providers on Form ATS–N? Please explain why or why not, including any advantages or disadvantages resulting from this disclosure.

m. Item 13: Segmentation; Notice

Part III, Item 13(a) of Form ATS–N is designed to disclose information about how trading interest in the Covered ATS is segmented into categories, classifications, tiers, or levels. The Covered ATS would be required to explain the segmentation procedures, including how and what trading interest is segmented. The Commission is proposing to add in Item 13(a) of Form ATS–N a requirement to explain where the identification of segmented trading interest is applied (*e.g.,* when ATS trading interest is received by the broker-dealer operator or entered into the ATS). From the Commission's experience, systems may segment trading interest when trading interest enters through the broker-dealer (from the SOR or similar functionality), or when the trading interest is entered into the ATS. The Commission believes subscribers would want to understand where their trading interest is segmented so they can assess who is making the decisions about how their trading interest will be categorized when entered into the ATS and the level of protections their confidential trading information will receive. The Covered ATS would also be required to identify and describe any categories, classifications, tiers, or levels and the types of trading interest that are included in each and provide a summary of the parameters for each segmented category and length of time each segmented category is in effect. The Commission is proposing to add to Item 13(a) that the parameters for each segmented category would include when such category is determined, reviewed, and can be changed. Item 13(a) also requires disclosure of any procedures for overriding a determination of segmented category and would require how segmentation can affect trading interest interaction.

This Item is designed to provide market participants with an understanding of the categories of trading interest or types of participants with which they may interact. In addition, the information provided would allow them to both assess the consistency of a segmented group and determine whether the manner in which the trading interest is segmented comports with their views of how

[608] These liquidity providers may quote in a particular security in the ATS during trading hours and may receive a benefit for performing this function, such as discounts on fees, rebates, or the opportunity to execute with a particular type of segmented order flow.

[609] *See* Part II, Items 1(c) and 2(c) of Form ATS–N.

[610] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38829.

[611] The Commission is proposing to change the current requirement to disclose arrangements with any ''Subscriber'' to display, enter, or trade against trading interest in the Covered ATS to require disclosure of any such arrangements with any ''persons.'' In the Commission's experience, arrangements to display, enter, or trade against trading interest in a Covered ATS may include arrangements with subscribers, non-subscriber participants who submit orders through a subscriber or the broker-dealer operator, and persons controlling subscribers or participants to the ATS. The Commission is therefore proposing to revise the rule text by using the term ''person'' to capture arrangements with non-subscribers that could impact order flow on the ATS.

certain trading interest should be categorized. Disclosure of the procedures and parameters used to segment categories would allow a participant to determine whether its view of what constitutes certain trading interest it wants to seek or avoid is classified in the same way by the Covered ATS. For example, a subscriber may find it useful to understand the standards a Covered ATS uses to categorize high frequency trading firms so that it can compare the criteria used by the ATS with its view of what constitutes a high frequency trading firm, and thus be able to successfully trade against or avoid such trading interest. Similarly, information regarding the procedures applicable to trading among segmented categories would allow market participants to evaluate whether they can successfully trade against or avoid the segments of trading interest. In response to the question regarding segmentation on previously-proposed Form ATS–G in the 2020 Proposal, one commenter stated that, as the fixed income market structure continues to develop, types of segmentation options may occur in Government Securities ATSs and should be disclosed.[612]

Some Covered ATSs segment trading interest entered in the ATS according to various categories for purposes of trading interest interaction. For example, a Covered ATS could elect to segment trading interest by type of participant (*e.g.,* buy-side or sell-side firms, PTFs, agency-only firms, firms above or below certain assets under management thresholds). When segmenting trading interest in the ATS, a Covered ATS might look to the underlying source of the trading interest such as the trading interest of retail customers. Some Covered ATSs segment by the nature of the trading activity, which could include segmenting by patterns of behavior, time horizons of traders, or the passivity or aggressiveness of trading strategies. Covered ATSs might use some combination of these criteria or other criteria altogether. The ATS might use these segmented categories to design its trading interest interaction rules, allowing only trading interest from certain categories to interact with each other.

The Commission recognizes the concern that describing the precise criteria used by the ATS to segment trading interest could result in gaming of those criteria by subscribers and thus reduce the effectiveness of segmentation as a control. On the other hand, market participants are interested in understanding how their trading interest is categorized in the ATS and the types of market participants that would interact with its trading interest. The Commission believes that Part III, Item 13 of Form ATS–N appropriately balances these competing interests by soliciting a *summary* of the parameters for each segmented category. By requiring Covered ATSs to provide a summary of these parameters on Form ATS–N, rather than a detailed analysis of the parameters and how they are calculated, this Item is designed to avoid responses that could allow the gaming or manipulation of segmentation criteria.

Based on the Commission's experience, systems that offer RFQs or BWIC protocols that bring buyers and sellers together to negotiate may apply filtering technology to allow participants to more easily search for securities with particular characteristics that comport with the participants' needs or exclude securities that do not meet the participants' needs. They may also offer counterparty filtering that prevents transactions between certain participants (*i.e.,* potential counterparties) by prohibiting views of either party's inventory by the other party. Such systems may also implement permissioning procedures for subscribers to be able to view trading interest of certain other subscribers. The Commission believes that market participants would benefit from understanding how a Covered ATS controls the counterparty interest that they, and their potential counterparties, can view and interact with, and accordingly, the Commission is proposing to add new Part III, Item 13(b), which would ask if the ATS, in the absence of subscriber direction, can prevent a participant or its potential counterparties from viewing or interacting with certain trading interest (*e.g.,* permissioning, filtering, or blocking).[613] An ATS that has such controls would be required to explain the processes, including what a subscriber or counterparty is prevented from viewing or interacting with and where this determination is made (*i.e.,* when trading interest is received at the broker-dealer operator or the ATS); how and when the ATS prevents a subscriber or its potential counterparty from viewing or interacting with certain trading interest; any categories, classifications, tiers, or levels, and the types of trading interest that the ATS uses to determine how subscribers can view or interact with other trading interest; a summary of the parameters for such processes and the length of time any such parameter is in effect; any procedures for overriding a determination of any category, classification, tier, or level that the ATS uses to designate how subscriber trading interest can interact; how such processes can affect trading interest interaction; and how a subscriber can view filtered messages and any permissioning process and criteria for a subscriber to send, receive, or interact with a message.

The Commission believes that market participants will benefit from transparency regarding protocols that Covered ATSs use to limit in any way the trading interest that certain subscribers can view or interact with based on the identity of the counterparty. The Commission recognizes that RFQs and similar systems may establish protocols to block or filter participants from viewing or interacting with the trading interest of certain potential counterparties. The Commission is thus proposing to clarify in Part III, Item 13 of Form ATS–N that the scope of the question would extend to ATS protocols involving the ATS filtering or blocking trading interest.

Part III, Item 13(c) would address whether the ATS identifies trading interest entered by a customer of a broker-dealer as customer trading interest. Disclosing the origin of customer trading interest of a broker-dealer could be a form of segmentation because it can facilitate users restricting their trading to only certain types of market participants and it can contribute to information leakage and adverse selection of trading interest of institutional investors, who generally trade passively. Accordingly, Part III, Item 13(c) would require a Covered ATS to disclose if it identifies trading interest entered by a customer of a broker-dealer in the ATS as customer trading interest.

In addition, in Part III, Item 13(d) of Form ATS–N, the ATS would be required to state whether it discloses to any person the designated segmented or otherwise designated category, classification, tier, or level of trading interest and, if so, provide a summary of the content of the disclosure, when and how the disclosure is communicated, who receives it, and whether and how such designation can

[612] *See* Bloomberg Letter at 8.

[613] The Commission is proposing to specify that this question relates to process implemented ''in the absence of subscriber direction.'' The Commission is drawing a distinction from the filtering or blocking that a subscriber can do in the ATS, which would be disclosed in Part III, Item 14 (Counter-Party Selection). If the ATS, on its own, and in the absence of subscriber directions, filters certain subscribers from viewing the existence of certain trading interest, that would be responsive to Part III, Item 13 of Form ATS–N.

be contested. This requirement is substantially similar to the current requirement of Part III, Item 13(d) of Form ATS–N, but the Commission is proposing to amend this request to add designations other than segmentation, such as permissioning, filtering, and blocking, that would be responsive under proposed Part III, Item 13(b) of Form ATS–N. This would provide information to market participants about the notice that the ATS provides subscribers about the segmented category to which they are assigned, and also, if applicable, who can obtain information about the segmented categories of other subscribers.

Request for Comment

125. What information about the segmentation of trading interest by a Covered ATS or any other practices or procedures that allow a Covered ATS to control which counterparties view each other's trading interest or are able to interact would be important to persons that use the services of the ATS?

n. Item 14: Counter-Party Selection

Part III, Item 14(a) of Form ATS–N is designed to provide information about whether trading interest can be designated to interact or not interact with certain trading interest in the ATS by an ATS participant. The Commission is proposing to make minor modifications to this question including new examples of the types of designations that a subscriber can make to control both interactions with and matching against trading interest or a participant in the ATS. These examples would include designations to interact with or execute against a specific subscriber's trading interest or prevent the trading interest of a subscriber from interacting with or executing against the trading interest of that subscriber. If the ATS has such counterparty selection available, it would be required to explain the counterparty selection procedures, including how counterparties can be selected and whether the designation affects the trading rules (*e.g.,* order interaction or priority) or communication protocols of the ATS.[614] To analyze whether the ATS is an appropriate venue to accomplish their trading objectives, market participants have an interest in knowing whether—and how—they may designate their trading interest to interact or avoid interacting with specific trading interest or persons in the ATS. Part III, Item 14 is designed to require disclosure of such information.

For instance, the disclosures proposed under this Item would allow a participant in the Covered ATS to know whether it can interact with certain categories of trading interest in the ATS or can designate trading interest submitted to the ATS to interact only with trading interest of certain other types of ATS participants. The ATS might allow subscribers to choose from categories of trading interest or categories of participants that the broker-dealer operator segments in the ATS. For example, buy-side or institutional subscribers might seek to trade only against other buy-side or institutional trading interest, or might seek to avoid trading against PTFs or high frequency trading firms. Also, it would also be responsive to this Item for a Covered ATS to state whether a subscriber can restrict interacting with its own trading interest, whether such restrictions are by default or only upon subscriber request, and any applicable limitations on such restrictions. This Item would require description of any procedures allowing a subscriber to limit its counterparty on an order-by-order basis or a participant-by-participant basis, how it would go about doing so, and how such selection would affect the interaction and priority of trading interest. For example, an ATS would include in its response to this Item whether a designation to interact with a specific category of counterparty trading interest or participants can be made by the subscriber (*i.e.,* by marking its trading interest) or whether the designation must be implemented by the broker-dealer, on the subscriber's behalf. If the broker-dealer implements the counterparty designation, the ATS would also include when such designation would go into effect (*e.g.,* on same trading day as the subscriber's selection or on a date thereafter).

The Commission is also proposing to amend Form ATS–N to add a requirement that the ATS disclose in Part III, Item 14(b) whether a subscriber can designate trading interest that the subscriber or potential counterparties can view (*e.g.,* filtering, blocking, permissioning). The ATS would be required to explain any such processes, including how and when a subscriber can (or cannot) designate which trading interest it or a potential counterparty can view, any categories, classifications, or levels, and the types of trading interest that subscribers are able to designate, a summary of the parameters for such processes and the length of time any such parameter is in effect, and how such processes can affect how trading interest interacts in the ATS. The Commission believes this type of functionality may be particularly relevant to communication protocols and negotiation systems that may fall within the criteria of Rule 3b–16(a), as proposed to be amended. From Commission staff's experience, ATSs may disclose counterparty filters that could, for example, allow a subscriber to prohibit itself from viewing a potential counterparty's inventory or to prohibit a potential counterparty from viewing its inventory. Under proposed Part III, Item 14(b), an ATS would include in its response if, for example, participants in the ATS can choose not to view trading interest from certain identified potential counterparties or certain types of counterparties, such as those that have failed to respond to RFQs in a given amount of time. Similarly, if a participant can block certain potential counterparties from viewing its trading interest, such functionality would be required to be disclosed in this Item as well. Market participants should be aware of how participants on the platform can choose not to interact with certain trading interest. If, however, the ATS (and not the participant) makes these designations and restricts the interactions of potential counterparties, such designations and restrictions would be required to be disclosed under Part III, Item 13.[615]

Request for Comment

126. Should Form ATS–N request more or less information about how trading interest can be designated to interact or not interact with certain trading interest in the Covered ATS? Are there important forms of counterparty selection that the Commission should address?

o. Item 15: Display and Visibility of Trading Interest

The Commission is proposing to restructure Part III, Item 15 so market participants can more readily understand information regarding trading interest that the Covered ATS displays to the subscribers, the public, and any person, including the broker-dealer operator, and what information regarding trading interest a subscriber of the ATS can display through the ATS. Although, as discussed below, the Commission proposes to require Covered ATSs to divide the responses to Part III, Item 15(b) of current Form ATS–N into Items 15(a), (b), and (c) in revised Form ATS–N, the Commission believes that these questions would solicit substantially similar information

[614] The Commission is proposing minor changes to Form ATS–N, Part III, Item 14, which references how the designation affects the ''interaction and priority of trading interest in the ATS'' to be more inclusive of communication protocols.

[615] *See supra* Section IV.D.5.m.

that is required by current Item 15(b) of Form ATS–N, in addition to information that is relevant to communication protocols and the use of non-firm trading interest.

Part III, Item 15(a) of Form ATS–N would require a Covered ATS to disclose whether the ATS displays trading interest to subscribers or the public (*e.g.,* whether the ATS disseminates orders through market data feeds or a website or sends invitations or requests to subscribers about potential counterparties to trade with). If the ATS displays trading interest to subscribers or the public, the ATS would be required to explain what information the ATS displays (*e.g.,* security, price, size, direction, the identity of the sender, rating information based on the sender's past performance in the ATS), how and when such information is displayed, to whom such information is displayed (*e.g.,* subscribers, public, types of market participant), and how long the displayed information is available. In addition, the ATS would also be required to indicate whether a subscriber can opt-out of the display of its trading interest, and if so, the process for subscribers to do so. This Item would also require the ATS to describe differences in latencies with which the ATS displays subscribers' trading interest due to a functionality of the ATS. For example, if a Covered ATS transmits and displays its proprietary data feed to certain subscribers faster than to other subscribers as a result of the alternative means offered by the ATS to connect, such information would be responsive to this Item. In addition, this Item would require an ATS that offers work-ups to match trading interest to disclose the information that is displayed to all subscribers or certain subscribers in public or private phases of the work-up, as well as what characteristics of the trading interest are displayed.

The ATS could display subscriber trading interest in a number of ways. For instance, when an ATS sends electronic messages outside of the ATS that expose the presence of trading interest in the ATS, it is displaying or making known trading interest in the ATS. In Part III, Item 15(a), a Covered ATS would be required to disclose the circumstances under which the ATS sends these messages, the types of market participants that received them, and the information contained in the messages, including the exact content of the information, such as symbol, price, size, attribution, or any other information made known. An ATS may also offer a direct data feed from the ATS that contains real-time order information.[616] Some ATSs have arrangements, whether formal or informal (oral or written), with third parties to display the ATS's trading interest outside of the ATS, such as IOIs from the subscribers being displayed on vendor systems or arrangements with third parties to transmit IOIs between subscribers. A Covered ATS would be required to include this type of information in its response to this Item.

Part III, Item 15(b) of Form ATS–N would require a Covered ATS to disclose whether a subscriber can use the ATS to display or make known trading interest to any person (*e.g.,* stream quotes to the subscribers or the public or send a request for quote, IOI, conditional order, or invitation to negotiate to a subscriber or the broker-dealer operator). If yes, the ATS would explain what information the subscriber can display through the ATS (*e.g.,* security, price, size, direction, the identity of the sender), procedures for subscribers to display such information, how and when such information is displayed, to whom such information is displayed (*e.g.,* subscribers, public, types of market participant), and how long the displayed information is available. In addition, Communication Protocol Systems may offer functionalities or protocols to allow their subscribers, who otherwise do not have the ability to display their trading interest, to use the functionalities or protocols to display trading interest information. Part III, Item 15(b) would differ from Part III, Item 15(a) in that Item 15(b) would ask what information subscribers can display or make known about their trading interest through the ATS whereas Part III, Item 15(a) would ask what information regarding trading interest the ATS displays. For example, an ATS that receives orders and disseminates top-of-book information to subscribers would be required to disclose this in Item 15(a), while an RFQ system that allows participants to select when, how, and to whom to display their trading interest to solicit counterparty trading interest would be required to disclose this in Item 15(b). The Commission is proposing the disclosure requirements of Item 15(b) because it believes that ATS participants would want to know whether a particular ATS would provide them with any protocol or functionality that would enable them to stream quotes to other subscribers or the public or send a request or invitation to negotiate to another subscriber or the broker-dealer operator. The disclosures regarding whether subscribers can display or make known their trading interest and the types of information that the subscribers can display would help market participants understand the extent to which potential information leakage may occur on the ATS.

Part III, Item 15(c) of Form ATS–N would require a Covered ATS to disclose whether any trading interest bound for the ATS is made known to any person—not including employees of the ATS who are operating the system. Many market participants are sensitive to precisely how and when the ATS displays or otherwise makes known their trading interest both inside and outside the ATS as such information could result in other market participants trading ahead of their positions, and thus possibly causing inferior execution prices for the participants whose trading interest is displayed or otherwise made known. These participants could use these disclosures to evaluate whether sending trading interest to a particular ATS would achieve their trading strategies. In particular, subscribers that use the services of Covered ATSs, including customers of the broker-dealer operator, have limited information about the extent to which their trading interest sent to the ATS could be displayed outside the ATS.

For example, trading interest directed to the ATS could pass through the broker-dealer operator's non-ATS systems or functionalities such as an algorithm or a SOR, before entering the ATS. Such non-ATS systems and functionalities could be used to support the broker-dealer operator's other business units, including any trading venues.[617] It would be responsive to this Item to identify the recipient of displayed information by identifying the functionality of the broker-dealer operator (*e.g.,* SOR, algorithm, trading desk), third party, or the type of market participant[618] that receives the displayed information. If, for instance, the ATS displays orders to the broker-dealer operator's SOR or trading desk, the ATS would indicate ''yes'' to this

[616] In the case of a Covered ATS offering a direct data feed with information about trading interest in the ATS, the ATS would be required to disclose under Part III, Item 15 what information the data feed provides about the trading interest, the associated timing in receiving the feed (*e.g.,* real-time, delayed), how a subscriber would receive the feed (*e.g.,* connectivity), and if all subscribers are treated the same in receiving the feed, including whether all subscribers are eligible to receive it and any differences in latency receiving the feed.

[617] The broker-dealer operator typically controls the logic contained in these systems or functionality that determines where trading interest that the broker-dealer operator receives will be handled or sent.

[618] *See* Part III, Item 1 of Form ATS–N (providing examples of types of market participants).

question. If the answer is ''yes'' to either of these questions, the ATS would be required to explain what information is displayed (*e.g.,* security, price, size, direction, the identity of the sender), how and when such information is displayed, to whom such information is displayed (*e.g.,* algorithm, SOR, trading desk, third party), and how long the displayed information is available. If, for instance, trading interest bound for the ATS passes through the broker-dealer operator's common gateway or algorithm, the ATS would need to disclose these functionalities as the trading interest was displayed to a functionality of the broker-dealer operator that would likely be outside the ATS. If trading interest resting in the ATS is displayed to one or more of the broker-dealer operator business units, the ATS would need to identify the business units of the broker-dealer operator by type of market participant (*e.g.,* institutional investors, PTFs, market makers, affiliates, trading desks at the broker-dealer operator, market data vendors, clearing entities, and potential subscribers, among others). This Item is designed to ensure that the ATS discloses any display of trading interest bound to the ATS or residing in the ATS not otherwise captured in Part III, Items 15(a) and (b). Consistent with the discussion above, the Commission believes that market participants should have a full understanding of how and when their trading interest becomes known to any person, particularly when the information is made known to the broker-dealer operator's non-ATS-systems and functionalities. The Commission further believes that information required under this Item would help market participants assess the potential for information leakage of subscribers' confidential trading information to the broker-dealer operator's non-ATS systems and functionalities.

The proposed Item would not require information about employees of the ATS in non-trading related roles, such as technical, quality assurance, compliance, or accounting roles, among others, that support the ATS's operations and to whom trading interest are made known in the performance of their duties.[619]

Part III, Item 15(d) of Form ATS–N would require the ATS to indicate whether it is an Electronic Communication Network (''ECN'') as defined in Rule 600(a)(31) of Regulation ATS.[620] NMS Stock ATSs that are also ECNs may differ in how and where trading interest are displayed. NMS Stock ATSs that indicate ''yes'' to this Item would also be required to provide information in response to Part III, Items 15(a), (b), or (c) to inform market participants how ECNs display trading interest.

Request for Comment

127. What information involving NMS stocks, government securities, and repos do ATSs or Communication Protocol Systems display? Are there levels of displayed information that a system may offer to market participants? If so, what are the levels and are there any specific requirements for a market participant to access that information? For instance, do ATSs or Communication Protocol Systems have different mechanisms or functionalities for displaying trading interest depending on the subscriber? What functionalities does the system use to display information in government securities and repos? Please explain the purpose and operation of any such functionality.

128. For ATSs or Communication Protocol Systems that display trading interest both on the system and outside the system, what is the process for market participants to submit trading interest to interact with the trading interest that is displayed outside the system?

129. Are there any aspects of display of trading interest on Government Securities ATSs that should be specifically addressed in the Item? Are there any aspects of display that are unique to Communication Protocol Systems?

p. Item 16: Routing

Part III, Item 16 is designed to provide information about whether trading interest in the ATS can be routed or sent to a destination outside the ATS. As proposed, Part III, Item 16 would apply to both NMS Stock ATSs and Government Securities ATSs. In the Commission's experience, routing of government securities among trading venues is not as prevalent as in the market for NMS stocks. To the extent it is inapplicable, a Government Securities ATS would check ''no'' on Form ATS–N. However, Government Securities ATSs may have mechanisms to send trading interest outside the ATS. Accordingly, the Commission is proposing to require Covered ATSs to disclose whether they route or otherwise ''send'' trading interest outside of the ATS. If the Covered ATS permits trading interest to be routed or sent to a destination outside of the ATS, the ATS would be required to indicate whether affirmative instructions from a subscriber must be obtained before its trading interest can be routed or sent from the ATS, and provide a description of the affirmative instruction and explain how the affirmative instruction is obtained. If the ATS is not required to obtain an affirmative instruction to route or send trading interest, the ATS would be required to explain when trading interest can be routed or sent from the ATS (*e.g.,* at the discretion of the broker-dealer operator). The Commission believes that such disclosures provide ATS participants with the ability to gauge how their trading interest would be handled by the ATS. Subscribers might, for example, have concerns about the leakage of confidential trading information when their orders are routed to other trading venues. The Commission believes the disclosures in Part III, Item 16 would provide relevant information for ATS participants to evaluate the potential for leakage of their confidential trading information.

The Commission is also proposing to relocate Part II, Items 1(d) and 2(d) of current Form ATS–N to Part III, Item 16(c) of revised Form ATS–N.[621] Specifically, proposed Item 16(c) of revised Form ATS–N would request whether trading interest in the ATS can be routed or sent to a destination operated or controlled by the broker-dealer operator or an affiliate of the broker-dealer. If yes, the ATS would be required to identify the destination and when and how trading interest is routed or sent from the ATS to the destination. The Commission believes that such information would help market participants evaluate whether the Covered ATS sending trading interest to a trading venue operated or controlled

[619] Covered ATSs, as proposed, would be subject to the requirements of Rule 301(b)(10) and would be required to establish adequate safeguards and procedures to protect subscribers' confidential trading information, which must include: Limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with these or any other applicable rules; and implementing standards controlling employees of the ATS trading for their own accounts. *See* 17 CFR 242.301(b)(10).

[620] Part III, Item 15(d) of revised Form ATS–N (which is currently included in Part III, Item 15(a) of current Form ATS–N) would be applicable only to NMS Stock ATSs because Rule 600(a)(31) only applies to systems that trade NMS stocks. A Government Securities ATS would select ''no'' in response to this question. The Commission is also correcting a typo referencing Rule 600(a)(23) and replacing the reference with Rule 600(a)(31).

[621] As discussed above, the Commission believes it would be more efficient for market participants and filers to consolidate the current disclosure in Part II, Items 1(d) and 2(d) to proposed Part III, Item 16(c). *See supra* Section IV.D.4.a.

by the broker-dealer operator or its affiliates poses a conflict of interest and is consistent with its trading objectives.

Request for Comment

130. Do Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed) and Communication Protocol Systems that trade NMS stocks send trading interest to destinations away from the system? If so, how and under what circumstances? Are there any aspects about how trading interest is sent away from a Covered ATS that should be addressed by Form ATS–N? Have the mechanisms for routing to a destination outside an NMS Stock ATS changed in any way since the adoption of Form ATS–N for NMS Stock ATSs? If so, do commenters believe that the Commission should require Covered ATSs to provide additional information in Part III, Item 16 to reflect such change?

q. Item 17: Closing

Part III, Item 17 of Form ATS–N is designed to provide information about differences between how trading interest is treated on the ATS during the ATS's closing session(s)[622] and during regular trading hours established by the ATS. The Item is designed to provide market participants with information about processes the Covered ATS uses to transition to the next trading day, including whether the ATS offers any particular order types during a closing session(s) or has different procedures for closing trading for a particular trading session and transitioning trading to the next trading day. The vast majority of requests in Part III of revised Form ATS–N relate to trading during the Covered ATS's regular trading hours. Therefore, when discussing differences between trading during the Covered ATS's closing session(s) and during regular trading hours set by the ATS, the Covered ATS would be required to discuss differences as compared to relevant information disclosed in Part III Items, including, among others, order types and sizes and trading facilities (Item 7), use of non-firm trading interest and communication protocols and negotiation functionality (Item 8), segmentation and notice (Item 13), and display and visibility of trading interest (Item 15). The Commission believes this information would be important for market participants to understand the closing procedures around a particular trading session, if any, to carry out their trading objectives.[623]

r. Item 18: Fees

Part III, Item 18 of Form ATS–N[624] would require a Covered ATS to provide information on any fees or charges for use of the ATS's services, including any fees or charges for use of the ATS's services that are bundled with the subscriber's use of non-ATS services or products offered by the broker-dealer operator or its affiliates, and any rebate or discount of fees or charges. The Commission believes that disclosures regarding fees on Form ATS–N are necessary and important, and should not be voluntary for Covered ATSs. Fee disclosures on Form ATS–N are designed to allow all market participants to analyze the fee structures across Covered ATSs in an expedited manner and decide which ATS offers them the best pricing according to the characteristics of their order flow, the type of participant they are (if relevant), or any other aspects of an ATS's fee structure that serves to provide incentives or disincentives for specific market participants or trading behaviors. Requiring disclosures of ATS fees is warranted as, in the Commission's experience, fees can be a primary factor for market participants in deciding where to send their trading interest.

Part III, Item 18 would request that Covered ATSs include in their descriptions the types of fees, the structure of the fees, variables that impact the fees, and differentiation among types of subscribers, and whether the fee is incorporated into the price displayed for a security, and the Commission would provide examples of responsive information in a parenthetical in the text of each subpart.[625] The Item also would require a range for each type of fee (*e.g.,* subscription, connectivity, and market data) charged on the Covered ATS.

The Commission is proposing to add the term ''market data'' to the examples listed in Part III, Item 18 of the types of fees that a Covered ATS must disclose. For example, if a Covered ATS distributed a market data feed and charged a fee for it, the ATS would be required to provide the information responsive to Item 18 regarding that fee. The Commission believes this example may be relevant to Government Securities ATSs, which are primarily lit venues that offer market data to subscribers. While most NMS Stock ATSs do not disseminate market data, a description of an NMS Stock ATS's market data fees is currently required by the Item, which requires disclosure of ''any'' fee or charge for use of the ATS services. Adding the example could assist Covered ATSs in responding comprehensively to the Item.

The Commission recognizes that the fee structures of Covered ATSs can vary and that not all Covered ATSs apply set tiers or categories of fees for subscribers; however, the Commission believes that a market participant should have sufficient information to understand the fees for using the services of the Covered ATS. Recognizing the various fees that can be charged by Covered ATSs, the Commission is specifying in the fee request the types of information that a Covered ATS must provide in response to the Commission's proposed request to describe its fees (*e.g.,* the structure of the fees, variables that impact each fee, differentiation among types of subscribers, and the range of fees). With regard to the variables that impact the fees set, ATSs would be required to be specific and delineate how a given variable would likely impact the fee level (*e.g.,* higher or lower). In addition, the Commission is proposing to add a new requirement not included in current Form ATS–N that the Covered ATS must disclose whether the fee is incorporated into the price displayed for a security (*e.g.,* markups, markdowns). For example, the price displayed by the security may be higher (or lower) than the market price, and the broker-dealer would be compensated by the difference between the displayed price and the market price. The Commission believes that, in particular, such fees or charges may be relevant to communication protocols that would be

[622] The Commission is proposing to revise Item 17 of Form ATS–N to clarify that the question relates to the ATS's closing session(s), and that ''regular trading hours'' refers to the ATS's regular trading hours.

[623] The Item would, for example, require disclosure of any procedures to match trading interest to set a single closing price to maximize liquidity and accurately reflect market conditions at the close of trading in the ATS.

[624] As discussed above, the Commission is proposing to delete current Part III, Item 18 of Form ATS–N (Trading Outside of Regular Trading Hours) to combine such disclosure requests with Part III, Item 4 (Hours of Operations). As a result of this deletion, the Commission is proposing to re-number Part III, Items 19 through 26 of current Form ATS–N. The discussion herein refers to the Items as proposed to be re-numbered.

[625] The Commission is including non-exhaustive lists of examples of responsive information in parentheticals in the text of the Item. For instance, for the description of the structure of the fees, the Commission is providing as examples fixed, volume-based, and transaction-based fee structures. For the description of variables that impact the fees, the Commission is providing as examples: The types of securities traded, block orders, and the form of connectivity to the ATS. For the description of the differentiation among types of subscribers for the fee, the Commission is providing as examples the types of subscribers: Broker-dealers, institutional investors, and retail investors.

included under the proposed definition of ''exchange.''

These disclosures are designed to provide market participants with more insight regarding the fees charged so that they can better understand how fees may apply to them and assess how such fees may impact their trading strategies. Although the fees charged for Covered ATS services may be individually negotiated between the broker-dealer operator and the subscriber, the disclosures about the type of fees charged by the Covered ATS are designed to help market participants discern how the ATS's fees are organized and compare that information across Covered ATSs, which could reduce the search costs of market participants in deciding where to send their trading interest. The Commission believes that Covered ATSs should be required to disclose differences in the treatment among ''types of subscribers'' (*e.g.,* broker-dealers, institutional investors, retail). This information would allow subscribers to observe whether a Covered ATS is offering preferential treatment for certain types of subscribers with respect to fees.

Part III, Item 18(a) would cover charges to subscribers for their ''use of the ATS services'' [626] and would not request information on fees charged for non-ATS services by a third party not in contract with the broker-dealer operator.[627] Part III, Item 18(b) would require a description of any bundled fees, including a summary of the bundled services and products offered by the broker-dealer operator or its affiliates, the structure of the fee, variables that impact the fee (including, for example, whether the particular broker-dealer services selected would impact the fee), differentiation among types of subscribers, and range of fees. Part III, Item 18(b) is designed to allow market participants to better evaluate fees for bundled services and products that include access to the Covered ATS. Covered ATSs would be required to provide information, including the relevant services and products offered by the broker-dealer operator and its affiliates for each bundled fee offered, that will provide context to market participants with which to assess how bundled fees could apply to them as subscribers.[628]

The disclosure requests under Part III, Item 18 would contain a stand-alone Item—Item 18(c)—which requests information about rebates and discounts of fees that are identified in subparts (a) and (b) of Item 18. Item 18(c) would require information about rebates and discounts that is similar to information required for fees (*e.g.,* type of rebate or discount, structure of the rebate or discount, variables that impact the rebate or discount, differentiation among types of subscribers, and range of rebate or discount).

Request for Comment

131. What fees should the Commission require a Covered ATS subject to the Fair Access Rule to disclose on Form ATS–N? Are there any fees disclosures that are unique to NMS Stock ATSs or Government Securities ATSs and, if so, what information about those fees should be disclosed on Form ATS–N?

132. What disclosures about bundled fees would be relevant and useful to potential and current subscribers to the ATS?

133. What fees should the Commission require a Communication Protocol System that operates as a Covered ATS to disclose on Form ATS–N?

s. Item 19: Suspension of Trading

Part III, Item 19 of Form ATS–N would require a Covered ATS to provide information about any procedures for suspending or stopping trading in the ATS, including the suspension of trading in an NMS stock, U.S. Treasury Security, or an Agency Security.[629] This Item is designed to, for example, inform market participants of whether, among other things, a Covered ATS will continue to accept trading interest after a suspension or stoppage occurs, whether the ATS cancels, holds, or executes trading interest that was resting in the ATS before the suspension or stoppage was initiated, and what type of notice the ATS provides to subscribers regarding a suspension or stoppage. Examples of system disruptions would include, but are not limited to, internal software problems that prevent the Covered ATS's system from opening or continuing trading,[630] a significant increase in volume that exceeds the ability of the trading system of the ATS to process incoming trading interest,[631] and the failure of the trading system of the ATS to receive external pricing information that is used in the system's pricing methodology. Information regarding a Covered ATS's procedures about how trading interest might be handled by the ATS during a suspension or stoppage of trading would be useful to market participants because an ATS's procedures might require the cancelation of existing trading interest or preclude the acceptance or execution of trading interest during a suspension, both of which would impact a subscriber's trading interest or its ability to trade in the ATS. This information would better inform a subscriber's trading decisions at the time of such an event and thus help that subscriber accomplish its trading objectives. If a Covered ATS establishes different procedures for suspending or stopping trading in the ATS depending on whether the source of the disruption is internal or external, a description of both procedures would be responsive to this request. In addition, this Item would require disclosure of procedures whereby a Covered ATS suspends trading in NMS stocks, U.S. Treasury Securities, or Agency Securities so that it does not cross the volume thresholds, as proposed herein, that may subject the ATS to certain Federal securities laws, including the order display and execution access rule (Rule 301(b)(3)), Fair Access Rule, or Regulation SCI. Information regarding the procedures for how a Covered ATS would handle trading interest during a suspension of trading or system disruption or malfunction would help the Commission better monitor the securities markets.

Request for Comment

134. Should Form ATS–N request information about any procedures for suspending or stopping trading that is particularly relevant to Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed) or Communication Protocol Systems that trade NMS stock?

t. Item 20: Trade Reporting

Part III, Item 20 of Form ATS–N would require a Covered ATS to provide information on any procedures and material arrangements for reporting

[626] The Covered ATS services generally include those services used for the purpose of effecting transactions in securities, or for submitting, disseminating, or displaying trading interest in the ATS. *See* 17 CFR 242.300(b).

[627] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38858 (discussing what fees should be categorized as for use of the ATS's services).

[628] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38858 (discussing responses to current Item 19(b) (proposed Item 18(b)) depending on whether there is an explicit fee for the ATS as part of any bundled services).

[629] The Commission is proposing to revise Form ATS–N, Part III, Item 19 of revised Form ATS–N (numbered as Item 20 in current Form ATS–N) to reference trading in U.S. Treasury Securities and Agency Securities.

[630] *See* Regulation SCI Adopting Release, *supra* note 3, at 72254–55 n.28.

[631] *See id.* at 72255 n.29.

transactions in the ATS.[632] For Government Securities ATSs, FINRA member firms are required to report transactions in U.S. Treasury Securities and Agency Securities to TRACE.[633]

Part III, Item 20 would require a Covered ATS to disclose its trade reporting procedures for reporting transactions in the ATS to an SRO or any alternative trade reporting destinations, if applicable. For example, it would be responsive to Item 20 for a Covered ATS to disclose whether the ATS has a specific procedure for reporting transactions to the SRO at different times based on, for example, a subscriber's use of a particular order type, or the type of subscriber involved in the transaction. Covered ATSs would also be required to disclose ''material'' arrangements for reporting transactions in the ATS. The Commission recognizes that there could be arrangements relevant to trade reporting, such as the specific software used to report, that play a minor role in the ATS's trade reporting and need not be disclosed. On the other hand, if a Covered ATS uses another party to report transactions occurring in the ATS or has a backup facility that it uses for trade reporting, that information is likely to be responsive as a material arrangement. Requiring reporting only of material arrangements would limit potential burdens on Covered ATSs while providing market participants with sufficient information to understand how their trade information will be reported. Also, the proposed disclosure of the trade reporting procedures would allow the Commission to more easily review the compliance of the Covered ATS with its applicable trade reporting obligations as a registered broker-dealer as proposed herein.

u. Item 21: Post-Trade Processing, Clearance, and Settlement

Part III, Item 21 is designed to provide information on any procedures and material arrangements undertaken as a result of the contractual agreements between the broker-dealer operator for the Covered ATS [634] and the ATS's participants to manage the post-trade processing, clearance, and/or settlement of transactions on the Covered ATS. The Commission is proposing revisions to Part III, Item 21 that would request information about post-trade processing, which covers the steps taken after execution to prepare a trade for clearance and/or settlement. These steps include, but are not limited to, routing trade information to relevant parties; enrichment of trade details with supplemental information (such as counterparty account information) required to effect settlement; performing allocations whereby a block trade is broken down into various client accounts; comparing the terms of a trade submitted by each counterparty (performing matching) to reconcile the terms so as to generate an affirmed confirm; performing sequential affirmation and confirmation processes; or sending notifications to interested parties, such as custodians. These types of activities can be performed both manually (with trading desk, middle office, or back office personnel completing the steps) or through automated activity processes (which seek to achieve the goal of straight-through processing whereby trade information passes through the necessary steps to effect settlement in an automated manner).

The proposed revisions to Part III, Item 21 provide some specific examples of the types of procedures and material arrangements that should be described by a Covered ATS under this Item, such as whether the broker-dealer operator, or an affiliate of the broker-dealer operator becomes a counterparty; submits trades to a registered clearing agency; requires subscribers to have arrangements with a clearing firm, or terminates trades. These examples are intended to be illustrative and not the only types of material arrangements that may exist. From Commission staff's experience reviewing Form ATS–N, the Commission understands that broker-dealer operators have different arrangements and contractual obligations that are important to understanding the clearance and settlement of transactions in the ATS.

A Covered ATS would also be required to describe any user requirements for such procedures and material arrangements, including the type and extent of connectivity (*e.g.,* FIX), and whether the connectivity is to an order management system (OMS), execution management system (EMS), end-of-month expirations (EOMS), clearinghouse/custodian, or other system.

The integrity of the trading markets depends on the prompt and accurate post-trade processing, clearance, and/or settlement of securities transactions. For example, counterparties to a trade face counterparty credit risk, regardless of whether they choose to clear and settle bilaterally or through a central counterparty, and therefore knowledge of any specific arrangements that are required by an ATS as part of the clearing process promotes market integrity.[635] The Covered ATS's procedures or material arrangements that address post-trade processing, clearance, and/or settlement are critical to ensuring that a buyer receives securities and a seller receives proceeds in accordance with the agreed-upon terms of the trade by settlement date. The disclosures required by this Item are intended to cover each of the steps in the post-trade process from the time of execution (including whether the broker-dealer operator or an affiliate of the broker-dealer operator is a counterparty to a transaction and whether the obligations of a counterparty are ever assigned or novated), through trade matching or affirmation/confirmation, and then through clearing procedures (including whether the Covered ATS requires its participants to be a member of a registered clearing agency, whether participants have any particular clearing obligations, and whether transactions are—wholly or partially—submitted to a registered clearing agency or cleared bilaterally using clearing banks or clearing agents), until settlement of the transaction (including whether counterparties make use of custodians, settlement banks, or a registered clearing agency). If the Covered ATS has adopted post-trade processing, clearing, and/or settlement processes or imposes any obligations on its participants in the event of a disruption (for example, a failure to deliver securities, a liquidity shortfall, or a counterparty default), this proposed Item should include a discussion of these processes and any resulting participant obligations.

The Item requires the disclosure of ''material'' arrangements to manage the post-trade processing, clearance, and/or settlement of transactions on the Covered ATS. For example, an arrangement under which another party would have a role in clearance or settlement may constitute a material

[632] This question is substantially the same as Part III, Item 21 of current Form ATS–N.

[633] *See supra* notes 228–229 and accompanying text.

[634] The contractual obligations of the ATS are ultimately those of the broker-dealer operator. Because an ATS must register as a broker-dealer, the broker-dealer operator controls the ATS and is legally responsible for all operational aspects of the ATS and for ensuring that the ATS complies with applicable Federal securities laws and the rules and regulations thereunder. *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38819.

[635] *See* Treasury Market Practices Group (TMPG), *White Paper on Clearing and Settlement in the Secondary Market for U.S. Treasury Securities* (July 12, 2018), *available at https://www.newyorkfed.org/medialibrary/Microsites/tmpg/files/CS-DraftPaper-071218.pdf.* ''The TMPG found that many market participants do not understand the role of the [interdealer brokers] platform in terms of who their counterparty credit risk was to and the roles of various market participants in settlement and clearing.'' *Id.* at 27.

arrangement that could trigger the disclosure requirement under Part III, Item 21. Limiting the explanation required to material arrangements would reduce the burden on Covered ATSs while at the same time still allowing market participants to understand and more easily compare such arrangements required across Covered ATSs.

Proposed Part III, Item 21 is also designed to help market participants understand the measures the Covered ATS takes to manage post-trade processing, clearance, and/or settlement of transactions. Market participants should know and be able to understand any requirements a Covered ATS places on its subscribers, or other persons whose trading interest is sent to the ATS, to receive certain post-trade processing, clearance, and/or settlement services. The Commission believes market participants would likely find the disclosures required by this Item to be useful in understanding the measures undertaken by a Covered ATS to manage post-trade processing, clearance, and/or settlement of subscriber orders in the ATS and allow them to more easily compare these arrangements across Covered ATSs as part of deciding where to send their trading interest. The Commission believes that these disclosures would assist the Commission in better understanding the post-trade processing, clearance, and/or settlement procedures of Covered ATSs and risks and trends in the market as part of its overall review of market structure.

Request for Comment

135. What aspects of the procedures and material arrangements undertaken to manage the post-trade processing, clearance, and/or settlement of transactions on Covered ATSs are important for ATSs to disclose on Form ATS–N for the benefit of market participants?

v. Item 22: Market Data

Part III, Item 22 [636] of Form ATS–N is designed to solicit information about the sources of market data used by the Covered ATS and how the ATS uses that market data from these sources to provide the services that it offers. As the Commission is proposing to apply Form ATS–N to Government Securities ATSs, the Commission is proposing to add to Part III, Item 22 to include ''feeds from trading venues'' in the examples of sources of market data, which may be applicable to Government Securities ATSs. Specifically, market participants would likely find it useful to know the source and specific purpose for which the market data is used by the Covered ATS, as the market data received by the ATS might affect the price at which trading interest is prioritized and executed, including trading interest that is pegged to an outside reference price. An NMS Stock ATS, for example, would be required to provide the names of national securities exchanges from which the ATS receives direct market data feeds, either from a vendor or directly from the exchange, in addition to the specific types of market data received from each source. In addition, a Covered ATS would be required to provide information about how the ATS uses market data to provide the services it offers. To avoid duplicative disclosure, market data reflecting options traded on government securities that is used by the ATS could be discussed in response to proposed Part III, Item 11. The Commission is proposing to include determining the best bid or offer (BBO) as an example of how the ATS uses market data, which could be applicable to Government Securities ATSs. Among other things, Part III, Item 22 requires the disclosure of the use of market data to display, price, prioritize, execute, and remove trading interest. As part of this explanation, the Covered ATS would be required to specify, if applicable, when the ATS may change sources of market data to provide its services. A Covered ATS would also be required to explain how market data is received by the ATS, compiled, and delivered to the matching engine. For example, among other possible arrangements, a Covered ATS could explain in response to the Item that market data is received and assembled by the broker-dealer operator, and subsequently delivered to the matching engine, or that market data is sent directly to the matching engine, which normalizes the data for its use.

Request for Comment

136. What are the sources of market data in NMS stocks, government securities, and repos that are available to market participants as well as to Covered ATSs and how do market participants and ATSs use this information? What disclosures about an ATS's use of market data would be important to market participants?

w. Item 23: Order Display and Execution Access

Part III, Item 23 is designed to provide information about whether an NMS Stock ATS is required to comply with Rule 301(b)(3)(ii) of Regulation ATS.[637] The Commission is not proposing to make changes to this Item, other than specifying that this Item would be applicable to NMS Stock ATSs, as the order display and execution access provisions under Rule 301(b)(3) only apply to an ATS's NMS stock activities.[638]

x. Item 24: Fair Access

Part III, Item 24 of Form ATS–N would provide a mechanism under which a Covered ATS would notify market participants whether it has triggered the proposed fair access threshold and, if so, whether the ATS is subject to the Fair Access Rule. As described above, the Commission is proposing to require Government Securities ATSs to comply with the Fair Access Rule if they meet the applicable thresholds.[639] As a result, Part III, Item 24 would be applicable to both NMS Stock ATSs and Government Securities ATSs that meet the applicable thresholds. Pursuant to proposed Rule 301(b)(5)(ii), a Covered ATS would aggregate the trading volume for a security or category of securities for ATSs that are operated by a common broker-dealer, or ATSs that are operated by affiliated broker-dealers for the purpose of calculating the volume thresholds.[640] In connection with proposed Rule 301(b)(5)(ii), the Commission is proposing to require the Covered ATS to indicate in Part III, Item 24(a) through (c) if the ATS crossed the volume thresholds ''whether by itself or aggregated pursuant to Rule 301(b)(5)(ii).''

If a Covered ATS crosses the fair access thresholds, proposed Rule 301(b)(5)(iii)(A) [641] requires the ATS to establish and apply reasonable written standards for granting, limiting, and denying access to the services of the ATS.[642] If subject to the Fair Access Rule, the Covered ATS would be required to describe the reasonable written standards for granting, limiting, and denying access to the services of the ATS pursuant to Rule 301(b)(5)(iii) of

[636] This Item is currently numbered as Part III, Item 23 of current Form ATS–N.

[637] Part III, Item 23 of revised Form ATS–N (currently numbered as Part III, Item 24 of current Form ATS–N) would be required only for NMS Stock ATSs, as the associated rule is inapplicable to government securities. *See* also NMS Stock ATS Adopting Release, *supra* note 2, at Section V.D.24.

[638] 17 CFR 242.301(b)(3).

[639] *See supra* Section III.D.

[640] The Commission is proposing changes to the Fair Access Rule, which are discussed in detail below. *See infra* Section V.A.2.

[641] *See infra* Sections V.A.3 through V.A.4.

[642] *See* 17 CFR 242.301(b)(5)(iii)(A). The Commission is proposing that any change in a Covered ATS's response to Item 24 would be filed as a contingent amendment. *See supra* note 440 and accompanying text.

Regulation ATS (as proposed to be applied herein).[643] A description of the Covered ATS's reasonable written standards in response to Part III, Item 24 should be clear and comprehensive and should explain, among other things, the objective and quantitative criteria upon which the ATS's reasonable written standards are based, any differences in access to the services of the ATS by applicant and current participants, and why the standards including any differences in access to the services of the ATS) are fair and not unreasonably discriminatory. To the extent another person performs a function of the ATS, the ATS would be required to provide reasonable written standards for granting, limiting, or denying access to the services performed by such person. In addition, an NMS Stock ATS must provide the ticker symbol for each NMS stock for which the NMS Stock ATS has exceeded the fair access threshold during each of the last 6 calendar months.

The Commission believes that the proposed disclosures would facilitate its oversight of Covered ATSs and their compliance with Rule 301(b)(5) as proposed herein. In addition, the proposed disclosures would allow market participants to assess whether fair access is, in fact, being applied by a Covered ATS that meets the fair access threshold, in part by making publicly available a description of the ATS's written standards for granting access.

Request for Comment

137. Is there other information that market participants might find important or useful regarding the reasonable written standards for granting, denying, and limiting access to the services of a Covered ATS that is subject to the Fair Access Rule? If so, describe such information and explain whether, and if so, why, such information should be required to be provided on Form ATS–N.

y. Item 25: Aggregate Platform-Wide Data; Trading Statistics

Part III, Item 25 of Form ATS–N[644] is designed to make public aggregate, platform-wide statistics that a Covered ATS already otherwise collects and publishes, or provides to one or more subscribers to the ATS. The purpose of Item 25 is to place subscribers on a level playing field with regard to aggregate, platform-wide statistics about the Covered ATS that the ATS makes available.

As explained above, the Commission is proposing to amend Form ATS–N to solicit information about the use of non-firm trading interest in the ATS, which relates to the proposed changes to Exchange Act Rule 3b–16.[645] Consistent with those proposed revisions, the Commission also proposes to change the request for information on Part III, Item 25 to require statistics beyond solely platform-wide order flow and execution statistics. Specifically, the Commission proposes that Part III, Item 25 require a Covered ATS to disclose all aggregate, platform-wide statistics that it publishes or provides to one or more subscribers. Such statistics would include the order flow and execution data that is currently solicited in Form ATS–N. In addition, the proposed disclosure request would require a Covered ATS to disclose statistics related to use of non-firm trading interest. On an RFQ system, such statistics might include the percentage or total number of timed-out inquiries (*i.e.,* when a participant receives no prices or other responses after posting an inquiry). With the use of a conditional order protocol, such statistics could include market participants' firm-up rates (*e.g.,* the ATS sends a firm-up request to participants after their conditional orders are matched).

While the Commission proposes to expand the scope of information that this Item would solicit, the proposed disclosure request does not require a Covered ATS to create, maintain, or publish any specific type of statistic. As is the case with the current requirement, this disclosure request only requires a Covered ATS to publicly disclose any statistics within the scope of the question that it already discloses to one or more subscribers. If a Covered ATS compiles a particular statistic without distributing it (*i.e.,* only uses it internally), it would not be required to provide that statistic on Form ATS–N. Finally, as with current Part III, Item 26 (proposed to be renumbered to Item 25), the proposed disclosure request does not require a Covered ATS to provide on Form ATS–N any data that is otherwise required by Rule 605 of Regulation NMS.[646] A Covered ATS may choose to create and publish or provide to one or more subscribers or persons aggregate, platform-wide statistics for different reasons. To the extent that a Covered ATS has made a determination to create and publish or provide to subscribers certain aggregate platform-wide data, the Commission believes that others may also find such information useful when evaluating the ATS as a possible venue for their trading interest.

As with the current disclosure request, the proposed disclosure request would not require a Covered ATS to amend its Form ATS–N every time it receives a subscriber data request. To comply with the proposed requirements under Part III, Item 25, Form ATS–N only requires a Covered ATS to update its disclosures for Part III, Item 25 on a quarterly basis.[647] For instance, if a participant were to request updated or new aggregate platform-wide statistics in January, the Covered ATS would not be required to immediately file an updating amendment containing these statistics after complying with the participant's request. Rather, the ATS would need to file an updating amendment within 30 days following the end of March. That updating amendment must contain the most recently distributed version of these statistics, as well as the most recently distributed version of all other aggregate platform-wide data that was provided during that quarter. The Commission notes that communications associated with the responsive statistics are not required to be publicly filed. In the prior example, for instance, if the statistics provided in the quarterly amendment are the ones provided in January (*i.e.,* those are the latest version of those aggregate platform-wide statistics the ATS distributed), the ATS would not (and should not) also attach to Form ATS–N the participant's email requesting the statistics.

Furthermore, Part III, Item 25 of Form ATS–N would only require a Covered ATS to publicly disclose aggregate platform-wide data. As such, a Covered ATS would not be required to disclose individualized or custom reports containing data relating to that participant's specific usage of the ATS. For example, an individual participant's trade reports, order and execution quality statistics, and other statistics

[643] The Commission is proposing revisions to Part III, Item 24 (currently numbered as Part III, Item 25) to conform to the proposed rule text of the Fair Access Rule, including rule re-numbering, describing the required written standards as ''reasonable,'' and to reference standards limiting and denying access to the services of the ATS.

[644] This Item is currently numbered as Part III, Item 26 of current Form ATS–N.

[645] *See supra* Section II.C.

[646] *See* 17 CFR 242.605.

[647] If, for example, a Covered ATS publishes or provides a particular statistic on a daily basis, the ATS would include in Exhibit 4 of Form ATS–N the statistic that was published or provided to one or more subscribers on the last trading day of the calendar quarter (*e.g.,* the statistic published or provided on June 30th or last trading day prior to June 30th). If a Covered ATS publishes or provides a particular statistic weekly, the ATS would be required to include in Exhibit 4 of Form ATS–N the statistic that was published or provided to one or more subscribers at the end of the week prior to the end of the calendar quarter (*e.g.,* the statistic published for the last full week of June).

specific to a participant's trading in the ATS would not be covered by the disclosure request in Part III, Item 25. A Covered ATS would need to independently evaluate any statistics that it compiles and distributes to determine whether they are responsive to this disclosure request.

Part III, Item 25 would require the Covered ATS to attach both the responsive statistics and its explanation of the categories or metrics of the statistics and the criteria or methodology used to calculate those statistics as Exhibits 4 and 5, respectively. Also, in lieu of filing Exhibits 4 and 5, the Covered ATS could certify that the information requested under Exhibits 4 and 5 is available at the website provided in Part I, Item 6 of the form and is accurate as of the date of the filing. The Commission is proposing to add to the instruction that if the ATS selects the checkbox, the ATS will maintain its website in accordance with the rules for amending Form ATS–N pursuant to Rule 304(a)(2)(i) to reflect any changes to such information. This would require an ATS checking the box to update its website as if it were Form ATS–N, and therefore, to update the information, as appropriate pursuant to the Commission's rules for amending Form ATS–N.

Request for Comment

138. Does Part III of Form ATS–N capture the information that is most relevant to understanding the operations of the Government Securities ATS and the use of non-firm trading interest on Communication Protocol Systems? Are there any Items that commenters believe are unnecessary? If so, why?

139. Should the Commission expand what Covered ATSs must disclose on Form ATS–N? Is there other information that market participants might find relevant or useful regarding the operations of Covered ATSs that should be publicly disclosed? If so, describe such information and explain whether, and if so, why, such information should be required to be provided under Form ATS–N.

140. Is there any information related to repos that Form ATS–N should require?

141. Is there any information related to options on government securities that Form ATS–N should require?

142. Is there any information that would be required by Part III of Form ATS–N that a Covered ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, commercially sensitive information, burden, or any other concerns?

143. Should the Commission adopt a more limited or expansive definition of ''affiliate'' for purposes of Part III?[648]

144. Would the disclosures under Part III of Form ATS–N help market participants better evaluate trading opportunities and decide where to send trading interest to reach their trading objectives?

145. Would the proposed disclosures in Part III of Form ATS–N require a Government Securities ATS to reveal too much (or not enough) information about its structure and operations?

146. Are there ways to obtain the same information as would be required from Government Securities ATSs by Part III of Form ATS–N other than through disclosure on Form ATS–N? If so, how else could this information be obtained?

147. Could the proposed requirement to disclose the information that would be required by Part III of Form ATS–N impact innovation in Government Securities ATSs?

148. Are there any aggregate platform-wide statistics of the Covered ATS that should not be required to be disclosed under Item 25?

149. Has Form ATS–N allowed market participants to better evaluate trading venues? If so, how? How do commenters believe the manner in which NMS Stock ATSs currently disclose information on Form ATS–N could be improved? Is the level of detail required appropriate? Are there any aspects of Form ATS–N on which the Commission should provide further guidance?

6. Part IV: Contact Information, Signature Block, and Consent to Service

Part IV of Form ATS–N would require a Covered ATS to provide certain basic information about the point of contact for the ATS, such as the point of contact's name, title, telephone number, and email address. Part IV would also require the Covered ATS to consent to service of any civil action brought by, or any notice of any proceeding before, the Commission or an SRO in connection with the ATS's activities. The Commission is proposing that Form ATS–N would be filed electronically and require an electronic signature.[649] The signatory to each Form ATS–N filing would be required to represent that the information and statements contained on the submitted Form ATS–N, including exhibits, schedules, attached documents, and any other information filed, are current, true, and complete. Given that market participants would use information disclosed on Form ATS–N to evaluate potential venues, and that the Commission intends to use the information to monitor developments of Covered ATSs, it is important that Form ATS–N contain disclosures that are current, true, and complete, and therefore the Commission is proposing to require that the signatory to Form ATS–N make such an attestation.

V. Proposed Amendments to Form ATS, Form ATS–R, and Other Conditions to Regulation ATS

A. Proposed Amendments to the Fair Access Rule for all ATSs

In addition to the amendments to the Fair Access Rule for Government Securities ATSs,[650] the Commission is proposing several amendments to the Fair Access Rule that would apply to all ATSs that are subject to the rule. The proposed amendments are discussed below.

1. Rule Text Clarifications

The Commission is re-proposing to amend the Fair Access Rule, as well as the Capacity, Integrity, and Security Rule under Rule 301(b)(6), to specify the use of volume to calculate the relevant thresholds under the rule. For purposes of determining whether an ATS crossed the average daily volume thresholds for compliance with the Fair Access Rule, Rule 301(b)(5)(i) does not specify whether the ATS's transaction volume in an NMS stock or an equity security that is not an NMS stock and for which transactions are reported to an SRO is calculated using the dollar or the share volume.[651] In the Regulation ATS Adopting Release, when discussing the Fair Access Rule, the Commission stated that for these two types of securities, the test should be based on the share volume.[652] Similarly, Rules 301(b)(5)(i) and (b)(6)(i) do not specify whether, for purposes of determining compliance with the Fair Access Rule and the

[648] *See supra* note 533 for the definition of affiliate under Form ATS–N.

[649] To avoid confusion, the Commission is proposing to delete language in the signature block in Part IV of Form ATS–N that refers to the signatory as ''duly sworn.'' The Commission notes that unlike Form ATS, Form ATS–N filings, which are submitted to EDGAR, are not required to be notarized; instead, they are subject to the rules governing electronic signatures set forth in Rule 302 of Regulation S–T. *See* 17 CFR 232.302.

[650] *See supra* Section III.B.4.

[651] 17 CFR 242.301(b)(5)(i)(A)–(B).

[652] *See* Regulation ATS Adopting Release, *supra* note 31, at 70873 (''Accordingly, if an [ATS] accounted for twenty percent or more of the *share volume* in any equity security, it must comply with the fair access requirements in granting access to trading in that security.'') (emphasis added).

Capacity, Integrity, and Security Rule, the volume for municipal securities or corporate debt securities is calculated based on the dollar or the share volume.[653] In the Regulation ATS Adopting Release, the Commission intended the test applicable to debt securities to be based on the dollar volume.[654] To mitigate any potential confusion, the Commission is adding these terms to Rules 301(b)(5)(i) and (b)(6)(i) to align the rule text with the Regulation ATS Adopting Release.[655]

The Commission is also re-proposing to amend Rules 301(b)(5)(i)(C) and (D) to clarify that the average daily dollar volume in municipal securities is provided by the SRO to which such transactions are reported and average daily dollar volume in corporate debt securities is provided by the SRO to which such transactions are reported.[656] When Regulation ATS was adopted, transaction reporting plans for municipal securities and corporate debt securities were being developed.[657] Today, transactions in municipal securities are reported to the MSRB and transactions in corporate debt securities are reported to FINRA. These two SROs provide the information that can be used by ATSs to determine whether the ATS is subject to the Fair Access Rule for these two categories of securities.[658] This amendment will add clarity to the rule given the established transaction reporting regimes for municipal securities and corporate debt securities.

2. Aggregation of Volume Threshold for Affiliated ATSs

The Commission is also proposing to amend the Rule 301(b)(5)(ii) of the Fair Access Rule to aggregate the trading volume for a security or category of securities for ATSs that are operated by a common broker-dealer, or ATSs that are operated by affiliated broker-dealers, solely for the purpose of calculating the average transaction volume under Rule 301(b)(5)(i)(A) through (F).[659] Today, there are single entities that may be the registered broker-dealer operator for different types of ATSs that trade different categories of securities (*e.g.,* NMS Stock ATS and non-NMS Stock ATS), and there are broker-dealers that may operate multiple ATSs that trade the same type of securities with different matching protocols (*e.g.,* limit order book for one and volume-weighted-average-price for the other). Likewise, there are entities that control multiple subsidiary broker-dealers, each of which operates one or more ATS or Communication Protocol System that trade the same or different categories of securities.[660] In these instances, each ATS with a common broker-dealer operator—and each of the affiliated Communication Protocol Systems that would be subject to Regulation ATS under this proposal—must comply with Regulation ATS.[661]

In response to the 2020 Proposal, one commenter stated that because each ATS is unique, it believed that for purposes of determining whether an ATS should be subject to the Fair Access Rule, volume should be determined at an individual ATS level and not aggregated across commonly controlled ATSs.[662] The commenter stated that a broker-dealer may choose to operate separate ATSs based on separate business units within the broker-dealer, different technology backbones, or different types of functionality, such as anonymous or fully disclosed order books or auction-based offerings.[663]

The Commission is concerned, however, that despite differences that may exist between ATSs that are operated by a common broker-dealer or ATSs operated by affiliated broker-dealers, there is a potential for a broker-dealer operator or controlling entity for more than one broker-dealer to structure its business to avoid triggering the fair access thresholds, and thereby circumvent the Fair Access Rule. It could do this by establishing multiple ATSs under one broker-dealer, or establishing multiple broker-dealers that each operate an ATS, to trade the same security or category of securities. The Fair Access Rule is designed to ensure that market participants have reasonable access to ATS market places that capture a significant percentage of national trading volume for a security or type of security. When a single entity operates multiple market places, that entity ultimately controls which market participants have access to trading across those market places.

When an organization, such as a broker-dealer, for example, provides an exchange market place for the same security or category of security but chooses to divide the market place into component parts by filing multiple Forms ATS or Forms ATS–N rather than filing a single form encompassing all the component market places, that organization is still the exchange providing a market place to bring together buyers and sellers of securities

[653] 17 CFR 242.301(b)(5)(i)(C)–(D); 17 CFR 242.301(b)(6)(i)(A)–(B).

[654] *See* Regulation ATS Adopting Release, *supra* note 31, at 70873, 70875 (requiring compliance with the Fair Access Rule and the Capacity, Integrity, and Security Rule if an ATS accounted for more than 20 percent of the total ''share volume'' in a security with respect to equity securities, and for more than 20 percent of the ''volume'' in a security with respect to debt securities). While Form ATS–R requires an ATS to report total volume in terms of both units and dollars for equity securities, it requires an ATS to report the total settlement value only in dollar terms for municipal securities and corporate debt securities. *See id.* at 70878.

[655] *See* proposed Rule 301(b)(5)(i)(A)–(D); proposed Rule 301(b)(6)(i)(A)–(B).

[656] To the extent transactions are reported to multiple SROs, the volume of transactions reported to such SROs would be combined for the purpose of calculating whether the transactions meet the threshold.

[657] *See* Regulation ATS Adopting Release, *supra* note 31, at 70873.

[658] *See* MSRB Rule G–14; FINRA Rule 6730. Electronic Municipal Market Access (''EMMA''), which is a service operated by the MSRB, and FINRA disseminate information on transactions in municipal securities and corporate debt securities, respectively. *See* EMMA Information Facility, *available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/Facilities/EMMA-Facility.aspx;* FINRA Rule 6750.

[659] For Rule 301(b)(5)(ii), the Commission would refer to the definition of affiliate used for purposes of Form ATS–N. *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38818–19. Affiliate was defined to mean ''with respect to a specified Person, any Person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified Person.'' *Id.* The Commission is proposing to include the definition of affiliate in proposed Rule 300(c). The currently defined term ''affiliate of a subscriber'' in Rule 300(c) is not currently used in Regulation ATS, and the Commission is therefore replacing such term with the definition of ''affiliate.'' The proposed amended definition of ''affiliate'' would help ATSs determine whether to aggregate the trading volume of ATSs operated by affiliated broker-dealer operators. The proposed definition of ''affiliate'' is identical to the definition of affiliate in Form ATS–N Explanation of Terms. Like the definition of ''affiliate of a subscriber'' under current Rule 300(c), the proposed definition of ''affiliate'' would include a specified person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person, and therefore would include employees of the specified person.

[660] The term ''control'' is defined in Rule 300(f) of Regulation ATS to mean: The power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through ownership of securities, by contract, or otherwise. A person is presumed to control the broker-dealer of an alternative trading system if that person: Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer of the alternative trading system; or in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker-dealer of the alternative trading system. 17 CFR 242.300(f). *See also* NMS Stock ATS Adopting Release, *supra* note 2, at 38818–19 (discussing definition of control).

[661] *See* Rule 3a1–1(a)(2) (providing that an organization, association, or group of persons shall be exempt from the definition of ''exchange'' if it is in compliance with Regulation ATS) and Rule 301(a) (providing that an ATS shall comply with the requirements of Rule 301(b)).

[662] *See* ICE Bonds Letter I at 6.

[663] *See id.*

and ultimately controls access to the entire security or category of securities that it makes available for trading across its multiple ATSs. In the Commission's experience, ATSs under common operation of a broker-dealer generally are designed to function as complementary products of a single business of the broker-dealer as opposed to separate market places competing against each other for order flow in the same security or types of securities. In the Commission's experience, it is typical for a broker-dealer that operates multiple ATSs for the same security or category of securities to use, for example, the same operations, technology, and administrative personnel for purposes of its ATSs' trading operations. Furthermore, a single entity controlling multiple ATSs often applies similar standards for granting access across all of its ATSs that trade the same security or category of security and applies the same market data, clearance, settlement, and trade reporting processes, and procedures for protecting subscriber confidential trading information. Even in the case of a single parent company, for example, which controls several affiliated broker-dealers that each operate an ATS for the same category of security, access to each ATS is obtained from the broker-dealer operator, and each broker-dealer operator is subject to the direction of the parent company. Ultimately, those ATSs serve the business interests of, and are under common control by, the parent company.

Aggregating trading volume among ATS market places and Communication Protocol Systems that would be subject to Regulation ATS under this proposal—either operated by a common broker-dealer or by affiliated broker-dealers—would help further the vital policy goal of ensuring that no single entity is able to restrict fair access to a security or type of security. As a result of this proposed change, if, for example, a broker-dealer operated two NMS Stock ATSs that each accounted for three percent of the average daily volume in an NMS stock during at least four of the preceding six calendar months, both NMS Stock ATSs would be subject to the Fair Access Rule for that security because their aggregated volume exceeds the five percent threshold of Rule 301(b)(5)(i)(A).[664] If, instead, one of the ATSs had six percent of the average daily volume for an NMS stock and the other ATS had one percent, both NMS Stock ATSs would be subject to the Fair Access Rule as a result of their common broker-dealer operator and aggregated volume. In another example, if two broker-dealers that are subsidiaries of the same parent company each operate an ATS for corporate bonds and each ATS accounts for three percent of the average daily volume of corporate bonds traded in the United States during at least four of the preceding six calendar months, then both ATSs would be subject to the Fair Access Rule. This result would be because the ATSs are operated by affiliated broker-dealers and their aggregate volume exceeds the volume threshold of Rule 301(b)(5)(i)(C).

3. Reasonable Written Standards

The Commission is proposing to amend the requirements related to reasonable written standards.[665] The Commission is proposing Rule 301(b)(5)(iii)(A) to provide that the ATS ''establish and apply reasonable written standards for granting, limiting, and denying access to the services of the alternative trading system.'' As discussed in more detail below, the Commission is proposing to add the word ''reasonable'' before ''written standards'' to incorporate the concept that is part of current Rule 301(b)(5)(ii)(B) (''not unreasonably prohibit or limit'') and used in the Regulation ATS Adopting Release.[666] The Commission is also adding in the rule text, for the removal of any doubt, that the ATS must ''apply'' the reasonable written standards as established. For example, if an ATS establishes a written standard that states subscribers' trading interest will not be displayed to anyone, but the ATS in practice displays trading interest to a subscriber, then the ATS would not be *applying* its established written standards. Establishing the written standard is not sufficient if the ATS is not following or applying them.

Also incorporated into proposed Rule 301(b)(5)(iii)(A), and taken from current Rule 301(b)(5)(ii)(B), is that the written standards apply to access of ''the services of the alternative trading system.'' This addition to the rule text serves to emphasize that the Fair Access Rule applies not only to the initial grant or denial of access to an applicant of the ATS, but also to the services of the ATS that are offered to current participants. ATS services, including, among others, the provision of market data, order entry functionalities, priority rules, segmentation procedures, negotiation features, communication protocols, counterparty selection, and order types offered, would all be subject to the provisions of the Fair Access Rule. The Commission is also incorporating from current Rule 301(b)(5)(ii)(B) that the Fair Access Rule applies when limiting and denying access to the ATS services, not solely granting access.[667] The application of the Fair Access Rule to limitations and denials of access would help ensure that market participants receive the full benefits of participation in an ATS subject to the Fair Access Rule unless a limitation or denial of access can be reasonably justified.

As indicated above, the Commission is making explicit in the text of Rule 301(b)(5) that the written standards required under the Fair Access Rule must be reasonable. An ATS subject to the Fair Access Rule is not required to treat all participants the same in all instances; however, the Fair Access Rule has always required that an ATS subject to the rule provide reasonable access to ATS services.[668] The Commission is revising the rule text to make it clear that the written standards must be reasonable. For an ATS's written standards to be reasonable, the standards must be fair and not unreasonably discriminatory. Some ATSs, for example, might offer different services, or levels of a service, to one subscriber or among different classes of subscribers. An ATS subject to the Fair Access Rule could not provide services to one class of participants and not to other classes of participants unless the ATS established standards with a reasonable basis for treating the participant classes differently. For example, as stated in the Regulation ATS Adopting Release, an ATS may establish a standard that requires all participants be registered broker-dealers and that ATS may deny access to the ATS to any applicant that is not a

[664] Also, if one of the ATSs operated by the common broker-dealer operator accounted for five percent of the average daily volume in an NMS stock for three months and the other ATS accounted for five percent of the average daily volume in the same NMS stock for the subsequent three months, then both ATSs would be subject to the Fair Access Rule for that NMS stock because aggregated they would have crossed the volume threshold for more than four of the preceding six calendar months.

[665] These requirements are currently in Rule 301(b)(5)(ii), which the Commission is proposing to re-number as Rule 301(b)(5)(iii).

[666] *See* Regulation ATS Adopting Release, *supra* note 31, at 70872. The Commission believes that the addition of ''reasonable'' is consistent with its intent as expressed in the Regulation ATS Adopting Release. Specifically, in discussing the Fair Access Rule, the Commission stated that ''fair treatment . . . is particularly important'' when ATSs reach significant volume in a security, and the rule would serve to prohibit ''unreasonably'' discriminatory denials of access.

[667] Rule 301(b)(5)(ii)(B) states that the ATS shall not ''unreasonably *prohibit or limit*'' (emphasis added) any person with respect to the services of the ATS.

[668] *See supra* notes 666–667.

registered broker-dealer.[669] As part of its reasonable analysis, an ATS subject to the Fair Access Rule must explain why the standard for admitting registered broker-dealers rather than non-registered broker-dealers is fair and not unreasonably discriminatory.[670] Fees can be a manner of limiting or denying services. In another example, an ATS that charges certain fees to one class of participants but different fees to another class of participants for the same service could not, if it were subject to the Fair Access Rule, discriminate in this manner unless it adopted reasonable written standards and applied them in a fair and non-discriminatory manner. Also, to *apply* the standards fairly and non-discriminatorily, the ATS's activities (or the activities of persons performing a function of the ATS) must be carried out in accordance with the established written standards of the ATS.

When assessing the reasonableness of standards under the Fair Access Rule, the Commission may consider principles applied in the national securities exchange context to guide its analysis of whether an ATS's written standards are fair and not unreasonably discriminatory. Under Section 6(b)(5) of the Exchange Act, for example, a national securities exchange must show that its rules are not designed to permit *unfair discrimination* between customers, issuers, brokers or dealers.[671] Sections 6(b)(2) and 6(c) of the Exchange Act require national securities exchanges to consider the public interest in administering their markets and to establish rules designed to admit members *fairly*.[672] National securities exchanges and ATSs are regulated pursuant to separate statutory and rule provisions of the Federal securities laws and there are different benefits and burdens associated with each entity; however, as the Commission stated in the Regulation ATS Adopting Release, fair access requirements are based on the principle that qualified market participants should have fair access to the U.S. securities markets, and such markets would include ATSs subject to the Fair Access Rule.[673]

The justification provided for why each written standard is fair and not unreasonably discriminatory is an important aspect of an ATS's compliance with the Fair Access Rule as proposed to be amended. The same limitation or restriction on different ATSs may be unfair on one ATS and not another depending on the design of the ATS and its rationale for such a limitation. One commenter suggested that fair access is not applicable to fixed income platforms where each participant has discretion over which other participants they want to trade with.[674] Under these circumstances where ATS participants can select their potential counterparties, the Commission would view an ATS that implements the participant's choices as having adopted those as ATS standards. As a result, the ATS subject to the Fair Access Rule would need to establish reasonable written standards that, among other things, justify why the differences in access between the selected and not-selected counterparties are fair and non-discriminatory and thus reasonable. For example, if subscribers selected their counterparties based on the condition of the counterparty's balance sheet (*e.g.,* totals for assets and liabilities), and the ATS implemented those selections, then the ATS would need to include a justification in its written standards for why implementing those selections is fair and not unreasonably discriminatory.[675] In cases where the Commission staff reviews an ATS's fair access standards, whether in the description provided under Item 24 of revised Form ATS–N for NMS Stock ATSs and Government Securities ATSs (as proposed) or during an examination, the Commission staff would review whether a given justification for the standard is, for example, unreasonably discriminatory, or is pretextual and, in fact, designed to thwart the goal of providing fair access to qualified market participants.[676]

Even if an ATS's written standard is equally applicable to all participants, the ATS must nevertheless ensure the standard itself is not unfair or unreasonably discriminatory or applied in an unfair or unreasonably discriminatory manner. If an ATS included in its written standards that it reserves the right to accept or deny applicants to the ATS at its sole discretion, such standard may apply equally to all applicants, but it would not be reasonable as it would contradict the rule's goal of promoting fair access to the securities markets. In another example, if an ATS adopts a written standard that it would only accept participants with ''industry-leading reputations,'' such written standard, depending on the justification, is unlikely to be considered reasonable because of its subjectivity and potential substantial limiting effect on market participants' access to the ATS. As stated in the Regulation ATS Adopting Release, if an ATS applied its standards so as to discriminate among similarly-situated participants, such actions would be inconsistent with reasonable written standards because the ATS would not be acting impartially. One example of this would be an ATS that provides liquidity providers that met certain volume thresholds with trading privileges, yet does not provide those privileges equally to every qualifying liquidity provider. Another example would be a Communication Protocol System that establishes a standard to track all participants' ''firm up'' rates in response to requests for quotes but subsequently denies or limits access to only certain subscribers that exceed the firm-up threshold and not to other participants who likewise exceeded the firm-up threshold.

The Commission is also proposing Rule 301(b)(5)(iii)(A)(*1*) through (*5*) to provide minimum requirements for the reasonable written standards that must be established, and applied, by an ATS that is subject to the Fair Access Rule. These minimum requirements for what the written standards must include do not alter the substantive requirement that the written standards be reasonable. Rather, they explain in more granular detail what is required to be sufficient written standards to facilitate compliance. First, the Commission is proposing Rule 301(b)(5)(iii)(A)(*1*) to require that an ATS's reasonable written standards provide the dates that each written standard is adopted, effective, and, if applicable, modified. This proposed requirement is designed to assist Commission examination staff in their evaluation of the application of an ATS's written standards as well as help the staff understand the written fair

[669] *See* Regulation ATS Adopting Release, *supra* note 31, at 70874.

[670] *See* proposed Rule 301(b)(5)(iii)(A)(*4*).

[671] 15 U.S.C. 78f(b)(5).

[672] 15 U.S.C. 78f(b)(2) and (c).

[673] *See* Regulation ATS Adopting Release, *supra* note 31, at 70874.

[674] *See* MarketAxess Letter at 10.

[675] In practice, the ATS participant making a selection of its potential counterparties would need to provide the ATS with its justification for selecting those counterparties, and the ATS would need to evaluate whether the stated justification comports with the Fair Access Rule, and if so, incorporate it into the ATS's established written standards.

[676] Rule 301(b)(5)(ii)(D) requires ATSs to report to the Commission information on Form ATS–R regarding grants, limitations, and denial of access to an ATS subject to the Fair Access Rule. Specifically, Form ATS–R, Exhibit C requires the ATS to list of all persons granted, denied, or limited access to the ATS during the period covered by the report, designating for each person whether they were granted, denied, or limited access; the date the ATS took such action; the effective date of such action; and the nature of any denial on limitation of access. The Commission stated in the Regulation ATS Adopting Release that the Commission intended to enforce the Fair Access Rule by reviewing Form ATS–R reports and investigating any possible violations of the rules. *See* Regulation ATS Adopting Release, *supra* note 31, at 70874.

access standards that were in place at a given time.

Second, the Commission is proposing Rule 301(b)(5)(iii)(A)(*2*) to require an ATS's reasonable written standards set forth any objective and quantitative criteria upon which each standard is based.[677] Objective or quantitative standards can help demonstrate an ATS's compliance with the Fair Access Rule by limiting an ATS's discretion and its ability to act arbitrarily with respect to an applicant to the ATS or current participant. Nevertheless, an ATS's objective or quantitative standards must still be fair and not unreasonably discriminatory. An ATS could not, for example, establish, without reasonable justification, a quantitative standard at such a high level that it unfairly results in only a limited group of ATS participants that can meet it. If an ATS, for example, sets its required firm up rate on conditional orders at 95 percent, compliance with the Fair Access Rule would depend on whether that standard was fair and whether it unreasonably discriminated against those subscribers that did not attain a 95 percent firm up rate.[678]

In the case of an ATS that segments the order flow of its participants into certain categories based on quantitative metrics, such as reversion rates,[679] the ATS's standards generally should include, among other things, the metrics and factors used to determine the segmented categories and, as explained further below, how the metrics and factors are fair and not unreasonably discriminatory, and thus are reasonable. The presence of the objective and quantitative thresholds limits the ATS's discretion in differentiating among participants (in this example, by setting segmented categories for order interaction and thus denying certain participants the ability to interact with other participants on the ATS). The quantitative threshold still must be reasonable; an objective or quantitative standard would not by itself be sufficient to comply with fair access. In cases where an ATS has a written standard for access that is not based on objective or quantitative criteria, the ATS must still justify why the standard is reasonable, and more specifically, how such standard is fair and not unreasonably discriminatory.

Third, the Commission is proposing Rule 301(b)(5)(iii)(A)(*3*) to require that an ATS's reasonable written standards identify any differences in access to the services of the ATS by applicants and current participants. The purpose of this provision is to highlight each instance where an ATS treats participants differently under the established written standards. Under the Fair Access Rule, ATSs may provide different services to different subscribers, or may vary how services are offered among ATS participants; however, the ATS must have a reasonable basis for doing so. An ATS might, for example, segment participant order flow into specific categories (*i.e.,* based upon the type of market participant generating the order flow) to determine order interaction. As a result, some subscribers can only interact with certain subscribers and not others. In such a case, the ATS would be required to, among other things, identify the segmentation categories and criteria used to set the categories. If, for example, an ATS grants certain trading privileges, such as being able to view certain trading interest, to a person classified as a liquidity provider, the ATS would be required to describe any such differences in treatment for the liquidity provider. The identification of differences in treatment required would also include those applicable to applicants to the ATS. For example, if an ATS had different minimum capital and credit requirements for applicants to the ATS, the ATS would need to identify the differences in its written standards. As described above, differences in access must be reasonable and the ATS would be required to justify how such differences in access are fair and not unreasonably discriminatory pursuant to proposed Rule 301(b)(5)(iii)(A)(*4*).

Fourth, the Commission is proposing Rule 301(b)(5)(iii)(A)(*4*) to require that an ATS's reasonable written standards justify why each standard, including any differences in access to the services of the ATS, is fair and not unreasonably discriminatory. While the Fair Access Rule does not require that the ATS treat all market participants equally, the Fair Access Rule requires an ATS to have a reasonable basis for not treating market participants equally. Accordingly, an ATS would be required to justify in writing why its standards are fair and not unreasonably discriminatory.[680] Requiring an ATS to justify its fair access standards in writing would facilitate Commission staff review of those standards, whether by reviewing the standards in the description provided under Item 24 of revised Form ATS–N for NMS Stock ATSs and Government Securities ATSs (as proposed) or during an examination of an ATS. Above, the Commission sets forth an example of an ATS establishing different minimum capital and credit requirements for applicants to the ATS. In addition to identifying that difference in its written standards, the ATS would also be required to justify why the difference is fair and not unreasonably discriminatory. The ATS could, for instance, explain: (1) Objective or quantitative criteria used to determine which minimum applies to which applicants and why the ATS chose the objective and qualitative criteria that it did, which would also meet the requirements of paragraph (b)(5)(iii)(A)(*2*) outlined above; and (2) why those objective or quantitative criteria are fair and not unreasonably discriminatory as applied to the ATS. If there are no objective criteria, the ATS must explain why it is fair and not unreasonably discriminatory to have and apply the capital and credit requirements among applicants to the ATS.

Finally, the Commission is proposing Rule 301(b)(5)(iii)(A)(*5*) to require an ATS's reasonable written standards address any standard for granting, limiting, or denying access to the services of the ATS performed by persons other than the broker-dealer operator. From the Commission's experience, persons other than the broker-dealer operator may perform all or some functions of the ATS. In other cases, the broker-dealer operator, or affiliate of the broker-dealer operator, may direct the ATS participants to use the services of a person other than the broker-dealer operator. In both such cases, the activities of those persons can affect participants' access to the ATS,

[677] *See* Regulation ATS Adopting Release, *supra* note 31, at 70874 (providing minimum capital or credit requirements for subscribers as an example of objective standards).

[678] In assessing whether such a standard is reasonable, the Commission could consider, among other things, the quantitative criteria upon which the standard is based, the justification by the ATS for why the standard is fair and not unreasonably discriminatory, the differences in, and impact on, access to services from the application of the standard, and other information provided through discussions with the ATS.

[679] In the Commission's experience, a common method for ATSs to segment order flow is to measure a security's change in price within a certain (usually short) time period after an execution and, based on that figure or reversion rate, assign a score to one or both of the parties to the transaction. If a security's price moves substantially after an execution, then that subscriber's (or subscribers') score may cause it to be segmented into a class of subscribers that is considered riskier to trade against and other subscribers may select to not trade against that subscriber. Subscribers are assigned scores based on their reversion rates and segmented into classes or categories accordingly.

[680] As the Commission is proposing to relocate these requirements under the requirements for an ATS's written standards under Rule 301(b)(5)(iii)(A), the Commission is proposing to delete the rule text under current Rule 301(b)(5)(ii)(B) and renumber current paragraphs (b)(5)(ii)(B) and (C) to paragraphs (b)(5)(ii)(C) and (D), respectively.

and therefore, the ATS must ensure, through its written fair access standards, that those persons have established reasonable written standards for granting, denying, and limiting access to the ATS and are applying those standards in a fair and non-discriminatory manner.

For example, an ATS that arranges for an entity to provide order entry services to the ATS would be required to ensure that the order entry provider has reasonable standards for ATS participants to access the order entry services, and thus the ATS. The ATS would be required to address in its reasonable written standards how the provider ensures that its standards are reasonable because the activities of the provider can impact the ability of participants to access the ATS. In addition, if the ATS broker-dealer operator, or affiliate of the broker-dealer operator, directs participants to use the services of another entity in connection with the ATS, that ATS would be responsible to ensure that such entity establishes reasonable standards for access. For example, if the broker-dealer operator, or affiliate of the broker-dealer operator, directs participants to use the services of a certain clearing broker, the ATS would be required to ensure that the clearing broker has reasonable written standards and to include in the ATS's written standards the clearing broker's written standards for granting, denying, or limiting access to its clearing services as they relate to the ATS. The Commission is concerned that an ATS may attempt to use an affiliate or third party to perform ATS activities or functions while avoiding the application of Regulation ATS to those activities or functions.[681] Requiring an ATS subject to the Fair Access Rule to address in its written standards the activities or functions performed by persons in conjunction with the ATS other than the broker-dealer operator would help ensure fair access to the ATS by investors.

4. Recordkeeping Requirements

The Commission is also proposing changes to the ATS recordkeeping requirements under Rule 301(b)(5)(iii)(B), as proposed to be amended.[682] The Commission is proposing to replace the reference to records relating to grants of access to ''subscribers'' with references to ''participants.'' In the Commission's experience, ATSs can grant access to customers of subscribers who may not themselves be subscribers to the ATS. This proposed change would clarify that records related to such participants would need to be made and kept under the rule. In addition, the Commission is proposing to add to the rule text that the ATS must make and keep records related to denials or limitations of access and reasons for each applicant ''and participant.'' By adding ''participant,'' the Commission will reflect that it requires an ATS subject to the rules to keep records of when it limits access to existing participants (not only ''applicants'') to the ATS system. This is a technical change, as the current rule requires the ATS to make and keep all records related to limitations of access and reasons for such limitations, which would apply to both existing participants, as well as applicants upon entry to the ATS.

The Commission is also proposing to add language to Rule 301(b)(5)(iii)(B)(*1*) and (*2*) to reference that grants of access and denials of limits of access and reasons for limitation and denying access to the services of the ATS would be under the standards provided in proposed Rule 301(b)(5)(iii)(A). Referencing the standards in Rule 301(b)(5)(iii)(A) would clarify that grants, limitations, and denials of ATS services would be under the standards of the rule, as proposed to be revised. The Commission is also proposing to amend Rule 303(a)(1)(iii) of Regulation ATS to require an ATS subject to the Fair Access Rule, for a period of not less than three years, the first two years in an easily accessible place, to preserve at least one copy, including each version, of such ATS's written standards for access to trading, all documents relevant to the ATS decision to grant, deny, or limit access to any person, and all other documents made or received by the ATS in complying with the Fair Access Rule.[683] This change would modify the current rule to specify that the standards are ''written'' and that the ATS must maintain ''each version'' of the written standards required under Rule 301(b)(5), which is consistent with the previous Commission guidance.[684]

5. Removal of the Exclusion for Passive Systems From the Fair Access Rule

The Commission is re-proposing to remove an exclusion from compliance with the Fair Access Rule under Rule 301(b)(5) and the Capacity, Integrity, and Security Rule under Rule 301(b)(6) that is applicable to ATSs that trade equities.[685] An ATS is excluded from complying with the requirements of the Fair Access Rule and the Capacity, Integrity, and Security Rule if the ATS: (i) matches customer orders for a security with other customer orders; (ii) such customers' orders are not displayed to any person, other than employees of the ATS; and (iii) such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.[686] In adopting the exclusion, the Commission stated that ATSs of this nature, the so-called ''passive systems,'' did not contribute significantly to price discovery; however, the Commission also stated that they had the potential to and frequently do affect the markets from which their prices are derived, and thus, the Commission would continue to monitor these systems and reconsider whether the requirements should apply if concerns arise in the future.[687]

In the Regulation ATS Adopting Release, the Commission explained that fair treatment by ATSs of subscribers is particularly important when an ATS captures a large percentage of trading volume in a security because investors lack access to viable alternatives to trading in the ATS.[688] Since the adoption of Regulation ATS, passive systems (as the term is used in the Regulation ATS Adopting Release) for NMS stocks have garnered a significant percentage of trading volume in securities and have come to play an important role in matching buyers and sellers of securities.[689] Eliminating the

[681] *See* Regulation ATS Adopting Release, *supra* note 31, at 70873, n.252.

[682] This is currently in paragraph (b)(5)(iii)(C), but would be renumbered to paragraph (b)(5)(iii)(B) under the proposed changes.

[683] The Commission is also proposing to specify in Rule 303(a)(1)(iv) and (v) that an ATS must maintain ''each version'' of copies of records made in the course of complying with Rule 301(b)(6) and copies of the written safeguards and written procedures to protect subscribers' confidential trading information and written oversight procedures created in the course of complying with Rule 301(b)(10).

[684] *See* Regulation ATS Adopting Release, *supra* note 31, at n.251 (stating that the Commission expects an ATS to maintain a record of its standards at each point in time, and that if the ATS amends or modifies its access standards, the records kept should reflect historic standards, as well as current standards).

[685] When adopting the exclusion, the Commission contemplated that it would apply only to ATSs that trade equity securities, as one of the elements of the exclusion requires that the prices in the ATS be based on the SIP. The third prong of each exception states that if an ATS meets the requirement, among others, to execute customer orders ''at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices,'' the ATS would not be subject to the Fair Access Rule or Capacity, Integrity, and Security Rule, as applicable. 17 CFR 242.301(b)(5)(iii)(C); 17 CFR 242.301(b)(6)(iii)(C).

[686] 17 CFR 242.301(b)(5)(iii); 17 CFR 242.301(b)(6)(iii).

[687] Regulation ATS Adopting Release, *supra* note 31, at 70853.

[688] *Id.* at 70872.

[689] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38770–71.

Rule 301(b)(5)(iii) exclusion would ensure that the Fair Access Rule is applied as intended and help ensure fair treatment of applicants and current subscribers by any type of ATS that captures a large percentage of trading in a security or type of security.

The Commission is also re-proposing to amend Rule 301(b)(6) to remove the exclusion from compliance with the Capacity, Integrity, and Security Rule under Rule 301(b)(6)(iii).[690] As part of Regulation SCI, Rule 301(b)(6) of Regulation ATS was amended to no longer apply to ATSs that trade equities because Regulation SCI superseded and replaced the requirements of the Capacity, Integrity, and Security Rule with regard to ATSs that trade NMS stocks and non-NMS stocks.[691]

Request for Comment

150. Should the Commission change the five percent fair access threshold for NMS stocks, equity securities that are not NMS stocks, corporate bonds, or municipal securities? If so, should the threshold be changed higher or lower than the existing five-percent threshold under Rule 301(b)(5)(i)? National securities exchanges are required to have rules designed to prevent unfair discrimination [692] and admit members fairly.[693] Because ATSs are operating pursuant to an exemption from exchange registration, should the Commission eliminate the volume threshold(s) for the Fair Access Rule and thus, require all ATSs to provide fair access to their participants regardless of trading volume? If yes, should the Commission eliminate the volume thresholds for all categories of securities subject to the Fair Access Rule or only specific categories?

151. Should the Commission change the look-back period for applying the fair access thresholds from four out of the preceding six months to something different? For example, should an ATS be subject to fair access if its average daily trading volume in a subject security is five percent over the prior quarter or the prior month? Should the Commission change to the look-back period for all categories of securities subject to the Fair Access Rule, or just specific categories?

152. Should the Commission allow or require ATSs to use sources of market data other than published data provided by the SRO to which trades are reported? If yes, which data sources?

153. Should the Commission change the Fair Access Rule for it to apply categorically to NMS stocks rather than on a security-by-security basis? For example, should the Commission change the fair access threshold for equity securities so that an ATS would only be subject to the requirements of the Fair Access Rule if its average daily trading volume is five percent across all NMS stocks? Should the Commission change the Fair Access Rule to provide fair access in all NMS stocks if it surpasses the fair access threshold in a single NMS stock?

154. Should the Commission change the Fair Access Rule so that it applies categorically, rather than on a security-by-security basis, to equity securities that are not NMS stocks? For example, should the Commission change the fair access threshold for equity securities so that an ATS would only be subject to the requirements of the Fair Access Rule if its average daily trading volume is five percent across all equity securities that are not NMS stocks? Additionally, or alternatively, should the Commission change the Fair Access Rule to require an ATS to provide fair access in all NMS stocks if it surpasses the fair access threshold in a single NMS stock?

155. Should the Commission adopt rules to amend the Rule 301(b)(5)(ii) of the Fair Access Rule to aggregate the trading volume for a security or category of securities for ATSs that are operated by a common broker-dealer, or ATSs that are operated by affiliated broker-dealers, solely for the purpose of calculating the average transaction volume under Rule 301(b)(5)(i)(A) through (F)?

156. Under Regulation ATS, an ATS would be subject to Rule 301(b)(3) (Order Display and Execution Rule) and Rule 301(b)(6) (Capacity, Integrity and Security Rule) if the ATS exceeded certain volume thresholds within a given period of time under the rules. Should the Commission amend the Order Display and Execution Rule and the Capacity, Integrity, and Security Rule to aggregate the trading volume for a security or category of securities for ATSs that are operated by a common broker-dealer, or ATSs that are operated by affiliated broker-dealers, for the purpose of calculating the average transaction volume under those rules?

157. Instead of aggregating trading volume across multiple ATSs operated by a common broker-dealer, should the Commission amend Regulation ATS to require a broker-dealer to operate only one ATS for a category of security? If no, why is it important for one broker-dealer to be able to offer multiple ATS market places for the trading of the same category of security?

158. Should the Commission adopt the same standard of reasonableness that is applied to national securities exchanges for purposes of the Fair Access Rule? If not, what standard of reasonableness should apply to ATSs that are subject to the Fair Access Rule?

159. Should the Commission adopt requirements in addition to the reasonable written standards proposed in Rule 301(b)(5)(iii)(A)(*1*) through (*4*)? Should any of those standards be amended?

160. Should the Commission eliminate the exclusion from compliance with the Fair Access Rule under Rule 301(b)(5)(iii) and with the Capacity, Integrity, and Security Rule under Rule 301(b)(6)(iii)?

161. Should the Commission adopt the changes to the recordkeeping provisions of the Fair Access Rule? Are there any additional records that an ATS should be required to keep?

B. Electronic Filing of and Other Changes to Form ATS and Form ATS–R

The Commission is re-proposing revisions to Rule 301(b)(2), Form ATS, and Form ATS–R to modernize Form ATS and Form ATS–R and to provide that they are filed electronically. In addition, the Commission is proposing to require ATSs to provide certain additional information on Form ATS–R, including volume reporting for transactions in repurchase and reverse repurchase agreements on the ATS. ATSs are required to file the information required by Form ATS–R [694] pursuant to Rule 301(b)(9) within 30 calendar days after the end of each calendar quarter in which the ATS has operated.[695]

First, the Commission is re-proposing an amendment to Rule 301(b)(2)(vi), which currently states that ''[e]very notice or amendment filed pursuant to this paragraph (b)(2) shall constitute a 'report''' within the meaning of applicable provisions of the Exchange Act. The Commission proposes to add a reference to Rule 301(b)(9) to state that Form ATS–R, as is the case with Form ATS, constitutes a report within the meaning of applicable provisions of the Exchange Act.[696]

[690] 17 CFR 242.301(b)(6)(iii).

[691] *See* Regulation SCI Adopting Release, *supra* note 3, at 72252, 72267.

[692] 15 U.S.C. 78f(b)(5).

[693] *See* 15 U.S.C. 78f(b)(2) and (c); 15 U.S.C. 78o–3(b)(8).

[694] *See* Form ATS–R. *See also supra* notes 144–147.

[695] *See* 17 CFR 242.301(b)(9)(i). An ATS must also file Form ATS–R more frequently upon request of the Commission. *See* Form ATS–R Instructions.

[696] This amendment would be consistent with Rule 301(b)(2)(vii), which states that ''[a]ll reports filed pursuant to this paragraph (b)(2) and

Continued

Next, the Commission is re-proposing to require that all Forms ATS and ATS–R are filed with the Commission electronically. As proposed, following the effective date of the proposed rule, all Form ATS filers would be required to file an amendment on Form ATS in the electronic format proposed herein that would also include all new information required by revised Form ATS. Currently, ATSs are required to submit paper submissions of Forms ATS and ATS–R to the Commission.[697] The Commission proposes to amend Rule 301(b)(2)(vii) to require that an ATS must file a Form ATS or a Form ATS–R in accordance with the instructions therein. The Commission is proposing to revise the instructions to Form ATS and Form ATS–R to require that they be submitted electronically via EDGAR.[698] The Commission is also proposing to require in Rule 301(b)(2)(vii) that reports provided for in Rule 301(b)(2) and (9) shall be filed on Form ATS and Form ATS–R, as applicable, and include all information as prescribed in Form ATS or Form ATS–R, as applicable, and the instructions thereto.[699] In addition, the Commission is proposing to require that any Form ATS or Form ATS–R shall be executed at, or prior to, the time Form ATS or Form ATS–R is filed and shall be retained by the ATS in accordance with Rule 303 of Regulation ATS and Rule 302 of Regulation S–T, and the instructions in Form ATS or Form ATS–R, as applicable.[700] Among other benefits, the electronic filing of Forms ATS and ATS–R would increase efficiencies and decrease filing costs for ATSs (*i.e.,* ATSs would no longer be required to print and mail paper filings) and for Commission staff when undertaking a review of these forms. Form ATS–N is required to be filed in EDGAR. EDGAR is currently configured to support the Commission's receipt and review of filings under Regulation ATS, and requiring electronic Form ATS and Form ATS–R filings to be submitted via EDGAR would be the most efficient way to facilitate their electronic filing.

To facilitate electronic filing, the Commission is proposing to amend the text of General Instructions A.4 of Forms ATS and ATS–R to require that all filings be submitted via EDGAR and prepared, formatted, and submitted in accordance with Regulation S–T and the EDGAR Filer Manual.[701] The Commission also proposes to amend Forms ATS and ATS–R General Instruction A.5 to state that a filing that is defective may be rejected and not be accepted by the EDGAR system and that any filing so rejected shall be deemed not filed. This is consistent with the requirements of Regulation S–T, which provides the rules for EDGAR submissions.[702] The Commission also notes that the instructions for current Form ATS contain similar language,[703] but the current instructions for Form ATS–R do not contain such language. The Commission believes that it would be appropriate to reject a filing as defective if it does not comply with the technical requirements of the form, for example, if a Form ATS or Form ATS–R is missing exhibits, or if the ATS does not provide a response to a Form ATS request or does not comply with the electronic filing requirements. The Commission is also proposing to amend General Instruction A.6 (''Recordkeeping'') of both forms to reflect that records must be retained in accordance with the EDGAR Filer Manual and Rule 303 of Regulation ATS and to conform to the recordkeeping instructions on Form ATS–N, as revised.[704] Instruction A.8 would also be revised to reflect updated Paperwork Reduction Act estimates, and, to conform to changes the Commission is proposing in Rule 301(b)(2)(vii),[705] to state that types of securities traded provided on Form ATS and Form ATS–R will not be afforded confidential treatment. The Commission is also proposing to add new Instruction A.8 to Form ATS to require that, for amendments, the filer attach an Exhibit C marked to indicate additions to or deletions from the disclosures in Items 1 through 6 of Form ATS. This document would help enable the Commission to identify any changes to the form more easily. Most ATSs currently provide such a marked document to the Commission on a voluntary basis. The Commission is also proposing to amend the instructions to Form ATS to state that Newly Designated ATSs are required to file a Form ATS no later than the date 30 calendar days after the effective date of any final rule, if adopted.[706]

In addition, the Commission is re-proposing to amend Form ATS to require an ATS filing an amendment on Form ATS to identify whether the Form ATS filing is a material amendment under Rule 301(b)(2)(ii), a periodic amendment under Rule 301(b)(2)(iii), or a correcting amendment under Rule 301(b)(2)(iv).[707] An ATS currently identifies an amendment to current Form ATS by marking the ''Amendment to Initial Operation Report'' box on Form ATS, and Form ATS currently does not ask the ATS to specify whether the amendment to Form ATS is a material, periodic, or correcting

paragraph (b)(9)'' of Rule 301 are, as proposed, accorded confidential treatment subject to applicable law. *See* 17 CFR 242.301(b)(2)(vii). The instructions to Form ATS and Form ATS–R require an ATS to submit one original and two copies of Form ATS and Form ATS–R to the Commission. *See* Form ATS and Form ATS–R Instructions. In addition, Rule 301(b)(2)(vii) requires that an ATS file copies of its Form ATS filings with the examining authority of the SRO with which it is registered (*e.g.,* FINRA) at the same time it files with the Commission, and upon request, the ATS must provide its SRO's surveillance personnel with duplicate Form ATS–R filings. *See* 17 CFR 242.301(b)(2)(vii).

[697] Rule 301(b)(2)(vii) of Regulation ATS specifies that reports on Form ATS shall be considered filed upon receipt by the Division of Trading and Markets, at the Commission's principal office in Washington, DC *See* 17 CFR 242.301(b)(2)(vii).

[698] *See infra* note 701 and accompanying text.

[699] Accordingly, the Commission is proposing to delete the provisions of Rule 301(b)(2)(vii) related to paper submission. Specifically, the Commission is proposing to delete the sentence that the reports shall be considered filed ''upon receipt by the Division of Trading and Markets, at the Commission's principal office in Washington, DC'' Additionally, although the Commission would continue to require that duplicates of filings on Form ATS be provided to the SRO that is the examining authority for each ATS, and that duplicates of the Form ATS–R be made available to the surveillance personnel of such SRO upon request, the Commission proposes to eliminate the reference to ''originals'' in Rule 301(b)(2)(vii) because paper reports will no longer be furnished to the Commission and there will therefore be no ''original'' version of the reports.

[700] The Commission notes that the proposed provisions would conform to similar provisions of Rule 304, which provide for the electronic filing of Form ATS–N. *See* 17 CFR 242.304(c).

[701] The Commission proposes to eliminate the language in the Form ATS instructions and Form ATS–R instructions requesting that an ATS type all information because an ATS would not otherwise have the option to handwrite any responses. The instructions for both forms would be amended to eliminate the option to use a ''reproduction'' of the forms. The Commission also believes it is redundant to state that the Form ATS or Form ATS–R must be the ''current version'' as the ATS is required to attest that the form is ''current.'' The Commission also proposes to delete the requirement to attach an execution page with original manual signatures for Form ATS because, as discussed above, Form ATS and Form ATS–R would be signed electronically and thus there would be no need for an execution page. The Commission also proposes to delete the instruction that the name of the alternative trading system, CRD number, SEC file number, and report period dates be listed on each page, as this requirement will be unnecessary because the Form ATS or Form ATS–R will be submitted as a single submission. Because Form ATS and Form ATS–R would be submitted via EDGAR, the Commission is also proposing to delete references to submitting the ''original'' and ''copies'' of the form to the Commission at the Commission's mailing address.

[702] 17 CFR part 232. This is also consistent with the requirements for Form ATS–N.

[703] The Form ATS Instructions state that ''Form ATS shall not be considered filed, unless it complies with applicable requirements.''

[704] Rule 303 of Regulation ATS provides the record preservation requirements for ATSs. *See* 17 CFR 242.303.

[705] *See infra* Section V.C.

[706] *See supra* note 180 and accompanying text.

[707] *See* Rule 301(b)(2)(ii)–(iv).

amendment.[708] Requiring an ATS to specify the type of amendment would better enable the Commission to determine whether an ATS is in compliance with Regulation ATS. The Commission also proposes requiring an ATS that is filing a cessation of operations report to provide the date that the ATS ceased to operate, which is not currently required on Form ATS. The Commission believes that having information about the date that the ATS ceased to operate would enable the Commission to determine more readily whether an ATS is, or was, in compliance with Regulation ATS.[709]

The Commission is also re-proposing to amend Form ATS and Form ATS–R to change the solicitation of information relating to the name of the broker-dealer operator and the registration and contact information of the broker-dealer operator. Because many broker-dealer operators of ATSs engage in brokerage and/or dealing activities in addition to operating an ATS, and some broker-dealers operate multiple ATSs, the name of the broker-dealer operator of an ATS often differs from the commercial name under which the ATS conducts business. To identify the broker-dealer operator of an ATS and to assist the Commission in collecting and organizing its filings and assessing whether the ATS has met its requirement to register as a broker-dealer, Forms ATS and ATS–R would require the ATS to indicate the full name of the broker-dealer operator of the ATS, as it is stated on Form BD, in Item 1 of Form ATS and Form ATS–R. To further facilitate compliance with the requirements of Regulation ATS, as proposed, Form ATS and Form ATS–R would require the ATS to indicate whether the filer is a broker-dealer registered with the Commission and whether the broker-dealer operator has been authorized by a national securities association to operate an ATS. Such requirements would conform to the proposed requirements of Form ATS–N.[710] The Commission is proposing to conform Item 1 of Form ATS and Form ATS–R[711] to the requirements of Form ATS–N, which is currently filed electronically. In addition, the Commission is proposing to add to Item 1 of Form ATS and Form ATS–R a requirement that the ATS provide the broker-dealer operator's LEI, if the broker-dealer operator has an LEI,[712] and the MPID of the broker-dealer operator.[713] These requests would help the Commission in identifying and corresponding with ATSs and would conform to the identifying information on Form ATS–N, as proposed to be revised.[714] To determine whether the compliance transition rules applicable to Newly Designated ATSs apply, the Commission is also proposing to require the ATS to indicate if it is a Newly Designated ATS in Item 2.

In addition, to facilitate the electronic filing of Form ATS, the Commission is proposing to revise Form ATS to provide that the narrative disclosures be included in a single document, rather than multiple exhibits.[715] The ATS would be required to provide the information currently required in Exhibits A, B, C, E, F (other than a copy of the ATS's subscriber manual and any other materials provided to subscribers), G, H, and I in a single document. Because the subscriber manual may be lengthy, it would be more efficient for the ATS to provide a copy of its subscriber manual and any other materials provided to subscribers, which are currently required to be included in Exhibit F, as a separate, new Exhibit A. In addition, the Commission is proposing new Exhibit B, which would include a copy of the constitution, articles of incorporation or association, with all amendments, and of the existing by-laws or corresponding rules or instruments, whatever the name, of the alternative trading system. Today, an ATS may, in lieu of attaching such documents, indicate that the ATS makes such information publicly available on a continuous basis on an internet site controlled by the ATS and indicate the website of the ATS. Because the Commission is requiring the ATS to provide its website in Part I,[716] the Commission is proposing to include a checkbox for the ATS to select if, in lieu of filing, the ATS certifies that the information requested under the exhibit is available at the website above and is maintained on a continuous basis and is accurate as of the date of the filing.

The Commission is also re-proposing to amend Form ATS–R to make it easier for the Commission staff to identify if the ATS has met its reporting obligations. First, the Commission is proposing to require an ATS to specify whether it is filing a quarterly report amendment under Rule 301(b)(9)(i) or a report for an ATS that has ceased to operate under Rule 301(b)(9)(ii) and, if the latter, to indicate the date the ATS ceased to operate. Requiring an ATS to indicate its type of Form ATS–R filing would enable the Commission to more effectively review Form ATS–R submissions and determine whether an ATS is in compliance with Regulation ATS. The Commission is also proposing

[708] The Commission is also proposing to add cites to the relevant rule text next to the check boxes on Form ATS identifying whether the ATS is filing an Initial Operation Report (''IOR''), amendment to IOR, or a cessation of operations report.

[709] *See* Rule 301(b)(2)(v) (requiring an ATS to promptly file a cessation of operations report on Form ATS in accordance with the instructions therein upon ceasing to operate as an ATS).

[710] *See supra* Section IV.D.3.

[711] Form ATS and Form ATS–R currently ask for the ATS's main street address, mailing address, business telephone number and facsimile number, and the contact information for the ATS's contact person. The Commission is proposing to move the information requests for the name and title and telephone number of the contact employee to the signature block on the form, and to request an email address for such person and not require the facsimile number. The proposed signature block would ask for the primary street address and mailing address of the ATS. The current certifications required in Form ATS and Form ATS–R, including that the information filed is current, true, and complete, would remain unchanged. However, the Commission is proposing to delete the provision allowing for service of any civil action pursuant to confirmed telegram and instead, permit service of any civil action via email. The signature block on Form ATS and Form ATS–R would conform to the signature block in Form ATS–N, as proposed. *See supra* Section IV.D.6.

[712] *See supra* note 506.

[713] *See supra* Section IV.D.3 (proposing requiring the ATS to disclose the MPID of its broker-dealer operator).

[714] The Commission proposes to replace in Item 1 of Form ATS and Form ATS–R the requests for the ATS's main street address, mailing address, and business telephone number and facsimile number with a requirement that the ATS provide the primary, and if any, secondary physical street address of the ATS's matching system, as well as a URL address for its website if it has a website. Knowing the location of the matching system address and secondary matching system address could be useful to the Commission in the event of, for instance, a natural disaster that could impact market participants' ability to trade in the ATS and potential latency that could be experienced due to the location of the secondary site of the ATS. The Commission is also requesting the full name of the national securities association of the broker-dealer operator, the effective date of the broker-dealer operator's membership with the national securities association, and MPID of the ATS. In addition, because any current or former names of the ATS would be searchable on EDGAR and there will be multiple identifiers included on the form, including MPID, the Commission is proposing to delete the requirement that the ATS indicate if it is changing its name and list its former name.

[715] In response to the 2020 Proposal, one commenter stated that current Form ATS Exhibit F, which requires the ATS to provide certain specified information about its operations and procedures, should be amended to follow the same structure as current Form ATS Exhibit G, which requires a ''brief description'' of the ATS's procedures for reviewing system capacity, security, and contingency planning procedures to provide ATS operators with latitude in the manner in which they provide information to the Commission. *See* ICE Bonds Letter I at 6–7. The Commission is not proposing a change to the structure of Exhibit F of Form ATS to conform to the structure of Exhibit G. The structures of Exhibits F and G are not dissimilar in that they both require an ATS to provide a description of ATS policies and procedures and that the information solicited by Exhibit F is important for the Commission to understand and oversee ATSs.

[716] *See supra* note 714.

to amend Form ATS–R to ask whether the ATS was subject to the fair access obligations under § 242.301(b)(5) during any portion of the period covered by the report by adding a corresponding box for the ATS to check ''yes'' or ''no.'' Currently, Form ATS–R requires an ATS that is subject to the Fair Access Rule to report a list of all persons for whom access to the ATS was granted, denied, or limited during the period covered by the Form ATS–R.[717] Asking the ATS to indicate whether the ATS was subject to the Fair Access Rule during any portion of the period covered by the report would facilitate the Commission's review of Form ATS–R submissions.

The Commission is also proposing changes to the Form ATS–R categories of securities to modernize them and add more specificity with regard to all categories of securities. Form ATS–R currently requires ATSs to indicate the total dollar volume of government securities transactions in the period covered by the report. The Commission is proposing to require that ATSs specify the total dollar volume of transactions in ''U.S. Treasury Securities'' and ''Agency Securities'' under the heading ''Government securities.'' [718] As currently, ATSs would also be required to indicate the total dollar volume in government securities overall. This change would help the Commission facilitate compliance with the thresholds for the Fair Access Rule and Regulation SCI, which the Commission is proposing would be based on trading volume in U.S. Treasury Securities and Agency Securities.[719] To avoid double-reporting of transactions in after-hours trading (reported under Item 6), the Commission is proposing to specify that Item 4 pertains to transactions ''other than those for after-hours trading.'' In addition, the Commission is proposing to amend Form ATS–R to update the descriptions of certain categories of securities for which volume is required to be reported on Form ATS–R by an ATS. Specifically, the Commission is proposing to delete the categories of securities, ''Nasdaq National Market Securities'' and ''Nasdaq SmallCap Market Securities,'' reported in Items 4 and 6 of Form ATS–R.[720] The proposal to require ATSs to file Form ATS–R electronically via EDGAR would allow the Commission staff to easily ascertain on which national securities exchanges the equity securities the ATS traded during the applicable period, as disclosed in Exhibit B, are traded. Therefore, it would no longer be necessary to separate out the total volume of securities traded on the Nasdaq markets from the total volume of securities traded on other national securities exchanges. The proposal would require ATSs to report the total volume previously reported under the ''Nasdaq National Market Securities'' and ''Nasdaq SmallCap Market Securities'' categories under ''Listed Equity Securities.''

The Commission is proposing to require ATSs to break down the volume for corporate debt securities, currently reported in Item 4J, by U.S. and non-U.S. corporate debt securities. Non-U.S. corporate debt securities would include debt securities issued by a foreign issuer (excluding a foreign government) in emerging markets as well as non-emerging markets. In addition, the Commission is adding new Item 4L to require ATSs to report total dollar volume for foreign sovereign debt securities, which currently are required to be reported under other debt securities in Item 4N. Foreign sovereign debt securities would be defined in Instruction B of Form ATS–R as any security other than an equity security, as defined in § 240.3a11–1, issued or guaranteed by a foreign government, as defined in § 240.3b–4.[721] Creating subcategories of corporate debt securities and a reporting requirement for foreign sovereign debt securities would improve the quality of data that the Commission already gathers through Form ATS–R. In addition, the proposed reporting requirements would help the Commission further understand the amount of trading that occurs on the ATSs for corporate bonds and foreign sovereign debt securities markets.

The Commission is also proposing to add new Items 4N and 4O to Form ATS–R, which would require ATSs to disclose the total unit and dollar volume of transactions in repurchase agreements and reverse repurchase agreements. Specifically, the Commission is proposing to require ATSs to disclose the total unit [722] and dollar volume of repurchase and reverse repurchase transactions broken down by (1) whether the transaction is overnight or term; [723] (2) whether the transaction is triparty [724] or bilateral; [725] and (3) the type of securities used to finance the collateral—*i.e.,* NMS stocks, U.S. Treasury Securities, Federal Agency Securities, Agency Mortgage-Backed Securities, municipal securities, U.S. and non-U.S. corporate debt securities, asset-backed securities, foreign sovereign debt securities, and other securities.[726] If an ATS traded repurchase or reverse repurchase agreements collateralized with other securities, the ATS would list the other types of securities in proposed Item 4N or 4O. In the Commission's experience, some ATSs that trade repurchase or reverse repurchase agreements, which are currently required to be disclosed as debt securities on Item 4N of Form ATS–R, currently provide in Item 5B of

[717] *See* Form ATS–R and Form ATS–R Instructions, No. 8.

[718] The Commission is proposing to add to the Form ATS–R instructions the definitions of U.S. Treasury Security and Agency Security, which would conform to the definitions the Commission is proposing in Rule 300(o) and (p), respectively.

[719] *See supra* Sections III.B.4 and III.C.

[720] Currently, any equity securities traded on the Nasdaq Global Market are required to be reported under ''Nasdaq National Market Securities,'' and any equity securities traded on the Nasdaq Capital Market are required to be reported under ''Nasdaq SmallCap Market Securities.'' ''Listed Equity Securities'' include all other equity securities listed on any other markets or national securities exchanges, including the Nasdaq Global Select Market. Any rights and warrants are required to be reported under the ''Rights and Warrants'' category even if they are listed on a national securities exchange. As proposed, Items 4B, 4C, 6B, and 6C would be deleted, and therefore, Items 4D through 4N and Item 6D would be re-numbered.

[721] ''Debt Securities'' is defined as ''any security other than an equity security, as defined in § 240.3a11–1'' in Form ATS–R. *See* Instruction B of Form ATS–R. Section 240.3b–4 (Rule 3b–4(a) under the Exchange Act) defines ''foreign government'' as the government of any foreign country or of any political subdivision of a foreign country. *See* 17 CFR 240.3b–4.

[722] For repurchase or reverse repurchase agreements collateralized with a basket or group of securities, ''total unit volume of transactions'' would mean the number of units within each basket or group rather than the number of baskets or groups.

[723] Overnight repo trades end in one business day, whereas term repos mature on a specific future business day that is more than one business day. *See, e.g.,* Office of Financial Research, U.S. Repo Market Data Release Methodology for Tri-party Repo, *available at https://www.financialresearch.gov/data/files/2021-04-Methodology-TPR.pdf;* Office of Financial Research, U.S. Repo Market Data Release Methodology for DVP Cleared Repo, *available at https://www.financialresearch.gov/data/files/2021-04-Methodology-DVP.pdf.*

[724] *See supra* note 521. Triparty repurchase and reverse repurchase transactions would include triparty trades between members that participate in the Fixed Income Clearing Corporation's (''FICC'') General Collateral Financing (GCF) Repo Service. On the other hand, repurchase and reverse repurchase transactions in the FICC's Delivery vs. Payment (''DVP'') Repo Service would be reported under the bilateral category.

[725] *See supra* note 522.

[726] As a result, ATSs would report the total unit and dollar volume of transactions for each of 80 categories of repos: 2 types of agreements (repurchase or reverse repurchase) × 2 transaction types (overnight or term) × 2 party types (bilateral or triparty) × 10 collateral types (NMS stocks, U.S. Treasury Securities, Federal Agency Securities, Agency Mortgage-Backed Securities, municipal securities, U.S. corporate debt securities, non-U.S. corporate debt securities, asset-backed securities, foreign sovereign debt securities, or other securities).

Form ATS–R on a voluntary basis a breakdown of nominal trade value of each of these types of securities. Adding new Items 4N and 4O to Form ATS–R to require that ATSs provide the total unit and dollar volume of transactions in repurchase and reverse repurchase agreements would require all ATSs that trade repurchase or reverse repurchase agreements to take a consistent approach in providing this information. The Commission understands that certain transaction information about repurchase and reverse repurchase agreements is publicly available.[727] However, individual ATSs are not currently required to provide the Commission with information breaking down the types of transactions in repurchase and reverse repurchase agreements. In addition, transactions in repurchase and reverse repurchase agreements are not generally required to be reported to an SRO, and the absence of information about the trading of repurchase and reverse repurchase agreements that occur on ATSs impedes the Commission's oversight of these markets. The proposed reporting requirement would enhance the Commission's oversight of ATSs that trade repurchase and reverse repurchase agreements.

Finally, the Commission is proposing to add new Item 5C, which would require an ATS to list the types of listed options reported in Item 4F of Form ATS–R. Item 4F of Form ATS–R currently requires ATSs to disclose the total unit volume and dollar volume of transactions in listed options. Under new Item 5C, an ATS might indicate, for example, that it trades equity options and options on government securities. This would provide the Commission with more specific information about the types of options that each ATS trades.

In addition, because the Commission is proposing to change the definition of ''exchange'' to include systems that use trading interest, the Commission is proposing to revise Form ATS to require information related to the entry of ''trading interest.'' Communication Protocol Systems that transact in securities other than NMS stocks or government securities or repos will be required to file Form ATS if they choose to comply with Regulation ATS and the resulting disclosures will help the Commission oversee these systems. In addition, the Commission is proposing to include in Form ATS the definition of ''trading interest'' identical to that proposed in Rule 3b–16(e) and Rule 300(q).[728] The Commission is also proposing to change the definition of ''subscriber'' to conform to the changes the Commission is proposing in Rule 300(b).[729] Form ATS Item 3.g (current Exhibit F.a) requests that the ATS provide information about ''the manner of operations of the alternative trading system.'' [730] An ATS that either operates a Communication Protocol System, or an order-driven system, would be required to provide information about the manner of operations on Form ATS that is akin to information provided in response to in Part III of Form ATS–N (*e.g.,* display, connectivity, segmentation, market data, counterparty selection).[731] For example, ATSs that use orders generally should provide information about order types and sizes, and the trading facilities and rules for bringing together the orders of buyers and sellers on the ATS. ATSs that use non-firm trading interest generally should provide information about the communication protocols and functionalities of the ATS, including the use of messages, requirements related to the size of trading interest, and procedures governing the communication protocols.

Request for Comment

162. Would the proposed changes to Form ATS and Form ATS–R enhance the Commission's oversight of ATSs? Do commenters disagree with any of the proposed modifications? If so, what alternatives should the Commission implement?

163. Form ATS–R requires an ATS to quarterly report volume of transactions for certain securities, all subscribers that were participants in the ATS, and securities that were traded in the ATS. Should the Commission adopt amendments to Form ATS–R to add, change, or modify any of the requests for information on Form ATS–R? Are the current categories of securities and the proposed categories of securities for reporting transaction volume to the Commission appropriate?

164. Should Form ATS–R require ATSs to disclose total unit volume in government securities, U.S. Treasury Securities, and/or Agency Securities?

165. Proposed Items 4N and 4O of Form ATS–R would require ATSs to report unit and dollar volume of transactions in repurchase and reverse repurchase agreements broken down by, among other categories, whether the transaction is triparty or bilateral. Do commenters believe that categorizing repurchase and reverse repurchase agreements into these two segments would yield useful information to the Commission? Do commenters believe that the Commission should require ATSs to separately report volumes for repurchase and reverse repurchase agreements in the FICC's GCF Repo Service and FICC's DVP Service rather than include them under volumes for triparty and bilateral, respectively? Are there any types of securities, not otherwise covered in proposed Items 4N and 4O, that are used as collateral in repurchase and reverse repurchase agreements?

166. Proposed Items 4N and 4O of Form ATS–R would require ATSs to report transaction volumes of repurchase and reverse repurchase agreements in total unit and dollar volume. Do commenters believe that ATSs should be required to provide the unit volume as well as the dollar volume?

167. Are there characteristics unique to repurchase or reverse repurchase agreements collateralized with a basket or group of securities that would make reporting those repurchase or reverse repurchase agreements in both unit and dollar volume in Form ATS–R unduly burdensome or inappropriate for ATSs? For such basket repos, the Commission is proposing to define ''total unit volume of transactions'' as the number of units within each basket or group rather than the number of baskets or groups. Do commenters believe ''unit'' should be defined differently for basket repos?

168. Proposed Item 4J of Form ATS–R would require ATSs to report dollar volume of transactions in U.S. and non-U.S. corporate debt securities. Do commenters believe that the two subcategories would yield useful information to the Commission? Non-U.S. corporate debt securities would include debt securities issued by a foreign issuer in emerging markets as well as non-emerging markets. Do commenters believe that the Commission should require ATSs to

[727] For instance, the Treasury Department's Office of Financial Research (''OFR'') collects data on repurchase agreements cleared by triparty clearing banks and major central counterparties, such as the FICC, and publishes aggregate statistics on these transactions broken out by three venues—which are the triparty market, FICC's DVP Service, and FICC's GCP Repo Service—collateral, tenor, volume, and rates. *See* OFR, U.S. Repo Market Data Release, *available at https://www.financialresearch.gov/data/us-repo-data/.*

[728] *See supra* note 98 and accompanying text.

[729] *See id.*

[730] *See* Item 4.g of Form ATS, as proposed to be revised.

[731] *See* NMS Stock ATS Adopting Release, *supra* note 2, at 38869 (describing that many of the disclosure items on Form ATS–N are also required by respondents in whole or in part on current Form ATS). *See also* NMS Stock ATS Proposing Release, *supra* note 29, at 81099–102 (describing that some of the disclosures of Form ATS–N that the Commission was proposing were already required under Form ATS).

further break down the volume for non-U.S. corporate debt securities by type of market—emerging and non-emerging? If so, how should ''emerging markets'' be defined for the purpose of reporting on Form ATS–R? Do commenters believe ''emerging markets'' should be defined by country or region?

169. Do commenters believe that the Commission should require ATSs to report total dollar volume of foreign sovereign debt securities on Form ATS–R, as proposed? Should the proposed definition of sovereign debt securities be modified in any way?

170. Instruction A.1 of Form ATS–R requires ATSs to file Form ATS–R within 30 days after the end of each calendar quarter, or more frequently upon the request of the Commission. Do commenters believe that the Commission should request information from ATSs on Form ATS–R on a more frequent basis (*e.g.,* monthly)? Do commenters believe that such request would be unduly burdensome for ATSs?

171. Form ATS requires an ATS to report information to the Commission about the ATS, including but not limited to, types of subscribers and differential access to services, types of securities traded, counsel, governance documents, service providers, manner of operations, including entry of trading interest, order execution procedures, clearance and settlement procedures, and trade reporting, procedures for reviewing system capacity, security, and contingency planning, procedures to safeguard subscriber funds and securities, and direct owners. Should the Commission adopt amendments to Form ATS to add, change, or modify any of the requests for information on Form ATS? The proposed changes to Rule 3b–16 would require Communication Protocol Systems that trade securities other than NMS stocks or government securities or repos to file Form ATS. Are there any changes that the Commission should make to Form ATS that would be relevant to Communication Protocol Systems? If so, please identify the request and explain how it should be amended.

172. Should the Commission amend Form ATS to require disclosures similar to disclosures required on Part II of Form ATS–N, which requests information about ATS-related activities of the broker-dealer operator and its affiliates?

173. Should the Commission amend Form ATS to include questions similar to those in Part III of Form ATS–N, which requests information about the manner of the ATS's operations?

174. Are there any specific items on Form ATS–N, currently or as proposed to be revised, that the Commission should incorporate into Form ATS?

175. Should the Commission amend Rule 301(b)(2) and Form ATS to provide that Form ATS is publicly disseminated? If so, should any of the information on Form ATS be kept confidential?

C. Amendment to Rule 301(b)(2)(vii)

Rule 301(b)(2)(vii) provides that all reports filed pursuant to Rules 301(b)(2) and (9) are ''deemed confidential.'' [732] As a result, the Commission does not make Form ATS and Form ATS–R disclosures available to the public, including the types of securities that the ATS trades or intends to trade.[733] Currently, the Commission makes public on a monthly basis on the Commission website information about ATSs that have a Form ATS on file with the Commission, which includes the name of the ATS, any name(s) under which business is conducted, and the location of each ATS. The list also identifies each ATS that filed a cessation of operations report in the prior month. While the Commission does not approve Form ATS filings, the list is designed to inform the public about ATSs that have noticed their operations with the Commission.

The Commission is re-proposing to amend Rule 301(b)(2) to clarify that being ''deemed confidential'' means receiving confidential treatment under a relevant Commission regulation subject to applicable law [734] and to eliminate confidential treatment for information about the type(s) of securities that the ATS trades as disclosed in the Exhibit B, subpart (a) of Form ATS and Exhibit B of Form ATS–R. The Commission does not believe that ATSs will be harmed by these disclosures because a vast majority of ATSs currently publicize the types of securities in which they transact, for example, on the website for the ATS or the website of the ATS broker-dealer operator. The Commission publishes on its website a list of ATSs that have an active Form ATS on file with the Commission; however, information about types of securities traded is not provided on that list and the Commission frequently receives requests from the public and regulators for more detail in the Commission's publication about the types of securities traded by ATSs. Disclosing this information could help the public understand a fundamental aspect of an ATS. To allow for this narrow exception, the Commission is proposing to amend Rule 301(b)(2)(vii) of Regulation ATS to state that the content of reports filed under Rule 301(b)(2) and (9) ''(except for types of securities traded provided on Form ATS and Form ATS–R) will be accorded confidential treatment subject to applicable law.''

Request for Comment

176. Should the Commission amend Rule 301(b)(2)(vii) to make Form ATS, Form ATS–R, or both public? Should the Commission amend Rule 301(b)(2)(vii) to make any other disclosures provided on Form ATS or Form ATS–R public?

177. Should the Commission eliminate confidential treatment for information about the type(s) of securities that the ATS trades as disclosed on Form ATS and Form ATS–R?

VI. General Request for Comment

The Commission is requesting comments from all members of the public. The Commission particularly requests comment from the point of view of persons who operate ATSs that would meet the proposed definition of Government Securities ATS, subscribers to those systems, and investors. The Commission seeks comment on all aspects of the proposed rule amendments and proposed form, particularly the specific questions posed above. Commenters are requested to provide empirical data in support of any arguments or analyses. With respect to any comments, the Commission notes that they are of the greatest assistance to its rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to the Commission's proposals where appropriate.

VII. Paperwork Reduction Act

Certain provisions of the proposed rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[735] The Commission is submitting these collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency

[732] *See* 17 CFR 242.301(b)(2)(vii).

[733] The Commission notes, however, that Form ATS and Form ATS–R are available to the examination staff of state securities authorities and SROs. *See* Instruction A.7 of Form ATS and Form ATS–R. *See also* 17 CFR 242.301(b)(2)(vii) (requiring duplicate of filings on Form ATS be provided to the surveillance personnel designated by the SRO that is the examining authority for each ATS, and that duplicates of the Form ATS–R be made available to the surveillance personnel of such SRO upon request).

[734] *See, e.g.,* 17 CFR 200.83, 240.24b–2.

[735] 44 U.S.C. 3501 *et seq.*

may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number. The Commission is proposing to alter seven existing collections of information and apply such collections of information to new categories of respondents. The titles of such existing collections of information are:

Rule	Rule title	OMB control No.
Rule 301 of Regulation ATS	Regulation ATS Rule 301 Amendments	3235–0509
Rule 302 of Regulation ATS	Rule 302 (17 CFR 242.302) Recordkeeping Requirements for Alternative Trading Systems.	3235–0510
Rule 303 of Regulation ATS	Rule 303 (17 CFR 242.303) Record Preservation Requirements for Alternative Trading Systems.	3235–0505
Rule 304 of Regulation ATS	Regulation ATS Rule 304 and Form ATS–N	3235–0763
17 CFR 240.15b1–1 (Rule 15b1–1 under the Exchange Act).	Form BD and Rule 15b1–1 Application for Registration as a Broker-Dealer	3235–0012
17 CFR 232.10(b) (Rule 10(b) of Regulation S–T).	Form ID	3235–0328
Rules 1001 through 1007 of Regulation SCI.	Regulation SCI and Form SCI	3235–0703

A. Summary of Collection of Information

The proposed amendments create burdens under the PRA by (1) adding new categories of respondents to the seven existing collections of information noted above and (2) modifying the requirements of two of those collections, as noted below. The proposed amendments do not create any new collections of information. The collections of information and applicable categories of new respondents[736] are summarized in the following table: [737]

Collection of information	Rule	Burden description	Respondent categories
Rule 301 of Regulation ATS and Forms ATS and ATS–R.	Rule 301(b)(2)	Revised Burden: File initial operations report using the proposed modernized Form ATS.	Certain Communication Protocol Systems. All Other Form ATS Filers.
	Rule 301(b)(5)	Comply with fair access standards recordkeeping and fair access notice requirements for certain securities, including, as proposed, U.S. Treasury Securities and Agency Securities.	Certain Communication Protocol Systems. Certain Legacy Government Securities ATSs. Certain NMS Stock ATSs. Certain Other ATS Filers.
	Rule 301(b)(6)	Comply with ATS-specific systems capacity, integrity and security recordkeeping and systems outages notice requirements.	Certain Communication Protocol Systems.
	Rule 301(b)(9)	Revised Burden: File quarterly reports using the proposed modernized Form ATS–R.	All Communication Protocol Systems. All Legacy Government Securities ATSs. All NMS Stock ATSs. All Other Form ATS Filers.
	Rule 301(b)(10)	Comply with written safeguards and procedures requirement.	All Communication Protocol Systems. All Currently Exempted Government Securities ATSs.
Rule 302 of Regulation ATS	Rule 302	Comply with ATS recordkeeping requirements (required by Rule 301(b)(8)).	All Communication Protocol Systems. All Currently Exempted Government Securities ATSs.
Rule 303 of Regulation ATS	Rule 303	Comply with ATS record preservation requirements (required by Rule 301(b)(8)).	All Communication Protocol Systems. All Currently Exempted Government Securities ATSs.
Rule 304 of Regulation ATS and Form ATS–N.	Rule 304	Revised Burden: File initial Form ATS–N (required by Rule 301(b)(2)(viii)), as proposed to be revised.	Certain Communication Protocol Systems. All Legacy Government Securities ATSs. All NMS Stock ATSs.
Rule 15b1–1 and Form BD	Rule 15b1–1	Register as a broker-dealer using Form BD (required by Rule 301(b)(1)).	Certain Communication Protocol Systems. Certain Currently Exempted Government Securities ATSs.
Form ID	Rule 101 of Regulation S–T.	Apply for EDGAR access using Form ID	Certain Communication Protocol Systems. Certain Currently Exempted Government Securities ATSs.

[736] *See infra* Section VII.C for a description of the categories of respondents.

[737] Unless otherwise described, none of the existing information collections are being revised with new requirements.

Collection of information	Rule	Burden description	Respondent categories
Regulation SCI	Rules 1001–1007 of Regulation SCI.	Comply with Regulation SCI	Certain Communication Protocol Systems. Certain Legacy Government Securities ATSs.

B. Proposed Use of Information

The existing information collections affected by the proposed amendments are used as described below:

1. Rule 301 of Regulation ATS and Forms ATS and ATS–R

Rule 301 of Regulation ATS sets forth the conditions that an ATS must comply with to be exempt pursuant to Exchange Act Rule 3a1–1(a)(2). Rule 301 requires an ATS to register as a broker-dealer. Rule 301 further requires all ATSs that wish to comply with Regulation ATS to file an initial operation report on Form ATS. The initial operation report requires information regarding operation of the system including the manner of operation, how subscribers access the trading system, and the types of securities traded. ATSs are also required to notice changes in their operations by filing amendments to Form ATS to the Commission.

In addition, Regulation ATS requires ATSs to provide quarterly transaction reports on Form ATS–R. ATSs are also required to file cessation of operations reports on Form ATS. The gathering of such information permits the Commission to oversee the operation of such systems and track the growth of their role in the securities markets.

The Commission is proposing revisions to Rule 301(b)(2), Form ATS, and Form ATS–R to modernize Form ATS and Form ATS–R and to provide that they are filed electronically. The Commission believes that, among other benefits, the electronic filing of Forms ATS and ATS–R would increase efficiencies and decrease filing costs for ATSs.

ATSs with significant volume are required to comply with requirements for fair access pursuant to Rule 301(b)(5) of Regulation ATS. As proposed, such ATSs would be required to establish and apply reasonable written standards for granting, limiting, and denying access to the services of the ATS and make and keep records of all grants of access including, for all subscribers, the reasons for granting such access, and all denials or limitations of access, and the reasons for each applicant for denying or limiting access.[738] The Commission is proposing to apply the Fair Access Rule to the trading of U.S. Treasury Securities and Agency Securities. The Commission believes that, today, the principles undergirding the Fair Access Rule are equally relevant to a Government Securities ATS and amending the Fair Access Rule to include the trading of U.S. Treasury Securities and Agency Securities would help ensure the fair treatment of potential and current subscribers to ATSs that consist of a large percentage of trading volume in these two types of securities.

ATSs with significant volume are also required to comply with requirements for systems capacity, integrity and security pursuant to Rule 301(b)(6), which, together with the requirements under Rule 302, requires ATSs to preserve any records made in the process of complying with the systems capacity, integrity, and security requirements. In addition, such ATSs are required to notify Commission staff of material systems outages and significant systems changes.

The Commission uses the information provided pursuant to Rule 301 to comprehensively monitor the growth and development of ATSs to confirm that investors effecting trades through the systems are adequately protected, and that the systems do not impede the maintenance of fair and orderly securities markets or otherwise operate in a manner that is inconsistent with the Federal securities laws. In particular, the information collected and reported to the Commission by ATSs enables the Commission to evaluate the operation of ATSs with regard to national market system goals, and monitor the competitive effects of these systems to ascertain whether the regulatory framework remains appropriate to the operation of such systems.

Without the information provided on Forms ATS and ATS–R, the Commission would not have readily available information on a regular basis in a format that would allow it to determine whether such systems have adequate safeguards. Further, in the absence of Rule 301, the Commission would not regularly obtain uniform trading data to identify areas where surveillance by SROs may be more appropriately tailored to the detection of fraudulent, deceptive and manipulative practices that may be peculiar to an automated trading environment.

2. Rule 302 of Regulation ATS

Rule 302, as proposed to be amended,[739] would require ATSs to make a record of subscribers to the ATS, daily summaries of trading in the ATS and time-sequenced records of trading interest information in the ATS. Regulators (including the Commission and SROs) use the information contained in the records required to be preserved by Rule 302 to ensure that ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. Without the data required by Rule 302, regulators would be limited in their ability to comply with their statutory obligations, provide for the protection of investors, and promote the maintenance of fair and orderly markets.

3. Rule 303 of Regulation ATS

Rule 303 describes the record preservation requirements for ATSs. Rule 303 also describes how such records must be maintained, what entities may perform this function, and how long records must be preserved.

The information contained in the records required to be preserved by Rule 303 is used by regulators (including the Commission and the SROs) to ensure that ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. Without the data required by Rule 303, regulators would be limited in their ability to comply with their statutory obligations, provide for the protection of investors, and promote the maintenance of fair and orderly markets.

4. Rule 304 of Regulation ATS and Form ATS–N

Rule 304 provides conditions for NMS Stock ATSs seeking to rely on the exemption from the definition of ''exchange'' provided by Rule 3a1–1(a) of the Exchange Act, including to file a Form ATS–N, and for that Form ATS–N to become effective. Form ATS–N requires NMS Stock ATSs to provide information about their manner of operations, the broker-dealer operator, and the ATS-related activities of the broker-dealer operator and its affiliates to comply with the conditions provided under Rule 304. Form ATS–N promotes

[738] *See supra* Section V.A.

[739] *See supra* notes 165–166 and accompanying text.

more efficient and effective market operations by providing more transparency to market participants about the operations of NMS Stock ATSs and the potential conflicts of interest of the controlling broker-dealer operator and its affiliates, and helps brokers meet their best execution obligations to their customers. Operational transparency rules, including Form ATS–N, are designed to increase competition among trading centers in regard to order routing and execution quality.

As discussed above, the Commission is re-proposing to amend Rule 304(a) to require that a Covered ATS, which would include a Government Securities ATS, must comply with Rules 300 through 304 of Regulation ATS, as applicable, to be exempt pursuant to Rule 3a1–1(a)(2). As proposed, all Government Securities ATSs would be required to comply with Rule 304, as proposed to be amended, to file Form ATS–N, as revised.[740]

The Commission is proposing to revise Form ATS–N to include information it previously proposed on Form ATS–G, including a question requiring information about interaction with related markets, which would be required to be responded to by both Government Securities ATSs and NMS Stock ATSs.[741] The Commission is also proposing to reorganize certain questions on Form ATS–N and to require disclosure about any surveillance and monitoring that is conducted with respect to the ATS.[742] The Commission believes that the proposed revisions to Form ATS–N will continue to allow for better comparisons between ATSs, and applying Form ATS–N to Government Securities ATSs will help enable market participants to compare Government Securities ATSs.

The Commission is also proposing certain amendments to Form ATS–N that would apply globally to Form ATS–N unless otherwise noted.[743] The Commission believes that Form ATS–N's public disclosures would provide important information to market participants that would help them better understand these operational facets of Government Securities ATSs and select the best trading venue based on their needs.

5. Rule 15b1–1 and Form BD

The Commission uses the information disclosed by applicants in Form BD: (1) To determine whether the applicant meets the standards for registration set forth in the provisions of the Exchange Act; (2) to develop a central information resource where members of the public may obtain relevant, up-to-date information about broker-dealers, municipal securities dealers, and government securities broker-dealers, and where the Commission, other regulators, and SROs may obtain information for investigatory purposes in connection with securities litigation; and (3) to develop statistical information about broker-dealers, municipal securities dealers, and government securities broker-dealers. Without the information disclosed in Form BD, the Commission could not effectively implement policy objectives of the Exchange Act with respect to its investor protection function.

6. Form ID

The information provided on Form ID allows the Commission staff to review applications for EDGAR access and, if the application is approved, assign identification numbers (if the applicant does not already have an identification number) and access codes to applicants to permit filing on EDGAR. Form ID is essential to EDGAR security.

7. Regulation SCI

Regulation SCI requires certain key market participants to, among other things: (1) Have comprehensive policies and procedures in place to help ensure the robustness and resiliency of their technological systems, and also that their technological systems operate in compliance with the Federal securities laws and with their own rules; and (2) provide certain notices and reports to the Commission to improve Commission oversight of securities market infrastructure.

C. Respondents

The categories of respondents for which the proposed amendments create a burden under the PRA are described below.

1. Legacy Government Securities ATSs

As discussed above, the Commission is re-proposing amendments to Regulation ATS that would require a Currently Exempted Government Securities ATS that seeks to operate pursuant to the exemption from the definition of an ''exchange'' under Exchange Act Rule 3a1–1(a)(2), and thus not be required to be registered as a national securities exchange, to comply with Regulation ATS as proposed[744] and that Current Government Securities ATSs will have to comply with the enhanced requirements for Government Securities ATSs.[745] The Commission estimates the total number of Currently Exempted Government Securities ATSs to be 7[746] and Current Government Securities ATSs to be 17,[747] and some or all of this number will be subject to the following collections of information as estimated below:

Collection of information	Rule	Number of respondents	Description
Rule 301 of Regulation ATS and Forms ATS and ATS–R.	Rule 301(b)(5)	7	The Commission estimates that certain Legacy Government Securities ATSs would satisfy the conditions for the proposed application of the Fair Access Rule to Government Securities ATS and be subject to the related recordkeeping and notice provisions.

[740] *See supra* Section IV.A.

[741] *See supra* Section IV.D.1.

[742] *See supra* Section IV.D.5.

[743] *See supra* Section IV.D.

[744] *See supra* Section III.B.2.

[745] *See supra* Section IV.A.

[746] The Commission estimates that there are 7 Currently Exempted Government Securities ATSs that would be newly subject to the requirements of the exemption under Rule 3a1–1(a)(2) and will be required to comply with the applicable sections of Regulation ATS, as amended. The Commission estimates that 5 such ATSs limit their trading activity to government securities and the other 2 ATSs limit their trading activity to repos.

[747] As of September 30, 2021, 17 Government Securities ATSs currently operate pursuant to a Form ATS currently on file with the Commission.

Collection of information	Rule	Number of respondents	Description
	Rule 301(b)(9)	24	The Commission estimates that all Legacy Government Securities ATSs will have to comply with the requirement to file quarterly reports on the proposed modernized Form ATS–R. The proposal would impose the full currently-authorized baseline burden of filing on Currently Exempted Government Securities ATSs, for which the requirement is new. For Current Government Securities ATSs, the proposal would only impose the marginal new burden of filing using the modernized version of the form.
	Rule 301(b)(10)	7	The Commission estimates that all Currently Exempted Government Securities ATSs will have to comply with the requirement to have written safeguards and written procedures to protect subscribers' confidential trading information.
Rule 302 of Regulation ATS	Rule 302	7	The Commission estimates that all Currently Exempted Government Securities ATSs will have to comply with the recordkeeping requirements for ATSs.
Rule 303 of Regulation ATS	Rule 303	7	The Commission estimates that all Currently Exempted Government Securities ATSs will have to comply with the record preservation requirements for ATSs.
Rule 304 of Regulation ATS and Form ATS–N.	Rule 304	24	The Commission estimates that all Legacy Government Securities ATSs will have to comply with the requirement to file initial Form ATS–N, as proposed to be revised.
Rule 15b1–1 and Form BD	Rule 15b1–1	1	The Commission estimates that certain Currently Exempted Government Securities ATSs currently operated by a bank and not registered as a broker-dealer will have to register using Form BD.
Form ID	Rule 101 of Regulation S–T.	1	The Commission estimates that the same subset of Currently Exempted Government Securities ATSs that are not currently registered as a broker-dealer will also have to file Form ID to apply for EDGAR access.
Regulation SCI	Rules 1001–1007 of Regulation SCI.	1 Legacy Government Securities ATS that is an existing SCI entity and 1 that is a new SCI entity.	The Commission estimates that certain Legacy Government Securities ATSs would meet the specified volume threshold to meet the proposed amended definition of ''SCI alternative trading system'' and be subject to the requirements of Regulation SCI.

2. Communication Protocol Systems

As discussed above, the Commission is proposing to amend Exchange Act Rule 3b–16(a) to cause Communication Protocol Systems to fall within the definition of ''exchange'' and believes that such Communication Protocol Systems would likely choose to register as a broker dealer and be regulated under the Regulation ATS exemption than register as a national securities exchange because of the lighter regulatory requirements imposed on ATSs, as compared to registered exchanges.[748] The Commission estimates the total number of Communication Protocol Systems to be 22,[749] and some or all of this total number will be subject to the following collections of information as estimated below:[750]

Collection of information	Rule	Number of respondents	Description
Rule 301 of Regulation ATS and Forms ATS and ATS–R.	Rule 301(b)(2)	14	The Commission estimates that certain Communication Protocol Systems, which trade securities other than NMS stocks or government securities or repos, would be required to file the proposed modernized Form ATS.

[748] *See supra* Section II.D.

[749] Some of the below estimates could change based on how the Communication Protocol Systems structure their operations if subject to Regulation ATS. For example, the Commission is basing some of the below estimates on the assumption that operators of Communication Protocol Systems that are affiliated with existing broker-dealers would structure their operations so that the existing broker-dealer would operate the ATS to avoid the costs of new broker-dealer registration. In addition, the Commission estimates that 2 Communication Protocol Systems that trade municipal securities or corporate debt securities would meet the volume thresholds to satisfy the conditions for complying with ATS-specific systems capacity, integrity and security recordkeeping as well as systems outages requirements. This number is based on aggregate data reported by broker-dealers and could vary based on how these systems structure their businesses.

[750] The estimated respondents for the Rule 304/Form ATS–N collection of information is based on the assumption that systems that operate multiple market places that are affiliated with a new or existing broker-dealer will all be operated by such broker-dealer, and that such systems will not register multiple broker-dealers to operate multiple affiliated ATSs.

Collection of information	Rule	Number of respondents	Description
	Rule 301(b)(5)	8	The Commission estimates that certain Communication Protocol Systems would meet the volume thresholds in government securities, NMS stocks, corporate debt securities, municipal securities, equity securities that are not NMS stocks and for which transactions are reported to an SRO and be subject to the Fair Access Rule and the related recordkeeping and notice provisions.
	Rule 301(b)(6)	2	The Commission estimates that certain Communication Protocol Systems that trade municipal securities or corporate debt securities and meet certain volume requirements would satisfy the conditions for complying with ATS-specific systems capacity, integrity and security recordkeeping as well as systems outages requirements.
	Rule 301(b)(9)	22	The Commission estimates that all Communication Protocol Systems will have to comply with the requirement to file quarterly reports on the proposed modernized Form ATS–R.
	Rule 301(b)(10)	22	The Commission estimates that all Communication Protocol Systems will have to comply with the requirement to have written safeguards and written procedures to protect subscribers' confidential trading information.
Rule 302 of Regulation ATS	Rule 302	22	The Commission estimates that all Communication Protocol Systems will have to comply with the recordkeeping requirements for ATSs.
Rule 303 of Regulation ATS	Rule 303	22	The Commission estimates that all Communication Protocol Systems will have to comply with the record preservation requirements for ATSs.
Rule 304 of Regulation ATS and Form ATS–N.	Rule 304	8	The Commission estimates that certain Communication Protocol Systems that trade NMS stocks or government securities or repos would be required to file Form ATS–N, as proposed to be revised.
Rule 15b1–1 and Form BD	Rule 15b1–1	6	The Commission estimates that certain Communication Protocol Systems are not currently registered as or affiliated with a broker-dealer and will have to register using Form BD.
Form ID	Rule 101 of Regulation S–T	6	The Commission estimates that the same subset of Communication Protocol Systems that are not currently registered as or affiliated with a broker-dealer will also have to file Form ID to apply for EDGAR access.
Regulation SCI	Rules 1001–1007 of Regulation SCI.	2	The Commission estimates that certain Communication Protocol Systems that trade government securities, NMS stocks, or equity securities other than NMS stocks reported to an SRO would meet the specified volume threshold to meet the proposed amended definition of "SCI alternative trading system" and be subject to the requirements of Regulation SCI.

3. NMS Stock ATSs

As discussed above, the Commission is proposing to revise Form ATS–N to include information it previously proposed on Form ATS–G, including adding questions requiring information about interaction with related markets, surveillance and monitoring on the ATS, and liquidity providers, which would be required to be responded to by both Government Securities ATSs and NMS Stock ATSs.[751] The Commission is also proposing to reorganize certain questions on Form ATS–N.[752] The Commission estimates the total number of NMS Stock ATSs to be 34 [753] and that all will be subject to the following collections of information as estimated below:

Collection of information	Rule	Number of respondents	Description
Rule 301 of Regulation ATS and Forms ATS and ATS–R.	Rule 301(b)(9)	34	The Commission estimates that all NMS Stock ATSs will have to prospectively comply with the requirement to file quarterly reports on the proposed modernized Form ATS–R.

[751] *See supra* Section IV.D.1.

[752] *See id.* and Section IV.D.4–5. In addition, for purposes of calculating whether an ATS meets the Fair Access Rule volume thresholds, the Commission is proposing to aggregate trading volume among certain affiliated ATSs. *See supra* Section V.A. At this time, the Commission estimates that no NMS Stock ATSs would be subject to the Fair Access Rule as a result of the proposed changes to aggregate affiliated ATS trading volume, and that the proposed change would therefore impose no additional burden. *Also see* infra note 1085.

[753] As of September 30, 2021, there are 34 NMS Stock ATSs that have filed an effective Form ATS–N with the Commission. For the purpose of this PRA analysis, NMS Stock ATSs include only those that operate today. The burden on Communication Protocol Systems that the Commission estimates will trade NMS stocks are included in the discussion of that category of respondent. *See supra,* Section VII.C.2; *infra,* Section VII.D.3.

Collection of information	Rule	Number of respondents	Description
Rule 304 of Regulation ATS and Form ATS–N.	Rule 304	34	The Commission estimates that all NMS Stock ATSs will be required to re-file their current electronic Form ATS–N disclosure using Form ATS–N, as proposed to be revised.

4. Other Form ATS Filers

There is set of respondents (''Other Form ATS Filers'') that are currently required to file Form ATS and are neither NMS Stock ATSs nor exclusively [754] Legacy Government Securities ATSs and will continue to have an obligation to file Form ATS after the effective date of any final rule. These filers will incur burdens to comply with the proposed revisions to Forms ATS and ATS–R discussed above.[755] The Commission estimates the total number of Other Form ATS Filers to be 59 [756] and that these respondents will be subject to the following collections of information as estimated below:

Collection of information	Rule	Number of respondents	Description
Rule 301 of Regulation ATS and Forms ATS and ATS–R.	Rule 301(b)(2)	59	The Commission estimates that all Other Form ATS Filers will be required to re-file their current paper Form ATS disclosure using the proposed modernized Form ATS.
	Rule 301(b)(9)	59	The Commission estimates that all Other Form ATS Filers will have to comply prospectively with the requirement to file quarterly reports on the proposed modernized Form ATS–R.

D. Total PRA Burdens

1. Burden of Rule 301 of Regulation ATS and Forms ATS and ATS–R

a. Rule 301(b)(2) Burden on Communication Protocol Systems and Other Form ATS Filers

As discussed above, the Commission is proposing to amend Exchange Act Rule 3b–16(a), which would cause Communication Protocol Systems to fall within the definition of ''exchange'' and believes that such Communication Protocol Systems would likely choose to register as a broker dealer and be regulated under the Regulation ATS exemption.[757] Certain Communication Protocol Systems that trade securities other than NMS stocks or government securities would be subject to requirements under Rule 301(b)(2), including to file an IOR and amendments thereto using the proposed modernized and electronic [758] Form ATS.

Other Form ATS Filers—current Form ATS filers that are not required to file Form ATS–N after the effective date of any final rule—would incur a burden to comply with the requirements to file Form ATS using the proposed modernized form. To comply with the requirements of revised Form ATS, such respondents would be required to re-file their most recently-filed Form ATS IOR or Amendment to IOR using the proposed modernized Form ATS. The Commission estimates an initial burden of 20.5 hours [759] and an annual burden of 5 hours [760] per respondent for complying with Rule 301(b)(2) and the following total initial and annual burdens:

[754] Government Securities ATSs that also have trading activities other than in government securities or repos will be required to separately report that activity on Form ATS after the effective date of any final rule.

[755] *See supra* Section V.B. In addition, for purposes of calculating whether an ATS meets the Fair Access Rule volume thresholds, the Commission is proposing to aggregate trading volume among certain affiliated ATSs. *See supra* Section V.A. At this time, the Commission estimates that no Other Form ATS Filers would be subject to the Fair Access Rule as a result of the proposed changes to aggregate affiliated ATS trading volume, and that the proposed change would therefore impose no additional burden. As discussed above, the Commission is also re-proposing to remove an exclusion from compliance with the Fair Access Rule under Rule 301(b)(5) and the Capacity, Integrity, and Security Rule under Rule 301(b)(6) that is applicable to ATSs that trade equities and also re-proposing revisions to Rule 301(b)(2), Form ATS, and Form ATS–R to modernize Form ATS and Form ATS–R and to provide that they are filed electronically. *See id.* The Commission does not expect, however, that any ATSs will be newly subject to the Fair Access Rule or the Capacity, Integrity, and Security Rule as a result of removing the exclusion. *Also see* infra note 1085.

[756] As of September 30, 2021, there are 61 ATSs that file Form ATS. Two of these trade only government securities or repos and, as proposed, would only be required to file a Form ATS–N and amendments to Form ATS–N after the effective date of any final rule. Accordingly, the Commission estimates that 59 ATSs will continue to file Form ATS amendments.

[757] *See supra* Section II.D.

[758] The Commission believes that the proposed electronic submission of Forms ATS and ATS–R would impose no additional burden on existing filers under Regulation ATS such as Other Form ATS Filers. These respondents would already have been required to register as broker-dealers pursuant to Rule 301(b)(1), and registered broker-dealers have been assigned a CIK number and do not need to submit a Form ID to access EDGAR. A broker-dealer that has never used EDGAR to make electronic submissions may use its assigned CIK number to receive access codes that will allow that broker-dealer operator to submit Form ATS–N filings on EDGAR without needing to apply for a Form ID, so the proposed changes would not impose a burden under the existing Rule 15b1–1 and Form BD or Form ID collections of information on this category of respondents.

[759] The Commission's currently approved baseline burden for the average initial compliance burden for each Form ATS IOR is 20 hours (Attorney at 13 hours + Compliance Clerk at 7 hours). *See* Extension Without Change of a Currently Approved Collection: Regulation ATS Rule 301 Amendments; ICR Reference No. 202101–3235–011; OMB Control No. 3235–0509 (June 9, 2018), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202101-3235-011* (''Rule 301 PRA Supporting Statement''). The Commission is proposing amendments to Part I of Form ATS, which would add an additional burden of 0.5 hours per filing using the modernized form (Compliance Clerk at 0.5 hours), and therefore the average compliance burden for each Form ATS filing would be 20.5 hours. *See supra* Section V.B and *infra* Section VII.E (discussing proposed changes).

[760] The Commission's currently approved baseline burden for the average ongoing compliance burden for each amendment to a Form ATS IOR is 4 hours ((Attorney at 1.5 hours + Compliance Clerk at 0.5 hours) × 2 IOR amendments a year). *See* Rule 301 PRA Supporting Statement, *supra* note 759. The Commission is proposing amendments to Part I of Form ATS, including a requirement applicable to an ATS filing an IOR amendment to attach as Exhibit 3 a marked document to indicate changes to ''yes'' or ''no'' answers and additions or deletions from any Item in Part I, Part II, and Part III, which would add an additional annual burden of 1 hour per ATS using the modernized form (Compliance Clerk at 0.5 hours × 2 IOR amendments a year). Therefore the average compliance burden for each Form ATS filing would be 5 hours. *See supra* Section V.B and *infra* Section VII.E (discussing proposed changes).

Burden type	Respondent type	Number of respondents	Burden per respondent (hours)	Total burden (number of respondents × burden per respondent) (hours)
Initial	Communication Protocol Systems	14	20.5	287
Annual			5	70
Initial	Other Form ATS Filers	59	20.5	1,209.5
Annual			5	295

b. Rule 301(b)(5) Burden on Communication Protocol Systems and Legacy Government Securities ATSs

As discussed above, the Commission is proposing to apply the Fair Access Rule to the trading of U.S. Treasury Securities and Agency Securities. Certain Communication Protocol Systems and Legacy Government Securities ATS that trade U.S. Treasury Securities and Agency Securities and meet the relevant thresholds would be newly subject to the requirements of Rule 301(b)(5) of Regulation ATS.[761] In addition, for purposes of calculating whether an ATS meets the Fair Access Rule volume thresholds, the Commission is proposing to aggregate trading volume among certain affiliated ATSs, which will impose a burden on certain NMS Stock ATSs and Other Form ATS Filers that trade securities subject to the Fair Access Rule.[762] There is no initial burden associated with the currently approved collection of information for this requirement.[763] The Commission estimates an annual compliance burden of 37 hours per respondent[764] and the following total annual burdens:

Respondent type	Number of respondents	Annual burden per respondent (hours)	Total annual burden (number of respondents × annual burden per respondent) (hours)
Communication Protocol Systems	8	37	296
Legacy Government Securities ATSs	7	37	259

c. Rule 301(b)(6) Burden on Communication Protocol Systems

As discussed above, the Commission is proposing to amend Exchange Act Rule 3b–16(a) to cause Communication Protocol Systems to fall within the definition of ''exchange'' and believes that such Communication Protocol Systems would likely choose to register as a broker dealer and be regulated under the Regulation ATS exemption. Certain Communication Protocol Systems that trade municipal and corporate debt securities and meet the relevant thresholds would be newly subject to the systems capacity, integrity, and security recordkeeping and systems outages notice requirements of Rule 301(b)(6) of Regulation ATS. There is no initial burden associated with the currently approved collection of information for this requirement.[765] The Commission estimates an annual compliance burden of 11 hours per respondent[766] and the following total annual burden:

Respondent type	Number of respondents	Annual burden per respondent (hours)	Total annual burden (number of respondents × annual burden per respondent) (hours)
Communication Protocol Systems	2	11.25	22.5

d. Rule 301(b)(9) Burden on All Respondents

All respondent categories—Communication Protocol Systems, Legacy Government Securities ATSs, NMS Stock ATSs, and Other Form ATS Filers—are subject to the requirements of Rule 301(b)(9) and would incur a burden to file quarterly transaction reports using the proposed modernized and electronic[767] Form ATS–R.

[761] *See supra* Section II.D.2.

[762] *See* proposed Rule 301(b)(5)(ii). *See supra* Section V.A.

[763] *See* Rule 301 PRA Supporting Statement, *supra* note 759.

[764] The Commission's currently approved baseline for the average compliance burden per respondent is 37 hours = 10 hours for Fair Access Standards recordkeeping (Attorney at 5 hours × 2 responses a year) + 27 hours for Fair Access notices (Attorney at 1 hour × 27 responses a year). *See* Rule 301 PRA Supporting Statement, *supra* note 759.

[765] *See* Rule 301 PRA Supporting Statement, *supra* note 759.

[766] The Commission's currently approved baseline for the average compliance burden per respondent is 11.25 hours = 10 hours for systems capacity, integrity and security recordkeeping (Attorney at 10 hours) + 1.25 hours for systems outages notice (Attorney at .25 hours × 5 systems outages a year). *See* Rule 301 PRA Supporting Statement, *supra* note 759.

[767] As discussed above, the Commission believes that the proposed electronic submission of Form ATS–R would impose no additional burden on current Forms ATS and ATS–N filers. *See supra* note 758.

Presently, neither Currently Exempted Government Securities ATSs—the subset of Legacy Government Securities ATSs not operating pursuant to a Form ATS on file with Commission as of the effective date of any final rule—nor Communication Protocol Systems—are required to file quarterly transaction information on Form ATS–R, but the proposed amendments will newly impose on all respondents in these categories the currently-approved baseline burden of filing Form ATS–R and the additional burden of filing using the proposed modernized form.[768]

Current Government Securities ATSs—the subset of Legacy Government Securities ATSs operating pursuant to a Form ATS on file with Commission as of the effective date of any final rule—as well as NMS Stock ATSs and Other Form ATS Filers already incur a burden to file Form ATS–R, so the proposed rules would only impose upon them the new increased burden of filing on the modernized version of Form ATS–R. There is no initial burden associated with the currently approved collection of information for this requirement.[769] The Commission estimates an annual compliance burden of 19 hours per new Form ATS–R respondent [770] and 3 hours per existing Form ATS–R respondent; [771] and the following total annual burdens:

Respondent type	Number of respondents	Annual burden per respondent (hours)	Total annual burden (number of respondents × annual burden per respondent) (hours)
Communication Protocol Systems	22	19	418
Currently Exempted Government Securities ATSs	7	19	133
Current Government Securities ATSs	17	3	51
NMS Stock ATSs	34	3	102
Other Form ATS Filers	59	3	177

e. Rule 301(b)(10) Burden on Communication Protocol Systems and Currently Exempted Government Securities ATSs

Rule 301(b)(10) requires ATSs to establish adequate written safeguards and written procedures to protect subscribers' confidential trading information. Neither Currently Exempted Government Securities ATSs nor Communication Protocol Systems are presently subject to any of the requirements of Rule 301(b), but the current proposal will newly impose on all respondents in these categories the currently-approved baseline burden of complying with Rule 301(b)(10) after the effective date of any final rule.[772] The Commission estimates an initial burden of 8 hours [773] and an annual burden of 4 hours [774] per respondent for complying with Rule 301(b)(10) and the following total initial and annual burdens:

Burden type	Respondent type	Number of respondents	Burden per respondent (hours)	Total burden (number of respondents × burden per respondent) (hours)
Initial	Communication Protocol Systems	22	8	176
Annual			4	88
Initial	Currently Exempted Government Securities ATSs	7	8	56
Annual			4	28

2. Burden of Rules 302 and 303 of Regulation ATS on Communication Protocol Systems and Currently Exempted Government Securities ATSs

Rule 301(b)(8) of Regulation ATS requires ATSs to comply with the recordkeeping requirements of Rule 302 and the record preservation requirements of Rule 303.

[768] The Commission's currently approved baseline for the average compliance burden for each Form ATS–R filing is 4 hours (Attorney at 3 hours + Compliance Clerk at 1). *See* Rule 301 PRA Supporting Statement, *supra* note 759. The Commission is proposing amendments to Form ATS–R, which would add an additional burden of 0.75 hours per filing (Compliance Manager at 0.25 hours + Compliance Clerk at 0.5), and therefore the average compliance burden for each Form ATS–R filing would be 4.75 hours. *See supra* Section V.B and *infra* Section VII.E (discussing proposed changes to Form ATS–R applicable to all ATSs).

[769] *See* Rule 301 PRA Supporting Statement, *supra* note 759.

[770] The annual burden per Currently Exempted Government Securities ATS or Communication Protocol System would be 4.75 hours × 4 quarterly filings annually = 19 burden hours.

[771] The annual burden per existing Form ATS–R respondent would be 0.75 hours × 4 quarterly filings annually = 3 burden hours.

[772] The proposal would not impose a new burden on Current Government Securities ATSs, NMS Stock ATSs, and Other Form ATS Filers, as these categories of respondents would already be required to comply with Rule 301(b)(10) before the effective date of any final rule.

[773] The Commission's currently approved baseline for the average initial compliance burden is 8 hours (Attorney at 7 hours + Compliance Clerk at 1 hour). *See* Rule 301 PRA Supporting Statement, *supra* note 759.

[774] The Commission's currently approved baseline for the average ongoing compliance burden is 4 hours (Attorney at 2 hours + Compliance Clerk at 2 hours). *See* Rule 301 PRA Supporting Statement, *supra* note 759.

The proposal would newly impose the currently-approved baseline burden of complying with these rules on Communication Protocol Systems and Currently Exempted Government Securities ATS.[775] The Commission estimates an annual burden of 45 hours per respondent to comply with Rule 302[776] and 15 hours to comply with Rule 303;[777] and the following total annual burdens:

Rule	Respondent type	Number of respondents	Annual burden per respondent (hours)	Total annual burden (number of respondents × annual burden per respondent) (hours)
Rule 302	Communication Protocol Systems	22	45	990
Rule 303			15	330
Rule 302	Currently Exempted Government Securities ATSs	7	45	315
Rule 303			15	105

3. Burden of Rule 304 of Regulation ATS and Form ATS–N on Communication Protocol Systems, Legacy Government Securities ATSs, and NMS Stock ATSs

As discussed above, the Commission is proposing to amend Exchange Act Rule 3b–16(a) to cause Communication Protocol Systems to fall within the definition of ''exchange'' and believes that such Communication Protocol Systems would likely choose to register as a broker dealer and be regulated under the Regulation ATS exemption.[778] Under the proposal, Government Securities ATSs (inclusive of Communication Protocol Systems) would be subject to the proposed changes to Regulation ATS related to Government Securities ATSs.[779] Those respondents, as well as Communication Protocol Systems that trade NMS Stocks, will be newly required to file Form ATS–N as revised,[780] pursuant to Rule 304. In addition, existing NMS Stock ATSs that do not also trade in government securities will, after the effective date of any final rule, be required to re-file their most recent Form ATS–N or Form ATS–N amendment using the revised Form ATS–N. The Commission estimates the initial burden for new filers of Form ATS–N, as revised—Currently Exempted Government Securities ATSs and Communication Protocol Systems that trade government securities or NMS Stocks—to be 136.4 hours.[781] The Commission estimates the initial burden for Current Government Securities ATSs, which currently file on Form ATS, to file on Form ATS–N, as revised, to be 116.4 hours.[782] The Commission estimates the initial burden for existing NMS Stock ATSs that do not also trade government securities, which currently file on Form ATS–N, to be 8 hours.[783] The Commission estimates that the annual burden for each new Form ATS–N respondent to file amendments to Form ATS–N is 47 hours.[784] The total estimated initial and annual[785] burdens for each respondent type are as follows:

[775] The proposal would not impose a new burden on Current Government Securities ATSs, NMS Stock ATSs, and Other Form ATS Filers, as these categories of respondents would already be required to comply with Rules 302 and 303 before the effective date of any final rule.

[776] The Commission's currently approved baseline for the average compliance burden is 45 hours (Compliance Clerk at 45 hours). *See* Extension Without Change of a Currently Approved Collection: Rule 302 (17 CFR 242.302) Recordkeeping Requirements for Alternative Trading Systems; ICR Reference No. 201906–3235–011; OMB Control No. 3235–0510 (October 24, 2019), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201906-3235-011.* There is no initial burden associated with this rule.

[777] The Commission's currently approved baseline for the average compliance burden is 15 hours (Compliance Clerk at 15 hours). *See* Extension Without Change of a Currently Approved Collection: Rule 303 (17 CFR 242.303) Record Preservation Requirements for Alternative Trading Systems; ICR Reference No. 202101–3235–010; OMB Control No. 3235–0505 (June 25, 2021), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202101-3235-010.* There is no initial burden associated with this rule.

[778] *See supra* Section II.D.

[779] *See supra* Section III.

[780] *See supra* Section IV.

[781] The Commission's currently approved baseline burden for the average initial compliance burden for each initial Form ATS–N is 130.4 hours (currently approved baseline burden to complete an initial Form ATS at 20 hours: Attorney at 13 hours and Compliance Clerk at 7 hours; *see* Rule 301 PRA Supporting Statement, *supra* note 759) + (Part I at 0.5 hour) + (Part II at an average of 29 hours) + (Part III at an average of 78.75 hours) + (Access to EDGAR at 0.15 hours) + (Posting link to published Form ATS–N on ATS website at 2 hours) = 130.4 burden hours. *See* Extension Without Change of a Currently Approved Collection: Regulation ATS Rule 304 and Form ATS–N; ICR Reference No. 202109–3235–014; OMB Control No. 3235–0763 (January 3, 2022), *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202109-3235-014* (''Rule 304 PRA Supporting Statement''). The aggregate totals by professional, including the baseline, are estimated to be approximately 54.6 hours for an Attorney, 0.5 hours for a Chief Compliance Manager, 34.55 hours for a Compliance Manager, 32.25 hours for a Senior Systems Analyst, 1 hour for a Senior Marketing Manager, and 7.5 hours for a Compliance Clerk. The Commission estimates that the proposed amendments to Form ATS–N would add an additional burden of 6 hours per filing (Attorney at 2.5 hours, Compliance Manager at 1.5 hours, Senior Systems Analyst at 1.5 hours, and Compliance Clerk at 0.5 hours), and therefore the average compliance burden for each new Form ATS–N filer would be 136.4 hours. *See supra* Section V.B and *infra* Section VII.E (discussing proposed changes).

[782] The Commission estimates that existing Form ATS filers will not incur the portion of the currently approved baseline burden to file an initial Form ATS–N that is attributable to completing an initial Form ATS, estimated at 20 hours. *See* Rule 304 PRA Supporting Statement, *supra* note 781. Thus, the total initial burden for these respondents will be 116.4 hours (130.4 hours baseline burden to file an Initial Form ATS–N − 20 hours + 6 hours per filing to complete the proposed revised items of Form ATS–N). *See id.*

[783] The Commission estimates the proposal would impose upon current Form ATS–N filers a one-time burden of 8 hours: The marginal burden of 6 hours to respond to the revised items in the form (*see supra* note 781) + 2 hours for a Compliance Clerk to reorganize their current Form ATS disclosures to respond to revised Form ATS–N.

[784] The currently approved baseline burden for filing amendments to Form ATS–N is 47 hours ((Attorney at 5.5 hours + Compliance Manager at 2 hours + Compliance Clerk at 1.9 hours) × 5 amendments a year). *See* Rule 304 PRA Supporting Statement, *supra* note 781.

[785] The currently approved baseline annual burden for Rule 304 contemplates NMS Stock ATSs filing amendments to Form ATS–N, and this proposal does not add to that burden.

Burden type	Respondent type	Number of respondents	Burden per respondent (hours)	Total burden (number of respondents × burden per respondent, rounded to nearest 0.5 hours)
Initial	Communication Protocol Systems	8	136.4	1,091
Annual			47	376
Initial	Currently Exempted Government Securities ATSs	7	136.4	955
Annual			47	329
Initial	Current Government Securities ATSs	17	116.4	1,979
Annual			47	799
Initial	NMS Stock ATSs	34	8	272

4. Burden of Rule 15b1–1 and Form BD on Communication Protocol Systems and Currently Exempted Government Securities ATSs

Rule 301(b)(1) of Regulation ATS requires ATSs to register as a broker-dealer under section 15 of the Act. The proposal would newly impose the currently-approved baseline burden of complying with the Rule 15b1–1 and Form BD collection of information on certain Communication Protocol Systems and Currently Exempted Government Securities ATSs that are not already registered as broker-dealers.[786] The Commission estimates an initial burden of 2.75 hours[787] and an annual burden of 1 hour[788] per respondent for completing Form BD and the following total initial and annual burdens:

Burden type	Respondent type	Number of respondents	Burden per respondent (hours)	Total burden (number of respondents × burden per respondent, rounded to nearest 0.5 hours)
Initial	Communication Protocol Systems	6	2.75	16.5
Annual			.95	5.5
Initial	Currently Exempted Government Securities ATSs	1	2.75	3
Annual			.95	1

5. Burden of Form ID on Communication Protocol Systems and Currently Exempted Government Securities ATSs

The same subset of Communication Protocol Systems and Currently Exempted Government Securities ATSs that are not already registered as broker-dealers discussed above would also newly incur the currently-approved baseline burden of the Form ID collection of information necessary to apply for EDGAR access.[789] The Commission estimates an initial burden of 0.15 hours[790] and no annual burden per respondent for completing Form ID, and the following total burdens:

Respondent type	Number of respondents	Initial burden per respondent (hours)	Total initial burden (number of respondents × initial burden per respondent, rounded to nearest 0.5 hours)
Communication Protocol Systems	6	0.15	1
Currently Exempted Government Securities ATSs	1	0.15	0

6. Burden of Regulation SCI on Communication Protocol Systems and Legacy Government Securities ATSs

As discussed above, the Commission is re-proposing to amend Regulation SCI to expand the definition of ''SCI alternative trading system'' to include Government Securities ATSs that meet a specified volume threshold, which would, in turn, fall within the definition of ''SCI entity'' and, as a result, be subject to the requirements of Regulation SCI.[791] As proposed, (1) Communication Protocol Systems that transact in U.S. Treasuries, Agency Securities, NMS stocks, or equity securities other than NMS stocks reported to an SRO and (2) Legacy Government Securities ATSs could become newly subject to the requirements of Regulation SCI if they

[786] The proposal would not impose a new burden on Current Government Securities ATSs, NMS Stock ATSs, and Other Form ATS Filers, as these categories of respondents are already subject to the requirement of Regulation ATS, and specifically Rule 301(b)(1) to register as a broker-dealer. The Commission also estimates that a subset of Communication Protocol Systems and Currently Exempted Government Securities ATSs would already be registered as broker-dealers.

[787] The Commission's currently approved baseline burden for the average initial compliance burden for each Form BD is 2.75 hours (Compliance Manager at 2.75 hours). *See* Extension Without Change of a Currently Approved Collection: Form BD and Rule 15b1–1. Application for registration as a broker-dealer; ICR Reference No. 201905–3235–016; OMB Control No. 3235–0012 (August 7, 2019), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201905-3235-016.* (''Form BD PRA Supporting Statement'').

[788] The Commission's currently approved baseline burden for the average ongoing compliance burden for each respondent amending Form BD is .95 hours (Compliance Manager at 0.33 hours × 2.87 amendments per year). *See* Form BD PRA Supporting Statement, *supra* note 787.

[789] As discussed above, respondents burdened under the PRA by this proposal that are already registered as broker-dealers would not incur this burden. *See supra* note 786.

[790] *See* Revision of a Currently Approved Collection: Form ID—EDGAR Password; ICR Reference No. 202104–3235–022; OMB Control No. 3235–0328 (April 29, 2021), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202104-3235-022.*

[791] *See supra* Section III.C.

satisfy the thresholds set forth in the proposed amended definition of ''SCI alternative trading system.'' [792]

The Commission estimates 2 Communication Protocol Systems will initially satisfy the conditions and thresholds set forth in the proposed amended definition of ''SCI alternative trading system'' that are not existing SCI entities or affiliated with SCI entities and will incur a higher initial burden to comply. With respect to Legacy Government Securities ATSs, the Commission estimates that 1 respondent will qualify as an SCI alternative trading system that is currently an SCI entity or is affiliated with an SCI entity and will incur a lower initial burden to comply with Regulation SCI, and 1 respondent will qualify as an SCI alternative trading systems that is not an existing SCI entity or affiliated with an SCI entity and will incur the higher initial burden to comply.

The Commission estimates an initial compliance burden for existing SCI entities of 1,017.15 hours,[793] an initial compliance burden for new SCI entities of 2,034.3 hours,[794] an annual compliance burden for all qualifying SCI entities of 2,458.65 hours,[795] and the following total initial and annual burdens:

Burden type	Burden description/respondent type	Number of respondents	Burden per respondent (hours)	Total burden (number of respondents × burden per respondent, rounded to nearest 0.5 hours)
Initial	Compliance with Regulation SCI (Legacy Government Securities ATSs that are existing SCI entities).	1	1,017.15	1,017
Annual			2,458.65	2,458.5
Initial	Compliance with Regulation SCI (Legacy Government Securities ATSs that are new SCI entities).	1	2,034.3	2,034.5
Annual			2,458.65	2,458.5
Initial	Compliance with Regulation SCI (Communication Protocol Systems that are new SCI entities).	2	2,034.3	4,068.5
Annual			2,458.65	4,917.5

E. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

178. Evaluate whether the proposed collection of information is necessary for the proper performance of the Commission's functions, including whether the information shall have practical utility;

179. Evaluate the accuracy of the Commission's estimates of the burden of the proposed collection of information;

180. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

181. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and

182. Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–02–22. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–02–22 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VIII. Economic Analysis

A. Introduction

We are mindful of the economic effects that may result from the proposed amendments, including the benefits, costs, and the effects on efficiency, competition, and capital formation.[796] This section analyzes the expected economic effects of the proposed rules relative to the current baseline, which consists of the current market and regulatory framework in existence today.

A significant number of buyers and sellers for securities are brought together through Communication Protocol Systems, Government Securities ATSs, ATSs trading other securities asset classes, and registered exchanges, but this activity is subject to different regulations according to the type of venue and asset class. By amending Exchange Act Rule 3b–16 to include Communication Protocol Systems within the definition of exchange and ending the exemption for Government Securities ATSs, the proposed amendments would functionally apply

[792] The proposal would not impose a new burden on (1) Communications Protocol Systems that transact in categories of securities that are not within the definition of ''SCI alternative trading system,'' (2) NMS Stock ATSs, which are already subject to the requirements of Regulation SCI (unless they are Communication Protocol Systems that meet the Regulation SCI thresholds in NMS stocks), and (3) Other Form ATS Filers, which, as defined in this proposal, do not transact in the categories of securities within the definition of ''SCI alternative trading system.''

[793] The Commission's currently approved baseline burden for the average initial compliance burden for an existing SCI entity that is not an SRO or a plan processor is 1,017.15 hours. *See* Extension Without Change of a Currently Approved Collection: Regulation SCI and Form SCI; ICR Reference No. 201807–3235–001; OMB Control No. 3235–0703 (September 26, 2018) *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201807-3235-001* (''2018 SCI PRA Supporting Statement'').

[794] The Commission's currently approved baseline burden for the average initial compliance burden for an existing SCI entity that is not an SRO or a plan processor is 2,034.3 hours. *See* 2018 SCI PRA Supporting Statement *supra* note 793.

[795] The Commission's currently approved baseline burden for the average ongoing compliance burden for an SCI entity that is not an SRO or a plan processor is 2,458.6 hours. *See* 2018 SCI PRA Supporting Statement *supra* note 793.

[796] Exchange Act Section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

Regulation ATS to an additional number of entities not currently regulated by it. This would have a number of benefits, including enhanced regulatory oversight and protection for investors, a reduction in trading costs and improvement in execution quality, and enhancement of price discovery and liquidity.

The proposed amendments would also have costs for those entities subject to new requirements, including compliance costs associated with filing forms such as Form ATS–N or Form ATS, protecting confidential information, keeping certain records, and complying with the Fair Access Rule and/or Regulation SCI.

B. Baseline

1. Current State of Communication Protocol Systems

Communication Protocol Systems bring together buyers and sellers of securities through the use of non-firm trading interest and by providing structured methods for communication. Three common types of protocols, RFQ, stream axes, and conditional order protocols, along with their potential advantages and disadvantages for participants, are described in following subsections.[797] Subsequent sections discuss details of Communication Protocol Systems that are particular to different asset classes.[798]

a. Request-for-Quote Protocol

As described in Section II.B.2, an RFQ protocol system typically allows market participants to obtain quotes for a particular security by simultaneously sending messages to one or more potential respondents. The initiating participant is typically required to provide information related to the request in a message, which may include the name of the initiating participant, CUSIP, side, and size. Participants that observe the initiating participant's request have the option to respond to the request with a price quote. These respondents are typically dealers in the relevant asset class, and are often, though not always, pre-selected. The initiating participant can then select among the respondents by either accepting one of multiple responses or rejecting all responses, usually within a ''good for'' time period. After the initiating participant and a respondent agree on the terms of the trade, the trade will then proceed to post-trade processing.

Initiating participants have an incentive to invite multiple respondents to an RFQ, because receiving more quotes increases price competition and thus may improve execution quality.[799] The Commission understands that it is common for an RFQ to include at least three participants.

The number of respondents that are invited to participate in the RFQ is generally less than the total number of dealers available through the system.[800] There may be several reasons for this. First, the Commission understands that the system itself may limit the total number of respondents that can be selected for a single RFQ, typically to five counterparties. This limitation may encourage dealers to respond to RFQs, since it reduces the number of other dealers they would compete with in any give request session.

A second reason stems from the initiating participant's possible incentive to limit the degree of information leakage. If the trade the initiating participant is seeking to complete with the help of the RFQ is not completely filled in that one session, and other participants know this, quotes the initiating participant receives elsewhere may be affected, including in subsequent RFQ sessions.

A third reason is that respondents and initiators both have an incentive to limit price impact because of the expense it will add to the offsetting trade that must follow. Specifically, a dealer who takes a position to fill a customer order through an RFQ will often subsequently offset that position in the interdealer market. If a large number of dealers are invited to participate in an RFQ, this would lead to widespread knowledge that the dealer with the winning bid will now try to offset that position, which could impact the prices available to that dealer in the interdealer market.

Because RFQs give the initiating participant the opportunity to mitigate the information leakage described above, they may give the initiating participant more control over its information than a limit order book (''LOB'').[801]

Once the initiator receives responses from the counterparties, the initiator can select a quote with which to trade. On some RFQ platforms, it is at this point that both sides become committed to the trade. However, there are other RFQ platforms which allow the respondent an opportunity to confirm the trade. Additionally, after the RFQ session has ended, the system may inform other respondents to the RFQ of the price of the second best quote. This allows them to get information as to what other respondents are quoting in the market, while limiting information leakage regarding the details of the actual trade that took place.

Anonymous RFQ sessions may reduce information leakage more than a disclosed RFQ, because the identity of the initiating participant might otherwise reveal something about the initiating participant's willingness to pay.[802] However, this means respondents are not able to price quotes on the basis of an ongoing relationship with the counterparty.

RFQ systems have disadvantages for the initiating participants, when compared with LOBs. For liquid securities, trading on an RFQ system results in less price competition among respondents when compared with an LOB, if the number of respondents are limited. Compared to an LOB, respondents cannot see what quotes they would have to beat to win the auction, and may not have to compete with as many respondents to provide a quote.

Also, the Commission understands that there may be less straight-through processing when trading is conducted via an RFQ protocol system, as opposed to on an exchange. Furthermore, depending on the type of asset being traded, there may not be centralized means of clearing and settlement available. For these reasons, the Commission understands that one reason why disclosed RFQs are used is so that RFQ initiating participants can choose dealers with whom the initiator has an established relationship.[803] Then, after an RFQ session has ended, all necessary processing for the trade is completed through this relationship, in the same way that a transaction might

[797] *See infra* Tables VIII.5 and VIII.6 for a breakdown of the market share of different protocols, including ATS protocols, in the markets for government securities and corporate debt.

[798] *See infra* Sections VIII.B.2.b, VIII.B.3.b, VIII.B.4.b, VIII.B.5.d, VIII.B.6.b, and VIII.B.7.

[799] *See* MarketAxess Letter at 3, stating that variations of the RFQ protocol can allow clients to simultaneously request liquidity on an anonymous basis from over 1,000 platform participants, and that connecting to more counterparties improves trading outcomes and lowers transaction costs for liquidity providers and takers.

[800] *See supra* Section V.A.3, discussing the applicability of fair access to platforms where each participant has discretion over which other participants they want to trade.

[801] This reduction in information leakage may be offset by the fact that on disclosed RFQs, the initiator's identity is revealed to participants in the session, which may be an especially sensitive bit of information to reveal.

[802] The use of anonymous RFQ is not uniform across asset classes. The Commission preliminarily believes that anonymous RFQ is uncommon in the market for U.S. Treasury Securities.

[803] *See, e.g.,* MarketAxess Letter at 5, stating that the majority of RFQ trades are completed on a name-disclosed basis with no central clearing party.

be processed via bilateral voice trading.[804]

In order to facilitate processing of the trade while maintaining the anonymity of the counterparties, the operator of the anonymous RFQ, which is typically a broker-dealer, may act as a counterparty to each side of the trade. Also, the Commission understands that anonymous RFQs are often received by all liquidity providers participating on the platform, instead of a pre-selected few. The Commission understands that providing an intermediary broker to act as a counterparty to each side of a trade on the system may also function as a convenience to RFQ participants generally, by allowing the system to help facilitate more straight-through processing.

As described in Section II.B.2, RFQ Lists, also referred to as BWIC or OWIC,[805] are a variation of the RFQ protocol in which quotes are solicited for multiple securities simultaneously. Market participants use RFQ Lists to complete trades in a number of different securities at the same time. Bringing all liquidity providers together into a single, multi-security RFQ may be a more efficient way of trading multiple securities at once than initiating a separate RFQ session for each security, especially if it is important to complete the trades close together in time. However, the use of the joint session may reveal more about the trading intentions of the initiator to its counterparties than using separate RFQ sessions, where information leakage is more limited, as respondents may be less aware of the complete position the initiator is seeking to take.

b. Stream Axes

As defined in Section II.B.2, ''stream axes'' are systems that electronically display continuous trading interest (firm or non-firm) in a security or type of security to participants on the systems. The Commission understands a typical stream axe to operate as follows: Dealers submit an indication or indications of interest (''axe'' or ''axes''), which may include price quotes and sizes for buying and selling securities. Axes are streamed to participants, updating continuously as dealers adjust prices and inventory offerings. A market participant may choose an axe with which to trade at the broadcasted price and size. In some cases, the axes are streamed on a non-anonymous basis, which permits the prices to be customized to the recipient on the basis of the relationship between the recipient and the dealer.

Stream axes differ from RFQs in that the dealer streaming the axes receives less information about the counterparty's trading intentions before the trade is agreed to. Stream axes are similar to an LOB in this way. This lack of information may end up reflected in the prices the dealer chooses to stream, as well as the type of dealer who chooses to participate in stream axes. Therefore, the decision to use an RFQ or stream axe may depend on the trading intentions of the participant. The stream axes protocol gives the participant receiving the stream the free option to trade at whatever price is being streamed at the moment, without revealing anything about its trading intentions beyond its identity. On the other hand, this may be less conducive to trading in certain sizes, and may not result in the same price as an RFQ.

c. Conditional Order Protocol

Section II.B.2 defines conditional orders as trading interest that may not be executable until after a user takes subsequent action, for example, sending a firm-up invitation message to other participants. Conditional order protocols often allow the matched parties to modify the attributes of the non-firm trading interest before accepting the firm-up invitation. If both matching parties accept the firm-up invite, the parties would agree upon the terms of the trade and an execution would occur.

Unlike LOBs, conditional order protocols allow participants to ultimately decline a transaction after receiving a response to their quote. This may be particularly useful for large size orders or for illiquid securities, for which search costs may be particularly high. For example, participants can place conditional orders on various systems in search of liquidity, and use the fact that the orders are non-firm to avoid the risk of double-execution by declining some responses if they receive more than one. However, the ability for the matched counterparty to also decline to transact implies that the risk of non-execution on conditional order protocols is likely higher than that of LOBs.

2. Current State of Government Securities Market

The market for U.S. Government securities is large both in terms of the outstanding debt and daily trading volume. According to the Treasury Department, as of the end of 2020, the total amount outstanding of marketable Treasury Securities was approximately $21 trillion.[806] The Financial Accounts of the United States Z.1 released by the Federal Reserve Board shows that the amount outstanding of Agency- and GSE-Backed Securities is about $10.1 trillion, as of the end of 2020.[807] According to data published by SIFMA, in September 2021, the average daily trading volume in government securities was about $850.1 billion, or roughly 95 percent of all fixed income trading volume in the U.S.[808] This includes $582.1 billion average daily trading in U.S. Treasury Securities, $265.7 billion in Agency MBSs, and $2.4 billion in other Agency Securities.

a. ATSs in the Market for U.S. Government Securities

i. Operations and Market Share of Government Securities ATSs

The variety of market participants trading on Government Securities ATSs has increased since their inception. While Government Securities ATSs in the market for U.S. Treasury Securities historically only allowed bank and non-bank dealers[809] to trade, beginning in 2003, firms that were neither banks nor dealers, such as hedge funds, insurance companies, and PTFs, gained permission from the ATSs to trade directly on Government Securities ATSs.[810] The Commission estimates that there are currently 17 ATSs trading in government securities (either Treasury or Agency securities, or both) that have a Form ATS on file.[811]

[804] Bilateral voice trading refers to telephone calls, chat messages, etc.

[805] *See supra* note 58.

[806] *See* Monthly Statement of the Public Debt of the United States, dated December 31, 2020, *available at https://www.treasurydirect.gov/govt/reports/pd/mspd/2020/opds122020.pdf.*

[807] *See* Financial Accounts of the United States Z.1 at 177, *available at https://www.federalreserve.gov/releases/z1/20210311/z1.pdf.*

[808] *See* SIFMA Fixed Income Trading Volume, *available at https://www.sifma.org/resources/research/us-fixed-income-securities-statistics/.* The stated figures include Treasury Securities, Agency MBS, and Federal Agency Securities.

[809] Absent an exception or an exemption, Section 15(a)(1) of the Exchange Act makes it unlawful for a ''dealer'' to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless registered with the Commission in accordance with Section 15(b) of the Exchange Act. Similarly, Section 15C of the Exchange Act makes it unlawful for a ''government securities dealer'' (other than a registered broker-dealer or financial institution) to induce or attempt to induce the purchase or sale of any government security unless such government securities dealer is registered in accordance with Section 15C(a)(2).

[810] *See* Letter from Jim Greco, CEO, Direct Match, to David R. Pearl, Office of the Executive Secretary, U.S. Department of the Treasury, dated April 22, 2016, (''Direct Match Letter'') at 5, *available at https://www.treasurydirect.gov/instit/statreg/gsareg/RFIcommentletterDirectMatch.pdf* at 6–7.

[811] *See supra* Section VII.C.1. The Commission estimates that some of these ATSs only support Treasuries trading to facilitate hedging in

Continued

Additionally, the Commission estimates that 7 Currently Exempted Government Securities ATSs are not currently required to register as a national securities exchange or comply with Regulation ATS.[812]

Currently, Government Securities ATSs account for a significant percentage of all Treasury trading activity reported to TRACE.[813] As shown in Table VIII.1, ATSs accounted for approximately 32 percent of U.S. Treasury Securities trading volume in the first half of 2021. Dealer participants on current ATSs use them as a source of liquidity in government securities, including the liquidity needed to efficiently fill customer orders outside the current ATSs. The Commission understands that this means some portion of dealer transactions on Government Securities ATSs are associated with the dealers' activity in filling customer orders.

TABLE VIII.1—ATS MARKET SHARE ANALYSIS

	Treasury securities	Agency securities	Number of unique platforms
Num. of Current Gov. Sec. ATSs	13	7	15
Num. of Currently Exempted Gov. Sec. ATSs	5	1	5
Num. of Grouped-Affiliated ATSs	18	7	.....
Total volume share of Current Gov. Sec. ATSs	24.5%	11.6%	.....
Total volume share of Currently Exempted Gov. Sec. ATSs	9.6%	0.7%	.....
Total volume share of Grouped-Affiliated ATSs Companies	34.1%	12.3%	.....
Above 10% Market Share			
Num. of Current Gov. Sec. ATSs	1	1	2
Num. of Currently Exempted Gov. Sec. ATSs	0	0	0
Num. of Grouped-Affiliated ATSs	2	1	.....
Total volume share of Current Gov. Sec. ATSs	15.2%	11.6%	.....
Total volume share of Currently Exempted Gov. Sec. ATSs	.....	.....	.....
Total volume share of Grouped-Affiliated ATSs	15.2%	.....	.....
Above 5% Market Share			
Num. of Current Gov. Sec. ATSs	2	1	2
Num. of Currently Exempted Gov. Sec. ATSs	0	0	0
Num. of Grouped-Affiliated ATSs	4	1	.....
Total volume share of Current Gov. Sec. ATSs	21.3%	11.6%	.....
Total volume share of Currently Exempted Gov. Sec. ATSs	.....	.....	.....
Total volume share of Grouped-Affiliated ATSs	23.7%	.....	.....
Above 4% Market Share			
Num. of Current Gov. Sec. ATSs	2	1	2
Num. of Currently Exempted Gov. Sec. ATSs	0	0	0
Num. of Grouped-Affiliated ATSs	4	1	.....
Total volume share of Current Gov. Sec. ATSs	21.3%	11.6%	.....
Total volume share of Currently Exempted Gov. Sec. ATSs	.....	.....	.....
Total volume share of Grouped-Affiliated ATSs	23.7%	.....	.....
Above 3% Market Share			
Num. of Current Gov. Sec. ATSs	2	1	2
Num. of Currently Exempted Gov. Sec. ATSs	2	0	2
Num. of Grouped-Affiliated ATSs	8	1	.....
Total volume share of Current Gov. Sec. ATSs	21.3%	11.6%	.....
Total volume share of Currently Exempted Gov. Sec. ATSs	7.9%	.....	.....
Total volume share of Grouped-Affiliated ATSs	32.0%	.....	.....

conjunction with corporate bonds transactions, but typically are not used for outright Treasuries trading. *See also* ICE Bonds Letter I at 3, stating that this offering of Government Securities ATSs gives participants the convenience of electronically trading in instruments with correlated trading activities in a centralized location.

[812] As discussed in Section I, a Currently Exempted Government Securities ATS is defined as an ATS that limits its securities activities to government securities or repos and registers as a broker-dealer or is a bank. Currently Exempted Government Securities ATSs transact exclusively in government securities or repos, and are not required to file a Form ATS.

[813] TRACE aggregation and analysis methods follow those used by Treasury market regulators and FINRA, including adjustments for multiple trade reports for a single transaction and counting only one trade report for an ATS or inter-dealer broker (IDB). Commission staff uses the regulatory version of TRACE in its analysis.

A ''Give-Up'' ID is reported when a principal to a transaction delegates another participant to report a trade on its behalf. When a ''Give-Up'' ID is reported, the corresponding reporting or contra-party is replaced with the ''Give-Up'' ID. This ensures that trades are attributed to the principals to each transaction. System control numbers are used to link corrected, canceled, and reversed trade messages with original new trade messages. In these cases, only corrected trades are kept and all cancellation and reversal messages and their corresponding new trade messages are removed.

Special care must be taken when counting market volume. When a FINRA registered broker directly purchases from another FINRA member, two trade messages are created. If those FINRA registered brokers transact through an IDB, four trade messages are created, two for the IDB and one for each member. In both cases, the volume from only one report is needed. To ensure that double counting of transactions does not occur, only the following trade messages are summed to calculate market volume: Sales to non-IDB members, sales to identified customers, such as banks, hedge funds, asset managers, and PTFs, and purchases from and sales to customers and affiliates. Any trade in which the contra-party is an IDB is excluded. Thus, in the case of trades involving IDBs, only the IDBs' sale message is added to overall volume.

TABLE VIII.1—ATS MARKET SHARE ANALYSIS—Continued

	Treasury securities	Agency securities	Number of unique platforms
Above 2% Market Share			
Num. of Current Gov. Sec. ATSs	3	1	3
Num. of Currently Exempted Gov. Sec. ATSs	2	0	2
Num. of Grouped-Affiliated ATSs	8	1	.....
Total volume share of Current Gov. Sec. ATSs	23.7%	11.6%	.....
Total volume share of Currently Exempted Gov. Sec. ATSs	7.9%	.....	.....
Total volume share of Grouped-Affiliated ATSs	32.0%	.....	.....

Each panel reports the volume share (%) for Government Securities ATSs and the number of Government Securities ATSs above the specified market share level. Grouped-Affiliated ATSs refer to ATSs operated by a common broker-dealer or affiliated broker-dealer and for which their volume would be aggregated under the proposed changes to the Fair Access Rule. Treasury Securities include nominal bonds, TIPS and STRIPS. Agency Securities include Agency Debentures, Agency Collateralized Mortgage Obligations, and Agency Pass-Through Mortgage Backed Securities.[a] Trading volume is measured in dollar volume in par value. Data is based on the regulatory version of TRACE for U.S. Treasury Securities and TRACE for Agency Securities from April 1, 2021 to September 30, 2021.[b c]

[a] Agency Pass-through Mortgage Backed Securities include those traded in specified pool transactions and those to be announced. ''Agency Debenture'' is equivalent to ''Federal Agency Security,'' as used in Part I, Item 8(b) of Form ATS–N. ''Agency Mortgage Backed Securities'' as used in Part I, Item 8(b) of Form ATS–N include both ''Agency Collateralized Mortgage Obligations'' and ''Agency Pass-Through Mortgage Backed Securities.''

[b] The analysis based on TRACE is necessarily limited to transactions reported to TRACE, which may not be all transactions in government securities. Transactions that take place on non-FINRA member ATSs or between two non-FINRA members are not reported to TRACE.

[c] Trades reported to TRACE may include trades conducted on a Communication Protocol System if one participant in the trade is a FINRA member. The volume reported in this table is categorized given this limitation.

Government Securities ATSs have evolved such that they operate with a level of technology use and speed of trading that is similar to that observed on NMS Stock ATSs, particularly in the secondary electronic cash market for on-the-run U.S. Treasury Securities.[814] Some Government Securities ATSs operate as anonymous LOB systems and offer features such as low latency connectivity, direct market data feeds, co-location services, and a variety of order types. In addition to facilitating low latency trading, the Commission understands that the data feeds provided by Government Securities ATS serve as a source for real-time prices in the market for government securities.[815] In providing such information to market participants about Treasury prices in particular, these feeds may serve as a source for real-time risk-free rate benchmarks, which help price other financial instruments.

PTFs have a significant presence on Government Securities ATSs.[816] Table VIII.2 shows that, during April to September of 2021, PTFs accounted for approximately 25.4 percent of total on-the-run U.S. Treasury Securities ATS trading volume. There were 41 PTFs operating on ATSs that trade U.S. Treasury Securities as of August 2021. The Commission understands that PTFs trading on the electronic market for U.S. Treasury Securities often employ automated, algorithmic trading strategies that rely on speed and allow the PTFs to quickly execute trades, or cancel or modify quotes in response to perceived market events.[817] The Commission understands that PTFs contribute liquidity to the trading environment on Government Securities ATSs.[818]

TABLE VIII.2—ON-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME

	Number of venues	Volume	Volume share (%)
On-the-Run U.S. Treasury Securities Trading Volume			
ATSs	18	812,480	49.7
Customer trades	11	52,754	3.2
Dealer trades	18	344,781	21.1
PTF trades	11	414,945	25.4
Non-ATS Interdealer Brokers	24	118,067	7.2
Customer trades	19	77,334	4.7
Dealer trades	23	40,252	2.5
PTF trades	9	481	0.0[a]
Bilateral dealer-to-dealer trades	352	92,051	5.6
Bilateral dealer-to-customer trades	333	604,823	37.0
Bilateral dealer-to-PTF trades	97	7,250	0.4

[814] *See* October 15 Staff Report, *supra* note 188, at 35–36, discussing increased electronic trading in the market for Treasuries. *See also* Bloomberg Letter at 5, stating that liquid on-the-run government securities are mostly traded on central limit order books and Bloomberg Letter at 21, stating that ATSs are a significant source of liquidity for on-the-run U.S. Treasury Securities.

[815] *See* Letter from Dan Cleaves, Chief Executive Officer, BrokerTec Americas, and Jerald Irving, President, ICAP Securities USA LLC, to David R. Pearl, Office of the Executive Secretary, Treasury Department, dated April 22, 2016 at 7, *available at https://www.treasurydirect.gov/instit/statreg/gsareg/ICAPTreasuryRFILetter.pdf.*

[816] *See supra* Section III.A.

[817] *See* October 15 Staff Report at 32, 35–36, 39.

[818] One market participant stated that this liquidity provision may fill a gap that was left after the introduction of post-2008 financial crisis regulations and their subsequent effects on dealers. *See* Direct Match Letter at 7.

TABLE VIII.2—ON-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME—Continued

	Number of venues	Volume	Volume share (%)
Total	.....	1,634,671	100.0

This table reports trading volume and volume share for ATSs,[b] Non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, bilateral dealer-to-customer, and bilateral dealer-to-PTF transactions for on-the-run U.S. Treasury Securities. On-the-run U.S. Treasury Securities are the most recently issued nominal coupon securities. Nominal coupon securities pay a fixed semi-annual coupon and are currently issued at original maturities of 2, 3, 5, 7, 10, 20, and 30 years. Treasury Bills and Floating Rate Notes are excluded. *Volume* is the average weekly dollar volume in par value (in millions of dollars) over the 6-month period, from April 1, 2021, to September 30, 2021.[c] *Number of Venues* is the number of different trading venues in each category and the number of distinct MPIDs for bilateral transactions.[d] *Market Share (%)* is the measure of the dollar volume as a percent of total dollar volume.[e] The volumes of ATSs and non-ATS interdealer brokers are broken out by *Customer trades, Dealer trades,* and *PTF trades* within each group.[f] Data is based on the regulatory version of TRACE for U.S. Treasury Securities from April 1, 2021, to September 30, 2021. Bilateral trades are a catchall classification that may include trades conducted via bilateral negotiation, as well as trades conducted electronically via platforms not registered with FINRA as an ATS. Bilateral trades may include trades conducted on Communication Protocol Systems.

[a] The percentage to the nearest non-zero is 0.02%.
[b] *See supra* notes b and c in Table VIII.1.
[c] FINRA reports volume as par volume, where par volume is the volume measured by the face value of the bond, in dollars. *See* relevant weekly volume files, *available at https://www.finra.org/filing-reporting/trace/data/trace-treasury-aggregates*.
[d] Dealers are counted using the number of distinct MPIDs.
[e] Total dollar volume (in par value) is calculated as the sum of dollar volume for ATSs, non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, and bilateral dealer-to-customer transactions.
[f] We identify ATS trades and non-ATS interdealer broker trades using MPID in the regulatory version of TRACE for U.S. Treasury Securities. The regulatory version of TRACE for U.S. Treasury Securities includes an identifier for customer and interdealer trades. Furthermore, we use MPID for non-FINRA member subscriber counterparties in the regulatory version of TRACE for U.S. Treasury Securities to identify PTF trades on ATSs.

Table VIII.1 also shows that trading in the Treasury Securities market is concentrated on a few large ATSs.[819] The largest ATS by Treasury dollar volume has 15.2 percent of the total Treasury Securities market reported to TRACE. Two Government Securities ATSs have dollar volumes that are over five percent of the total TRACE volume figure, and four have dollar volumes over three percent.

Table VIII.2 shows that the majority of trading in on-the-run government securities reported to TRACE goes through Government Securities ATSs. Specifically, Government Securities ATSs accounted for nearly 50 percent of total dollar volume.

When on-the-run securities transition to off-the-run status, their trading activity shifts away from Government Securities ATSs, and towards other transaction methods, including Communication Protocol Systems.[820] This is reflected in Table VIII.3, which shows that Government Securities ATSs account for approximately 21 percent of the total dollar volume of off-the-run Treasury trading reported to TRACE.[821] Table VIII.3 also shows that, while dealers remain a significant contributor to ATS trading in Treasury Securities in the off-the-run market, PTFs make up a smaller percentage of volume than they do in the on-the-run market.

TABLE VIII.3—OFF-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME

	Number of venues	Volume	Volume share (%)
Off-the-Run U.S. Treasury Securities Trading Volume			
ATSs	17	110,945	21.7
Customer trades	10	13,304	2.1
Dealer trades	17	83,668	13.0
PTF trades	11	13,973	2.2
Non-ATS Interdealer Brokers	22	43,604	6.8
Customer trades	18	15,092	2.4
Dealer trades	21	28,451	4.4
PTF trades	12	61	0.0[a]
Bilateral dealer-to-dealer trades	509	47,912	7.5
Bilateral dealer-to-customer trades	333	437,665	68.2
Bilateral dealer-to-PTF trades	114	1,415	0.2
Total	.....	641,540	100.0

[819] All ATSs identified in this table are determined by the regulatory version of TRACE. TRACE data contains an identifier for trades occurring on ATSs, identifying the MPID of the ATS.

[820] One commenter referenced that market participants trading in less liquid off-the-run securities are better able to find liquidity in non-ATS trading methods. *See* Bloomberg Letter at 5 and 21–22.

[821] *See supra* note 193.

TABLE VIII.3—OFF-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME—Continued

	Number of venues	Volume	Volume share (%)

This table reports trading volume and volume share for ATSs,[b] non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, bilateral dealer-to-customer, and bilateral dealer-to-PTF transactions for off-the-run U.S. Treasury Securities. Off-the-run or ''seasoned'' U.S. Treasury Securities include TIPS, STRIPS, and nominal coupon securities issues that preceded the current on-the-run nominal coupon securities. *Number of Venues* is the number of different trading venues in each category and the number of distinct MPIDs for bilateral transactions. *Volume* is the average weekly dollar volume in par value (in millions of dollars) over the 6-month period, from April 1, 2021, to September 30, 2021. *Market Share (%)* is the measure of the dollar volume as a percent of the total dollar volume. The volumes of ATSs and non-ATS interdealer brokers are broken out by *Customer trades, Dealer trades,* and *PTF trades* within each group.[c] Data is based on the regulatory version of TRACE for U.S. Treasury Securities from April 1, 2021, to September 30, 2021. Bilateral trades are a catchall classification that may include trades conducted via bilateral negotiation, as well as trades conducted electronically via platforms not registered with FINRA as an ATS. Bilateral trades may include trades conducted on Communication Protocol Systems.

[a] The percentage to the nearest non-zero is 0.009%.
[b] *See supra* notes b and c of Table VIII.1.
[c] We identify ATS trades and non-ATS interdealer broker trades using MPID in the regulatory version of TRACE for U.S. Treasury Securities. The regulatory version of TRACE for U.S. Treasury Securities includes an identifier for customer and interdealer trades. Furthermore, we use MPID for non-FINRA member subscriber counterparties in the regulatory version of TRACE for U.S. Treasury Securities to identify PTF trades on ATSs.

Government Securities ATSs also play a significant role in the market for Agency Securities, accounting for approximately 12 percent of the total dollar volume reported to TRACE. Like in the Treasury market, dealers play a significant role in trading on ATSs for Agency Securities.[822]

It is the Commission's understanding that PTFs play only a small role in the market for Agency Securities. The Commission invites comment on the role of PTFs in trading Agency Securities. The Commission also requests comment on the providers of liquidity in the market for Agency Securities.

TABLE VIII.4—AGENCY SECURITIES TRADING VOLUME

	Number of venues	Volume	Volume share (%)
Agency Securities Trading Volume			
ATSs	8	31,940	12.3
Customer trades	7	6,767	2.6
Dealer trades	7	25,173	9.7
PTF trades	3	1	[a] 0.0
Non-ATS Interdealer Brokers	13	7,935	3.0
Customer trades	9	1,096	0.4
Dealer trades	13	6,838	2.6
PTF trades	5	0	[b] 0.0
Bilateral dealer-to-dealer trades	470	12,170	4.7
Bilateral dealer-to-customer trades	470	206,777	79.9
Bilateral dealer-to-PTF trades	84	3	[c] 0.0
Total	.....	264,916	100.0

This table reports trading volume and volume share for ATSs,[d] non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, and bilateral dealer-to-customer transactions for U.S. Agency Securities. Agency Securities include Agency Debentures, Agency Collateralized Mortgage Obligations, and Agency Pass-Through Mortgage Backed Securities. *Number of Venues* is the number of different trading venues in each category and the number of MPIDs for bilateral transactions. *Volume* is the average daily dollar volume in par value (in millions of dollars) over the 6-month period, from April 1, 2021, to September 30, 2021. *Market Share (%)* is the measure of the dollar volume as a percent of the total dollar volume. The volume of ATSs and non-ATS interdealer brokers are broken out by *Customer trades* and *Dealer trades* within each group.[e] Data is based on the regulatory version of TRACE for Agency Securities from April 1, 2021, to September 30, 2021. Bilateral trades are a catchall classification that may include trades conducted via bilateral negotiation, as well as trades conducted electronically via platforms not registered with FINRA as an ATS. Bilateral trades may include trades conducted on Communication Protocol Systems.

[a] The percentage to the nearest non-zero is 0.0003%.
[b] The percentage to the nearest non-zero is 0.00007%.
[c] The percentage to the nearest non-zero is 0.001%.
[d] *See supra* notes b and c of Table VIII.1.
[e] We identify ATS trades and non-ATS interdealer broker trades using MPID in the regulatory version of TRACE for Agency Securities. The regulatory version of TRACE for Agency Securities includes an identifier for customer and interdealer trades.

[822] Agency Securities are those issued by U.S. Government sponsored enterprises (''GSEs'') such as Federal Home Loan Banks (''FHLBs''), the Federal National Mortgage Association (''Fannie Mae''), and the Federal Home Loan Mortgage Corporation (''Freddie Mac'').

ii. Regulatory Environment for Government Securities ATSs

The regulatory environment for Government Securities ATSs varies according to whether the ATS is a Current Government Securities ATS or a Currently Exempted Government Securities ATS, and whether the ATS is operated by a registered broker-dealer. Differences in reporting requirements can lead to an uneven competitive landscape for Government Securities ATSs and leave room for regulatory arbitrage.[823] In addition, current regulation for Government Securities ATSs does not require public disclosure about operations, fair access, or robust systems.

Much of the difference in regulatory treatment among Government Securities ATSs comes from the fact that Current Government Securities ATSs must comply with Regulation ATS, while Currently Exempted Government Securities ATSs do not. For example, Currently Exempted Government Securities ATSs are not required to file Form ATS with the Commission, while ATSs that trade U.S. Government securities as well as non-government securities, such as corporate or municipal securities, must have filed Form ATS as a confidential filing with the Commission when they began operations, and will incur the cost to do so again if there is a material change in operations.[824]

Current Government Securities ATSs are also required to confidentially report their transaction dollar volume in government securities to the Commission on a quarterly basis via Form ATS–R within 30 days after the end of each calendar quarter. Currently Exempted Government Securities ATSs are not subject to this requirement.

Unlike Current Government Securities ATSs, Currently Exempted Government Securities ATSs are not required to establish written safeguards and written procedures to protect subscribers' confidential trading information.[825] To the extent that a Currently Exempted Government Securities ATS does not have these procedures, or has them but the procedures are not adequate,[826] a subscriber's confidential trading information might be at risk of unauthorized disclosure or subject to potential misuse.

Current Government Securities ATSs must also comply with certain additional requirements, such as recordkeeping requirements pursuant to Rule 301(b)(8). These include requirements to make and keep certain records for an audit trail of trading activity, such as time-sequenced order information, as well as information about current subscribers and summaries of trading activity. The requirement to keep such records may impose compliance costs on Current Government Securities ATSs to which Currently Exempted Government Securities ATSs are not subjected. To the extent that Currently Exempted Government Securities ATSs do not voluntarily maintain records similar to those required by Rule 301(b)(8), detection and investigation of potential market irregularities may be inhibited.

A further disparity exists in the case of the estimated one bank-operated Currently Exempted Government Securities ATS. All other Currently Exempted Government Securities ATSs and all Current Government Securities ATSs are registered broker-dealers that incur the costs of registering with the Commission as well as the costs of SRO membership, and face operational regulatory reporting requirements.[827] In contrast, the estimated one bank-operated Currently Exempted Government Securities ATS is not required to register as a broker-dealer with the Commission and thus, does not have to file Form BD with the Commission or be subject to FINRA rules.

The estimated one bank-operated Currently Exempted Government Securities ATS does not report government securities transactions to TRACE. All transactions in government securities that include at least one FINRA member are required to be reported to TRACE within 15 minutes of the time of execution.[828] Trades on ATSs operated by FINRA members may be required to be reported to TRACE, by either the ATS, counterparties to the trade, or both, depending on whether the counterparties are FINRA members and whether the ATS holds itself out as a party to the trade.[829]

Neither Current Government Securities ATSs nor Currently Exempted Government Securities ATSs are required to make disclosures on public forms, and this might lead to information asymmetries amongst different subscribers. For example, certain Government Securities ATSs might make voluntary disclosures regarding their operations as a signal of quality to some customers,[830] without disclosing the same information to other customers or market participants generally. As a result, some subscribers have limited information which may affect their trading decisions.

There is no legal mechanism to prevent Government Securities ATSs from unreasonably denying or limiting

[823] One commenter stated that the lack of a consistent regulatory framework for entities that undertake similar activities leads to opportunities for arbitrage and may result in market fragmentation, which in turn may cause reduced market liquidity. *See* Tradeweb Letter at 9.

[824] The Commission may use this information in monitoring, examinations and enforcement.

[825] These requirements come from Rule 301(b)(10) of Regulation ATS. Current Government Securities ATSs are currently subject to these rules. *See supra* Section II.D.2.

[826] Currently Exempted Government Securities ATSs are not required to file their written safeguards and written procedures with the Commission. Therefore, absent an examination by the Commission staff, the Commission is not able to determine which Currently Exempted Government Securities ATSs currently have adequate, written safeguards and written procedures to protect subscribers' confidential trading information. At the same time, based on the experience of the Commission, the Commission believes that some Currently Exempted Government Securities ATSs currently have, and maintain in writing, safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed.

[827] *See* FINRA Letter at 2–3, stating that nearly all Government Securities ATSs currently are FINRA members

[828] *See supra* note 228 and corresponding text discussing TRACE reporting requirements for U.S. Government securities.

[829] FINRA Rule 6731 exempts certain ATSs from TRACE reporting requirements as long as all of the following conditions are met: All trades are between ATS subscribers that are both FINRA members; the ATS demonstrates that member subscribers are fully disclosed to one another at all times, the system does not permit automatic execution and a member must take affirmative steps to agree to a trade, the trade does not pass through any ATS account and the ATS does not hold itself out as a party to the trade; and the ATS does not exchange TRACE-Eligible Securities or funds on behalf of its subscribers, take either side of the trade for clearing or settlement purposes, or in any other way insert itself into the trade; the ATS and the member subscribers acknowledge and agree in writing that the ATS shall not be deemed a party to the trade for purposes of trade reporting and that trades shall be reported by each party to the transaction; and the ATS agrees to provide to FINRA on a monthly basis data relating to the volume of trades by security executed by the ATS's member subscribers using the ATS's system. Furthermore, Rule 6732 exempts certain transactions on ATS from TRACE reporting requirements as long as all of the following conditions are met: The trade is between FINRA members; the trade does not pass through any ATS account, and the ATS does not exchange TRACE-Eligible Securities or funds on behalf of the subscribers, take either side of the trade for clearing or settlement purposes, or in any other way insert itself into the trade; the ATS agrees to provide to FINRA on a monthly basis data relating to each exempted trade occurring on the ATS's system pursuant to this Rule 6732; the ATS remits to FINRA a transaction reporting fee for each exempted sell transaction occurring on the ATS; and the ATS has entered into a written agreement with each party to the transaction that such trade must be reported by such party. *See* also FINRA Letter at 6–7, stating that a fixed income ATS is a ''party to a transaction'' in a TRACE-eligible security occurring through its system and has TRACE transaction reporting obligations, unless an exception or exemption applies.

[830] For example, the ATS may disclose order execution statistics to some customers.

subscribers' access, because the Fair Access Rule does not currently apply to any ATS that trades government securities.[831] When a Government Securities ATS has a significant share of trading volume in government securities, unfairly discriminatory actions might hurt investors because viable alternatives to trading on such a high-volume system might be limited. To the extent this happens, it results in higher trading costs and a reduced efficiency with which such excluded participants achieve trading objectives, which may also lead to concentration in the market for dealers in government securities.[832] Furthermore, market forces alone might not be sufficient to prevent a Government Securities ATS from unreasonably denying access to some market participants.[833]

The Commission preliminarily believes that Government Securities ATSs may not fully internalize the cost of the externalities associated with not having robust, resilient systems, as would be required by the provisions of Regulation SCI and Rule 301(b)(6) of Regulation ATS. Without appropriate safeguards in place for Government Securities ATSs, technological vulnerabilities continue to exist and could lead to the potential for costly failures, disruptions, delays, intrusions, and the reduction in systems up-time,[834] which could harm the price discovery process and price efficiency of government securities. Systems issues pose significant negative externalities on the market, in that if a trading system of a Government Securities ATS with significant trading volume fails, this failure will not only force the ATS to forgo revenue but might also diminish trading in government securities during the disruption. This would increase the trading costs of market participants that have optimized their trading strategy under the assumption that all Government Securities ATSs with significant volume are fully operational, and might harm the price discovery process and liquidity flows for government securities.[835] In addition, price discovery in securities that use government security transaction prices as risk-free rate benchmarks might also be harmed.[836]

One commenter on the 2020 Proposal stated that ''many Government Securities ATSs may already align with industry standards that achieve many of the same goals of Regulations SCI, although in slightly different manner.''[837] While the Commission recognizes that Government Securities ATSs have some incentives to maintain robust systems to remain competitive and thereby reduce systems issues, the Commission believes that market forces alone may not be sufficient to significantly reduce systems issues, because some of the impact of these systems issues represent an externality to the Government Securities ATS.[838]

A comment letter received in response to the Treasury Request for Information stated that many Government Securities ATSs adopted system testing and control procedures that followed the recommended best practices of the Treasury Market Practices Group.[839] However, these best practices are meant only as useful operational guideposts rather than binding rules, and each trading venue can choose if it wants to comply and how to comply, which might provide weak only incentives to internalize the externality costs associated with system failures.

The Commission is aware of 1 Government Securities ATS operated by a broker-dealer that also operates an NMS Stock ATS that is an SCI entity and so may already comply with much of Regulation SCI.

b. Communication Protocol Systems in the Market for Government Securities

Communication Protocol Systems play a significant role in the market for government securities. The Commission estimates that there are 3 Communication Protocol Systems operating in the market for government securities that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16. The Commission understands that these systems are a significant component of the dealer-to-customer segment of the U.S. Treasury market and account for approximately 30 to 40 percent of the total trading volume in U.S. Treasuries.[840] One of the roles of such systems is to provide a means to communicate trading interest in the dealer-to-customer market.[841]

The Commission understands that investors who wish to transact in government securities generally do so with a dealer on a principal basis. Communication Protocol Systems typically facilitate the first step in a principal trade, namely trading between the dealer and customer. In this capacity, the systems provide a way for customers to obtain quotes from dealers and to select a dealer to fill their order, in addition to the other reasons for using a Communication Protocol System described in Section VIII.B.1. The Commission understands that dealers and PTFs may also use Communication Protocol Systems to demand liquidity in government securities, a decision which may be motivated by the possibility of executing block trades with less information leakage compared to ATSs.[842]

The Commission understands that dealer respondents on RFQ systems in the market for government securities typically provide a continuous stream of indicative, non-firm quotes that are aggregated into a single quote and made

[831] *See supra* Section II.D.2, discussing the Fair Access Rule requirements.

[832] One commenter stated that registered investment companies generally are not able to directly access liquidity on most Treasury interdealer platforms. *See* ICI Letter at 4.

[833] *See* MFA Letter at 3, stating that currently there is no mechanism to prevent Government Securities ATSs from unreasonably denying or limiting subscribers' access to an ATS that is a significant market for government securities.

[834] Systems up-time is a measure of the time that a computer system is running and available.

[835] On January 11, 2019, the largest trading platform in on-the-run U.S. Treasury Securities, experienced a system outage approximately from 2 p.m. to 3:30 p.m. ET. While the outage resulted in a modest reduction in market volume, had it occurred at a time other than late on a Friday afternoon when trading activity is normally already low, the outage could have resulted in more adverse consequences on the overall market. *See also* Elizabeth Stanton, Nick Baker, & Matthew Leising, *Treasuries Hit by One-Hour Outage on Biggest Electronic Platform,* Bloomberg, January 13, 2019, *https://www.bloomberg.com/news/articles/2019-01-11/brokertec-inter-dealer-treasury-broker-suffers-outage.*

[836] As noted in the October 15 Staff Report, price discovery is especially important in the secondary market for on-the-run U.S. Treasury Securities because the transaction prices are used as risk-free rate benchmarks to price other securities transactions.

[837] *See* BrokerTec Letter at 6.

[838] A commenter on the 2020 stated ''. . . we believe that market forces alone may be insufficient to significantly reduce systems issues in the market for trading and execution services in government securities.'' *See* MFA Letter at 6.

[839] *See* Letter from Mike Zolik, Nate Kalich, and Larry Magargal, Ronin Capital LLC, to David R. Pearl, Office of the Executive Secretary, U.S. Department of the Treasury, dated March 19, 2016, at 31–33, *available at https://www.treasurydirect.gov/instit/statreg/gsareg/RoninCapital.pdf. See also BrokerTec Letter at 6.* The Treasury Market Practices Group promotes a robust control environment for government securities trading, using internal controls and risk management. *See Treasury Market Practices Group, Best Practices For Treasury, Agency Debt, and Agency Mortgage-Backed Securities Markets (July 2019), available at https://www.newyorkfed.org/medialibrary/Microsites/tmpg/files/TMPG_BestPractices_071119.pdf.*

[840] *See infra* Section VIII.B.2.d, Table VIII.5. Some part of the stream axes volume accounted for in that table may be ATS volume.

[841] As described in Section III.A, the secondary market for U.S. Treasury Securities is generally bifurcated between the dealer-to-customer market and the interdealer market. *See also* Bloomberg Letter at 5, referencing that the bifurcating of the market is due to some extent to structural issues in clearing.

[842] *See supra* Section VIII.B.1.a, discussing information leakage and RFQs.

available to all participants who may wish to initiate an RFQ on the trading system. Such quotes may also be disseminated over the internet to the general public. These indicative quote streams are an important service on RFQ systems for at least two reasons. First, they are a source of price information in government securities, and the Commission understands that some market data vendors may rely exclusively on such quote streams for the information they provide on, for example, the Treasury market. In providing such transparency in the Treasury market, these quote streams may be used as a risk-free rate benchmark, and to help price other financial instruments. Second, the quote streams give potential participants in the RFQ a sense of what quotes they would receive in response to a request without having to make a request, which helps these market participants get a sense of the market without revealing trading interest.

Communication Protocol Systems do not meet the current definition of an exchange and thus are not subject to regulation either as an exchange or an ATS. This means they face a regulatory regime similar to that of Currently Exempted Government Securities ATSs as described in Section VIII.B.1.ii above. Furthermore, depending on how much of a role the Communication Protocol System takes in facilitating the transaction (*e.g.,* acting as a counterparty to each side of the trade), and whether the Communication Protocol System operator and/or parties to the transaction are FINRA members, transactions taking place through the Communication Protocol System may not be reported to TRACE at all.

The Commission estimates that a single Communication Protocol System trading in government securities is not currently operated by a registered broker-dealer. This system does not currently incur the costs of registering with the Commission as well as the costs of SRO membership, and is not subject to FINRA operational regulatory reporting requirements.

c. Other Methods of Trading in U.S. Government Securities

Market participants may also transact in government securities via bilateral voice trading. As the Commission understands, a market participant wishing to make a purchase or sale of government securities would phone a potential counterparty, typically a dealer in government securities, to inquire about specific securities. The parties would then negotiate on price and size. If there were agreement, the parties would execute a trade. If not, the liquidity demander could repeat this process to find a more suitable counterparty. The Commission understands that a liquidity demander would typically contact more than one dealer, in order to compare quotes.

Bilateral voice trading can be attractive to traders in government securities because this method of trading allows for flexibility, minimizes information leakage relative to other trading protocols, and may be conducive to maintaining relationships. The lack of information leakage may cause bilateral voice trading to be a useful method for traders seeking to execute large block trades of government securities.

d. Competition for U.S. Government Securities Trading Services

Government securities are traded through a diverse set of methods, including ATSs, Communication Protocol Systems, and bilateral negotiation methods such as voice trading. The Commission preliminarily believes that each type of trading method may be more prevalent in separate segments of the government securities market.

TABLE VIII.5—U.S. TREASURY SECURITIES TRADING PROTOCOL MARKET SHARE

Limit order book	RFQ	Stream axes [a]	Voice
26.3	29.9	10.4	33.4

This table reports volume share by trading protocol type in the market for U.S. Treasury Securities. *Market Share (%)* is the measure of the dollar volume as a percent of total dollar volume. Data is based on Coalition Greenwich's Greenwich MarketView data from January 2021 through September 2021. Voice protocol is calculated as the remainder of volume after accounting for Limit Order Book, RFQ, and Stream Axes reported directly to Coalition Greenwich from aggregated FINRA TRACE volume.

[a] Coalition Greenwich's Greenwich MarketView refers to this data value as "Stream/Click-to-Engage."

ATSs and Communication Protocol Systems compete with one another to attract order flow. Table VIII.5 shows the percentage of TRACE-reported Treasury Securities transactions that are completed using different trading protocols, and shows that the use of ATSs and Communication Protocol Systems to transact in Treasury Securities are roughly evenly matched in terms of volume.[843] LOB volume represents ATS trades, and the Commission understands that some amount of stream axes volume may also be from ATSs. The remaining portion of stream axes and the RFQ volume represent Communication Protocol Systems in this market.

The Commission understands that the primary customers of ATSs tend to be dealers and PTFs. The Commission understands that many of the PTFs trading on Government Securities ATSs utilize latency-sensitive trading strategies.[844] Such strategies would likely not be possible to implement when trading on a Communication Protocol System, or via bilateral voice trading. This gives ATSs an advantage in attracting such order flow. Because orders on LOB ATSs are generally displayed to all participants on the ATS, ATSs with LOBs may have more price competition among liquidity providers than alternatives. Also, ATSs, unlike non-ATS trading services, can offer certain additional execution protocols, such as crossing mechanisms and auctions, which generally meet the current definition of an exchange.

Government Securities ATSs compete on fees, trading features, and by attracting liquidity to their system. As described above in Section VIII.B.2.a, a substantial amount of order flow in government securities is concentrated on the largest Government Securities ATS.[845]

[843] One commenter pointed out that, at around 30 percent, U.S. Treasury market ATS market share is at a similar level that NMS equities ATS market share was in 1999 when Regulation ATS was adopted. The commenter stated that the exemption of Treasury securities from Regulation ATS gave Treasury market structure time to develop, but the market has now matured to a point where the exemption should be reconsidered. *See* Bloomberg Letter at 21.

[844] *See supra* Section VIII.B.2.a.i for additional discussion on the role of PTFs in the Treasury market.

[845] *See supra* Section VIII.B.2.a.i.

The primary customers of Communication Protocol Systems are those market participants in the dealer-to-customer market. Customers seeking to trade government securities may find the sophistication and infrastructure required to trade on ATSs to not be cost-effective relative to the type and quantity of trading they wish to undertake. This may give the Communication Protocol Systems an advantage in attracting such traders. In addition, Communication Protocol Systems offer features that ATSs might not, such as the ability to trade on a fully disclosed, non-anonymous basis; or the ability to connect trading in Treasuries to related trades in corporate bonds.[846]

Communication Protocol Systems compete with each other through the fees they charge, and through innovation and improvement in the type and quality of the protocols they offer. The Commission preliminarily believes that such competition among Communication Protocol Systems may explain the proliferation of different types of protocols.

Both ATSs and Communication Protocol Systems compete against the option of transacting through bilateral voice trading. Such methods of trading in government securities have been common historically and continue to be used today. As described above in Section VIII.B.2.c, these methods of trading provide traders with the ability to customize transactions on the basis of a relationship between the two parties. At the same time, these trades may be more cumbersome and may suffer from a lack of price competition relative to Communication Protocol Systems and ATSs.

The Commission preliminarily believes that the differences in regulatory regimes among ATSs and between ATSs and Communication Protocol Systems [847] can lead to an uneven competitive landscape and adversely impact the potential for robust competition in the market for government securities.[848]

The Commission believes that the current lack of public disclosure about the operations and potential conflicts of interest of Government Securities ATSs and Communication Protocol Systems that currently trade government securities might hinder competition among these ATSs and between Government Securities ATSs and Communication Protocol Systems in the market for government securities. Competition among Government Securities ATSs and between Government Securities ATSs and non-ATS trading systems would affect the trading costs of government securities market participants, including dealers, PTFs, hedge funds, and institutional investors. Their trading costs include bid-ask spreads,[849] search costs in the selection of trading venues and counterparties, and trading venue fees. When deciding which trading system most suits their trading objectives, market participants consider various operational facets of the system, such as order handling, order types, order segmentation, trading functionalities, and any potential conflicts of interest that might arise from the operator of the trading service or its affiliates. Trading system fees would also be a factor for market participants in deciding between trading systems.

3. Current State of Corporate Debt Market

Although smaller than the market for government securities, the market for corporate debt securities (''corporate bonds'') represents a significant part of the fixed income market. In September 2021, the average daily dollar volume of corporate bond trading was $26.4 billion, including $19.8 billion in investment-grade bonds and $6.5 billion in high-yield bonds.[850] One commenter stated that levels of trading in corporate debt have typically been lower than in other fixed income markets, such as government securities: While corporate bonds made up 20 percent of new issuances in Q4 2020, they only made up 4.4 percent of fixed income market trading.[851] However, the commenter pointed out that the absolute dollar volume of corporate bond trading volume is still very significant, as is the overall size of the market: As of January 2021, the corporate bond market is valued at $9.3 trillion in investment-grade and $2.4 trillion in high-yield debt outstanding.[852] Estimates put the annualized growth rate of the corporate bond market at 5.2 percent between 2008 and 2019, a growth rate second only to that of government securities within the fixed income space.[853]

Trading in corporate bonds tends to be more illiquid than trading in government securities, with liquidity often concentrated in the largest and most recently issued bonds.[854] One commenter referenced that only 18 percent of corporate bonds trade each day, and only 8 percent have more than five trades on any given day.[855] Several commenters stated that this is due in part to the highly idiosyncratic nature of corporate bond characteristics,[856] which

[846] *See supra* Sections VIII.B.1 and VIII.B.2.b for additional details on the nature of Communication Protocol Systems. *See infra* Section VIII.B.3.b for additional details on the trading of corporate bonds on Communication Protocol Systems.

[847] *See supra* Section VIII.B.2.a.ii, discussing the regulatory regime for Government Securities ATSs and Section VIIIB.2.b, discussing the regulatory regime for Communication Protocol Systems.

[848] *See* ICE Bonds Letter II at 2, stating that the significant regulatory burdens on fixed income ATSs puts them at a competitive disadvantage to non-ATS trading systems that are not subject to these same regulatory obligations. *See also* ICE Bonds Letter II at 5, stating that market participants are harmed when electronic trading systems that perform market place functions in fixed income securities are not subject to the same requirements as a fixed income ATSs, and that if the regulatory obligations of operating a fixed income ATS become too burdensome or impair the ability of fixed income ATSs to compete, it may discourage the expansion of ATSs and potentially encourage operators of fixed income ATSs to restructure their operations to avoid being characterized as an ATS.

[849] The estimated average daily relative quoted spread for interdealer transactions for on-the-run U.S. Treasury Securities is small, approximately 0.8 bps for 2-year Treasury Securities and 2.4 bps for 10-year Treasury Securities. The estimated average daily relative quoted spread for interdealer transactions for off-the-run U.S. Treasury Securities, approximately 1.7 bps for 2-year Treasury Securities and 5.4 bps for 10-year Treasury Securities, is larger compared to that of on-the-run Treasury Securities. Spreads have narrowed in the past couple of years with a change to a smaller minimum trading increment of ⅛ of 1/32 of $1. The average daily relative quoted spread is computed as the daily average of the difference between the intraday offer and bid prices divided by the corresponding price mid-quote. *See also* Paolo Pasquariello & Clara Vega, *The On-the-Run Liquidity Phenomenon,* 92 J. Fin. Econ. 1 (2009); Tobias Adria, Michael Fleming, & Or Shachar, *Market Liquidity after the Financial Crisis* (June, 28, 2017), Federal Reserve Bank of New York, Liberty Street Economics, *available at https://libertystreeteconomics.newyorkfed.org/2017/06/market-liquidity-after-the-financial-crisis.html.*

[850] *See http://finramarkets.morningstar.com/BondCenter/TRACEMarketAggregateStats.jsp?bondType=C.* While there are many types of corporate bonds, most tend to fall within two categories: Investment-grade bonds and high-yield bonds (also commonly referred to as ''non-investment-grade'' or ''junk'' bonds). High-yield bonds tend to have higher yields than both government securities and investment-grade bonds, but are also subject to a higher degree of risk.

[851] *See* Healthy Markets Letter at 8.

[852] *See id.*

[853] *See https://vegaeconomics.com/trends-in-the-us-corporate-bond-market-since-the-financial-crisis.*

[854] *See* A Financial System That Creates Economic Opportunities: Capital Markets, U.S. Department of the Treasury, October 2017, *available at https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf* (''Treasury Report'') at 85.

[855] *See* Bloomberg Letter at 9, citing Financial Times at *https://www.ft.com/content/3175772a-7ea0-3b61-ae53-063459e78c42.* Another commenter gave a similar number, estimating that only 17 percent of the more than 43,000 unique U.S. investment-grade bonds traded on any given day in 2020. *See* MarketAxess Letter at 3.

[856] *See* Bloomberg Letter at 20, mentioning that the corporate bond market is non-standard and highlighting the importance of market-making, and MarketAxess Letter at 3, stating that liquidity is lower for corporate bonds than for equities because, while there are only a few thousand common

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can differ along many different dimensions, including issuer, tenor, coupon rate, and covenants.[857] One commenter stated that, compared to the equity market, the large number of individual CUSIPs in the corporate debt market has resulted in a meaningful subset of corporate bonds without market makers, which in turn lowers the liquidity of these bonds.[858]

Corporate bondholders, who are mainly institutional investors such as mutual funds, pension funds, insurance companies, and banks,[859] have traditionally facilitated their trades through broker-dealers on a principal basis.[860] The past decade has seen an increasing shift towards trading arrangements in which dealers quickly arrange offsetting trades when intermediating between buyers and sellers so as to avoid taking on significant inventory risk for extended periods of time. A more recent trend has seen a rise in the direct participation of institutional investors as corporate bond liquidity providers: In April 2020, one corporate bond RFQ platform reported a record 900 firms providing liquidity, including 700 asset managers.[861]

a. ATSs in the Market for Corporate Debt

In September 2021, corporate bond trading on ATSs accounted for 7.7 percent of total TRACE-reported corporate bond trading volume in terms of dollar volume.[862] Currently, the Commission understands that there are 12 ATSs with a Form ATS on file trading corporate bonds.[863] Protocols in corporate bond ATSs include limit order books (LOBs), displayed and non-displayed venues, and auctions, among others. According to Table VIII.6, the most commonly reported protocol used for trading corporate bonds via ATSs is an auction. Typically, auctions operate by periodically crossing at prices that maximizes the amount of buy and sell trading interest that can be executing at that price.

Corporate bond ATSs are mostly used by dealers, who may be either using them to trade on behalf of retail investors or to rebalance excess inventories.[864] A Division of Economic Risk and Analysis (''DERA'') white paper on corporate bond ATSs finds that large dealers (*i.e.,* those in the highest quartile of trading volume and number of bonds traded) are more likely to provide corporate bond quotes on ATSs than smaller dealers.[865]

Similar to Current Government Securities ATSs, an ATS that trades in corporate debt securities must comply with the requirements of Regulation ATS, including registering as a broker-dealer.[866] Also, similar to Current Government Securities ATSs, corporate bond ATSs are not required to make public disclosures, and, as discussed above, this lack of disclosure requirements might lead to information asymmetries amongst different subscribers.[867] Further, corporate bond ATSs with significant volume [868] are required to comply with the requirements of the Fair Access Rule.[869] Moreover, ATSs that trade in corporate debt must also comply with Rule 301(b)(6) of Regulation ATS (''Capacity, Integrity, and Security Rule'') if they meet certain volume thresholds.[870] The requirements of Rule 301(b)(6), while similar, are less rigorous and less costly than the requirements of Regulation SCI.

All transactions in corporate bonds that include at least one FINRA member are required to be reported to TRACE within 15 minutes of the time of execution.[871] Furthermore, trades on ATSs operated by FINRA members may be required to be reported to TRACE, by either the ATS, counterparties to the trade, or both, depending on whether the counterparties are FINRA members and whether the ATS holds itself out as a party to the trade.[872] Academic studies have shown that TRACE reporting requirements have reduced overall trading costs in corporate bond markets,[873] but may increase the cost of

stocks, there are hundreds of thousands of CUSIPs for corporate and municipal bonds. *See also* ICI Letter at 8, stating that corporate bond liquidity varies dramatically across bonds due to their diverse nature, and that liquidity shifts can be exacerbated during times of market stress.

[857] *See https://fredblog.stlouisfed.org/2015/10/illiquidity-in-the-bond-market/.*

[858] *See* MarketAxess Letter at 3.

[859] One commenter stated that registered investment companies (''funds'') held 21 percent of bonds issued by both U.S. corporate issuers and foreign bonds held by U.S. residents as of year-end 2019. *See* ICI Letter at 1–2.

[860] *See, e.g., ≤https://www.marketwatch.com/story/u-s-corporate-debt-soars-to-record-10-5-trillion-11598921886.* (Retrieved from Factiva database); O'Hara, M., & Zhou, X.A. (2021). Anatomy of a liquidity crisis: Corporate bonds in the COVID–19 crisis. Journal of Financial Economics.

[861] *See* McDowell, Hayley. (2020, April 30). ''MarketAxess reveals record number of buy-side acted as liquidity providers in COVID–19 crisis,'' THETRADE, available at *https://www.thetradenews.com/marketaxess-reveals-record-buy-side-acted-liquidity-providers-covid-19-crisis/.*

[862] *See* TRACE Monthly Volume Files, *available at https://www.finra.org/finra-data/browse-catalog/trace-volume-reports/trace-monthly-volume-files.* One commenter referenced similar numbers for 2020, stating that corporate bond trades (including both investment-grade and high-yield bonds) on all ATSs represented 6.4 percent of the trade volume and 18.7 percent of the trade count reported to TRACE. *See* MarketAxess Letter at 1.

[863] In addition, a small percentage of corporate bonds are exchange-traded on trading systems such as NYSE Bonds and the Nasdaq Bond Exchange. *See, e.g., https://www.nyse.com/markets/bonds* and *https://www.nasdaq.com/solutions/nasdaq-bond-exchange.* Trading volume in exchange-traded bonds was reported to be around $19 billion as of January 2020. *See* Uhlfelder, Eric, (Jan. 2020), A Forgotten Investment Worth Considering: Exchange-Traded Bonds, The Wall Street Journal, available at *https://www.wsj.com/articles/a-forgotten-investment-worth-considering-exchange-traded-bonds-11578279781.* (Retrieved from Factiva database).

[864] *See* Kozora, M., Mizrach, B., Peppe, M., Shachar, O., & Sokobin, J.S. (2020). Alternative Trading Systems in the Corporate Bond Market. FRB of New York Staff Report, (938).

[865] *See* Craig, L., Kim, A., & Woo, S.W. (2020). Pre-trade Information in the Corporate Bond Market. U.S. Securities and Exchange Commission, Division of Economic and Risk Analysis White Paper. White papers and analyses are prepared by SEC staff in the course of rulemaking and other Commission initiatives. The U.S. Securities and Exchange Commission disclaims responsibility for any private publication or statement of any employee or Commissioner. White papers express the authors' views and do not necessarily reflect those of the Commission, the Commissioners, or other members of the staff.

[866] *See supra* Section II.D.2. *See also supra* Section VIII.B.2.a.ii for a discussion about the effects of these regulations and the costs to comply.

[867] *See supra* Section VIII.B.2.b.ii for additional discussion on the effects of a lack of public disclosure.

[868] An ATS trading in corporate debt securities is subject to the Fair Access Rule if, during at least four of the preceding six months, the ATS had five percent or more of the average daily volume in corporate debt securities traded in the United States. *See* 17 CFR 242.301(b)(5)(i) and *https://www.sec.gov/tm/faq-regulation-ats-fair-access-rule.*

[869] *See supra* Section II.D.2. Also, *see supra* Section VIII.B.2.b.ii describing the impact of the Fair Access Rule.

[870] *See* 17 CFR 242.301(b)(6) and *supra* note 157 and corresponding text. Rule 301(b)(6) currently applies to an ATS that trades only corporate debt securities with 20 percent or more of the average daily volume traded in the United States during at least four of the preceding six calendar months. One commenter stated that, given current aggregate ATS volumes, it is unlikely that any single ATS will approach 20 percent of overall corporate debt market volume. *See* MarketAxess Letter at 10.

[871] *See* FINRA Rule 6730(a)(1) requiring FINRA members to report transactions in TRACE-Eligible Securities, which FINRA Rule 6710 defines to include corporate debt securities. For each transaction in corporate debt securities, a FINRA member would be required to report the CUSIP number or similar numeric identifier or FINRA symbol; size (volume) of the transaction; price of the transaction (or elements necessary to calculate price); symbol indicating whether transaction is a buy or sell; date of trade execution (''as/of'' trades only); contra-party's identifier; capacity (principal or agent); time of execution; reporting side executing broker as ''give-up'' (if any); contra side introducing broker (in case of ''give-up'' trade); the commission (total dollar amount), if applicable; date of settlement; if the member is reporting a transaction that occurred on an ATS pursuant to FINRA Rule 6732, the ATS's separate Market Participant Identifier (''MPID''); and trade modifiers as required. *See* FINRA Rule 6730(c).

[872] *See supra* note 829 describing exemptions for ATS transaction reporting to TRACE.

[873] *See, e.g.,* Edwards, A.K., Harris, L.E., & Piwowar, M.S. (2007). Corporate bond market

trading through large dealers, who previously were able to offer lower transaction costs due to their information advantages.[874]

b. Communication Protocol Systems in the Market for Corporate Debt

Communication Protocol Systems play a significant role in the market for corporate debt. Table VIII.6, which breaks down corporate bond dollar volumes according to different trading protocols, shows that corporate bond trading on Communication Protocol Systems (including anonymous and disclosed RFQs, portfolio trading, and stream axes), accounted for 23.1 percent of total corporate bond trading volume during the first half of 2021. Currently, the Commission estimates that there are 8 Communication Protocol Systems trading corporate bonds that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16.

One commenter stated that protocols such as electronic RFQs in the fixed income market evolved from single dealer order routing and the use of the ''three quote rule,'' in which institutional investors would seek three quotes from three dealers in order to assist them in getting the best prices. According to the commenter, in more liquid securities, electronification has allowed traders to better organize pre-trade data, allowing for new Communication Protocol Systems that enable functionalities such as RFQ Lists and other multiple-security trade messaging inquiries.[875]

''Portfolio trading'' is a multi-security protocol that may be particularly useful for corporate bond market participants. This protocol is similar to RFQ Lists as defined in Section II.B.2 and discussed in Section VIII.B.1.b; however, while RFQ Lists permit users to respond with quotes for only some of the securities listed, securities that are listed in a portfolio trading protocol are executed for the entire portfolio at a single price with a single counterparty.[876] One industry report estimates that two to five percent of TRACE trading volume in investment-grade bonds is executed via portfolio trading protocols.[877] Furthermore, one report estimates that portfolio trading volume increased by 159 percent between 2019 and 2021.[878] The ''all-or-none'' nature of portfolio trading can be especially beneficial for corporate bond market participants who wish to trade baskets of securities that include some difficult-to-trade bonds. Specifically, market participants may be able to receive better prices for more illiquid bonds, which may or may not be balanced out by receiving worse prices on more liquid bonds.[879] Additionally, portfolio trading also tends to be faster than list trading, as there is less of a need to look at each individual security. However, these trades tend to be complex and may be more difficult to automate, as they often require extensive negotiations.[880]

While not necessarily its own protocol, one functionality that is increasingly being added to corporate bond Communication Protocol Systems involves so-called ''net spotting.'' Spotting is the practice of hedging corporate bond transactions through offsetting government security transactions, which is useful for participants as corporate bonds—investment-grade bonds in particular—are typically traded ''on spread,'' *i.e.,* quoted relative to a benchmark government bond yield. This practice has led to interlinkages between the corporate bond and government securities markets.[881] However, the Commission understands that manual spotting can suffer from inefficiencies resulting from time delays in completing trades in the two markets.

''Net spotting,'' which incorporates automated spotting functionalities into corporate bond Communication Protocol Systems, may reduce these inefficiencies. This practice calculates a net interest rate exposure resulting from a spot trade, producing a net position that can be traded as a single transaction.[882] Net spotting may help to reduce transaction costs of spot trades. A growth in the popularity of this practice is also likely to increase interlinkages between trading protocols in the corporate bond and government securities markets. One trading system operator estimates that, only six months after adding net spotting functionality to its trading system, almost 10 percent of the corporate bond trading volume on its trading system was using this functionality.[883]

In recent years, driven in part by an increase in the popularity of corporate bond exchange-traded funds (ETFs), there is some evidence that PTFs have begun to enter the corporate bond market.[884] One factor that may correlate with the entry of these firms is the ability to use portfolio trading protocols to more efficiently trade in the bonds underlying corporate bond ETFs.[885] Therefore, unlike in the market for government securities, in which PTFs prefer to trade on Government Securities ATSs, PTFs may have a more active presence on corporate bond Communication Protocol Systems than on corporate bond ATSs.[886]

Corporate bond Communication Protocol Systems do not meet the current definition of an exchange and thus are not subject to exchange registration or the requirements of Regulation ATS, such as requirements for robust systems.[887] The Commission

transaction costs and transparency. *The Journal of Finance,* 62(3), 1421–1451.

[874] *See* Bessembinder, H., Maxwell, W., & Venkataraman, K. (2006). Market transparency, liquidity externalities, and institutional trading costs in corporate bonds. *Journal of Financial Economics,* 82(2), 251–288.

[875] *See* Bloomberg Letter at 12.

[876] *See* Husveth, Ted (2021) ''Electronic Portfolio Trading Rewrites the Corporate Bond Liquidity Playbook,'' *Tradeweb, available at https://www.tradeweb.com/newsroom/media-center/insights/blog/electronic-portfolio-trading-rewrites-the-corporate-bond-liquidity-playbook/.*

[877] *See* McPartland, Kevin (2020), ''All Electronic Trading is Not Created Equal,'' *Greenwich Associates, available at https://www.greenwich.com/fixed-income/all-electronic-trading-not-created-equal.*

[878] *See* McPartland, Kevin (2021), ''Making the Case for Portfolio Trading,'' *Greenwich Associates, available at https://www.greenwich.com/fixed-income/making-case-portfolio-trading.*

[879] One commenter stated that submitting multiple securities as a portfolio of liquid and less-liquid securities enables a liquidity provider to potentially offer better prices than trading each security individually. *See* Bloomberg Letter at 13.

[880] *See* McPartland, Kevin (2020), ''All Electronic Trading is Not Created Equal,'' *Greenwich Associates, available at https://www.greenwich.com/fixed-income/all-electronic-trading-not-created-equal;* and Husveth, Ted (2021) ''Electronic Portfolio Trading Rewrites the Corporate Bond Liquidity Playbook,'' *Tradeweb, available at https://www.tradeweb.com/newsroom/media-center/insights/blog/electronic-portfolio-trading-rewrites-the-corporate-bond-liquidity-playbook/.*

[881] *See* Bloomberg Letter at 8, referencing the Joint Staff Report on the U.S. Treasury Market on October 15, 2014, *available at https://www.treasury.gov/press-center/pressreleases/Documents/Joint_Staff_Report_Treasury_10-15-2014.pdf,* stating that markets, including the U.S. Treasury market, are connected through ''automated trading strategies that involve a nearly instantaneous response to common trading signals or that seek to arbitrage short-lived opportunities across related interest-rate products.''

[882] *See* ''Net Spotting: Reducing Trading Costs for U.S. Corporate Bonds,'' (2021), *Tradeweb, available at https://www.tradeweb.com/newsroom/media-center/insights/commentary/net-spotting-reducing-trading-costs-for-u.s.-corporate-bonds/.*

[883] *See id.*

[884] *See https://www.greenwich.com/blog/what%E2%80%99s-next-high-frequency-traders,* which mentions that one PTF has begun to trade using corporate bond RFQs.

[885] *See, e.g.,* Rennison, Joe, Armstrong, Robert, and Wigglesworth, Robin, January 22, 2020, ''The new kings of the bond market,'' Financial Times, *available at https://www.ft.com/content/9d6e520e-3ba8–11ea-b232-000f4477fbca.*

[886] *See supra* Section VIII.B.2.b for a discussion of PTFs' role in government securities ATSs.

[887] *See supra* Section VIII.B.2.b for discussion of the effects of not being subject to such regulations. One commenter stated that, given the lack of a central clearing party for corporate and municipal

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estimates that there are currently 2 Communication Protocol Systems with sufficient corporate bond trading volume such that they would otherwise be over the threshold for the Capacity, Integrity, and Security Rule 301(b)(6).[888] Several commenters stated that the resiliency of the fixed income market during the COVID crisis showed that the current structure of the fixed income market, and of the electronic trading market in particular, is already resilient and robust.[889]

The Commission estimates that 6 Communication Protocol Systems for corporate bonds are not currently operated by registered broker-dealers. These systems do not currently incur the costs of registering with the Commission as well as the costs of SRO membership, and are not subject to FINRA operational regulatory reporting requirements.[890]

A corporate bond transaction on a Communication Protocol System is reported to TRACE if at least one party to the transaction is a FINRA member, and/or if the Communication Protocol System itself is a member of FINRA.[891] Depending on how much of a role the Communication Protocol System takes in facilitating the transaction (*e.g.,* acting as a counterparty to each side of the trade), and whether the Communication Protocol System operator and/or parties to the transaction are FINRA members, transactions taking place through the Communication Protocol System may not be reported to TRACE at all.[892]

c. Other Methods of Trading in the Market for Corporate Debt Securities

While the electronic trading of corporate bonds through ATSs and Communication Protocol Systems has grown over time,[893] traditionally corporate bonds trading has taken place bilaterally through either dealer-to-dealer or dealer-to-customer negotiations, often using telephone calls. There is evidence that such manual transactions methods remain an important part of the corporate bond market: Table VIII.6 shows that 71.4 percent of trading in corporate bonds was facilitated via bilateral voice trading during the first half of 2021.

Transactions in corporate bonds that do not take place on electronic platforms will be reported to TRACE if at least one party to the trade is a member of FINRA.[894]

d. Competition for Corporate Debt Securities Trading Services

The trading of corporate debt securities takes place through a variety of different methods, including ATSs, Communication Protocol Systems, and informal bilateral trading methods such as voice trading. These different methods compete with each other for customers, and may appeal to different segments of the corporate market depending on that segment's preferences and trading needs. Trading systems within the ATS and Communication Protocol System spaces also compete with one another on the basis of fees, trading features, and their ability to attract liquidity.

One commenter stated that the choice of trading method is driven largely by liquidity considerations, with less liquid securities trading via manual protocols such as voice trading, more liquid securities using protocols such as RFQs, and the most liquid securities trading electronically on ATSs using protocols such as LOBs and call auctions.[895] Other commenters stated that the majority of corporate bonds are not liquid enough to support order book trading,[896] which may be one reason why there is not much corporate bond trading volume in ATSs as compared to Communication Protocol Systems, and why there is less ATS trading in corporate bonds as compared to other securities, such as government securities. As discussed in Section VIII.B.1, customers who want to trade electronically but are concerned about information leakage may be more likely to use Communication Protocol Systems, particularly RFQs, as opposed to ATSs. One study finds that corporate bond ATSs may be most utilized for smaller transactions in investment-grade bonds, which are less vulnerable to information asymmetry, and transaction in bonds that have (all else being equal) experienced a recent decrease in secondary market trading volume, for which search costs may be high.[897]

As shown in Table VIII.6, the majority (65.4 percent) of non-voice trading in corporate bonds is conducted on RFQs. About one fourth of RFQ volume is anonymous, and, while the majority of corporate bond trading volume on RFQs is disclosed, even participants on disclosed RFQs often have greater flexibility over the extent to which they reveal their trading interest, for example by limiting how many entities can view their trading interest or by refraining from responding to a quote request.[898] RFQs may also help facilitate a wider variety of functionalities that market bond participants find particularly useful, such as portfolio trading and net spotting. Automated executions and limited negotiation possibilities may make these functionalities more difficult to implement on many ATSs.

bond trades, each participant has the discretion over which other participants they wish to extend credit to and trade; therefore, fair access to a corporate bond Communication Protocol System may not have the same meaning given to it in the equity ATS context as the system does not have the ability to ensure that all participant have the same access to liquidity. *See* MarketAxess Letter at 10. Another commenter stated that Communication Protocol Systems such as RFQs do not pose the same technological risks as, *e.g.,* fully automated central limit order books (CLOBs) because trading is slower, there are fewer algorithms that may malfunction, and, if RFQ systems are unavailable, parties can continue to negotiate and execute transactions bilaterally away from the trading system. *See* Tradeweb Letter at 6.

[888] *See supra* notes 157 and 870. One commenter stated that, other than Rule 301(b)(6)(ii)(F) and (G), it expects that nearly all existing platforms already meet or are trying to meet the requirements of Rule 301(b)(6). *See* MarketAxess Letter at 11. Another commenter that runs a fixed-income Communication Protocol System stated that it invested in proper contingency planning, disaster recovery, robustness, and resiliency to ensure there is no disruption in service. *See* FlexTrade Systems Letter at 3.

[889] *See, e.g.,* Bloomberg Letter at 18 and 23 and MarketAxess Letter at 12.

[890] One commenter stated that, even if Communication Protocol System providers do not meet the standard of brokerage activity, since registered broker-dealers are using these trading systems, they are supervised under FINRA standards for brokers relying on outsourced technology. The commenter states that these systems are also monitored by broker-dealer, who are incentivized to do so. *See* Bloomberg Letter at 30–31.

[891] One commenter pointed out that FINRA has recently proposed changes to TRACE reporting of portfolio trades. *See* Bloomberg Letter at 14, citing FINRA request for comment, Regulatory Notice 20–24, September 15, 2020, *available at https://www.finra.org/sites/default/files/2020–07/Regulatory-Notice-20-24.pdf.*

[892] *See* FINRA Rule 6730(a)(1) requiring FINRA members to report transactions in TRACE-Eligible Securities. *See* also *supra* note 228 and *https://www.finra.org/rules-guidance/notices/14-53.*

[893] One commenter stated that approximately 32 percent of investment-grade and 23 percent of high-yield corporate bond daily dollar volumes are executed electronically. *See* BDA Letter at 1.

[894] *See* FINRA Rule 6730(a)(1) requiring FINRA members to report transactions in TRACE-Eligible Securities. *See* also *supra* note 228 and *https://www.finra.org/rules-guidance/notices/14-53* and *https://www.finra.org/filing-reporting/market-transparency-reporting/trace/faq/reporting-corporate-and-agencies-debt.*

[895] *See* Bloomberg Letter, Figure 2. *See also* Bloomberg Letter at 14. *See also* MarketAxess Letter at 2, stating that institutional investors in credit markets prefer RFQs because they have found that liquidity on demand results in the best pricing for illiquid securities.

[896] *See, e.g.,* ICI Letter at 6 and MarketAxess Letter at 3.

[897] *See* Kozora, M., Mizrach, B., Peppe, M., Shachar, O., & Sokobin, J.S. (2020). Alternative Trading Systems in the Corporate Bond Market. FRB of New York Staff Report, (938).

[898] See Section VIII.B.1 for a discussion on the difference between disclosed and anonymous RFQs.

TABLE VIII.6—CORPORATE DEBT SECURITIES AND DOLLAR VOLUME SHARE BY TRADING PROTOCOL

Anonymous RFQ	Disclosed RFQ	Auction	Limit order book	Non-displayed venue [a]	Portfolio trading	Stream axes [b]	Voice
4.8	13.9	3.0	2.4	0.1	2.2	2.2	71.4

This table reports volume share by trading protocol type in the market for corporate debt securities. *Market Share (%)* is the measure of the dollar volume as a percent of total par dollar volume. Data is based on Coalition Greenwich's Greenwich MarketView data from April 2021 through September 2021. Voice market share is calculated as a remainder of total market volume after accounting for electronic protocols volume reported to Coalition Greenwich.

[a] Non-displayed venues are referred to as ''dark pools'' in the Coalition Greenwich's Greenwich MarketView data.
[b] Coalition Greenwich's Greenwich MarketView refers to this data value as ''Stream/Click-to-Engage.''

Customers may prefer other methods such as bilateral voice trading because they wish to transact in less liquid bonds that may require more intermediation to find a counterparty, despite the possibility that the lack of price competition may lead to higher trading costs. One academic study shows that the movement of corporate bond trading volume from voice trading to an RFQ-type protocol system mainly reduced transaction costs for the most liquid securities.[899] However, one commenter referenced that the electronification of manual trading methods, while improving operational efficiencies, does not fundamentally change liquidity in the corporate bond market as the same intermediaries and interactions between dealers and customers are still involved.[900]

Similarly to the market for government securities, the Commission preliminarily believes that the differences in regulatory regime between ATSs and other trading methods, including Communication Protocol Systems such as RFQs and others, can lead to an uneven competitive landscape and adversely impact the potential for robust competition in the market for corporate debt securities.[901] Specifically, the lack of public disclosure about the operations and potential conflicts of interest of Communication Protocol Systems trading in corporate bonds might hinder competition among these trading systems and between Communication Protocol Systems and ATSs in the market for corporate bond trading services.

The fact that ATSs are subject to numerous regulatory requirements that Communication Protocol Systems, which may perform a similar market place function, are not subject to may place ATSs at competitive disadvantage compared to Communication Protocol Systems as a result of the associated compliance costs and potentially higher barriers to entry. Furthermore, one commenter stated that the different regulatory treatment of fixed income trading platforms, with some platforms regulated as ATSs, some regulated as broker-dealers, and others not regulated at all, leaves room for regulatory arbitrage.[902]

4. Current State of the Municipal Securities Market

The market for municipal securities (''municipal bonds'') represents another important part of the fixed income market. Daily trading volumes in the municipal bond market averaged around $12.4 billion during the 2020 calendar year.[903] Average trade sizes in this market tend to be smaller than in other fixed income markets: In September 2021, 81 percent of trades were for $100,000 or less, reflecting the higher presence of retail investors in this market.[904]

The relatively large role of retail investors in the market for municipal bonds represents one important way in which this market differs from the markets for government securities and corporate bonds. Unlike in the markets for other fixed income securities, which are mostly owned by institutional investors, retail investors play a prominent role in the ownership of municipal bonds, with 45.2 percent of municipal bonds held by households and nonprofits as of 2020.[905] This is largely due to the tax-exempt status of most municipal bonds, which makes them attractive to households but less attractive to institutional investors such as pension funds, whose holdings are already tax-deferred or tax exempt. Municipal bond markets also tend to be highly localized, as investors that are located in geographic proximity to an issuer are more likely to be informed about that issuer, and tax benefits are often conferred on investors that are located in the same state as the issuer.[906]

Households tend to be buy-and-hold investors, which may contribute to overall low liquidity levels in the secondary market for municipal bonds. In 2018, less than one percent of outstanding municipal bonds traded on a typical day, and, as in the corporate bond market, liquidity is mostly concentrated in newly-issued bonds.[907] Furthermore, there is evidence that trading in municipal bonds has declined in recent years, as secondary market trading volume declined by about 19 percent between 2019 and 2021.[908]

The market for municipal bonds is highly heterogeneous, and perhaps even more fragmented than the market for corporate bonds. In addition to a wide diversity of bond characteristics, including maturity, tax status, and coupon type, there are more than 50,000 different issuers in the municipal bond market, including state and local governments, towns, cities, and counties, who as of 2020 have issued

[899] *See* Hendershott, T., & Madhavan, A. (2015). Click or call? Auction versus search in the over-the-counter market. *The Journal of Finance,* 70(1), 419–447.

[900] *See* Bloomberg Letter at 9 and10, citing Treasury Report.

[901] *See supra* Section VIII.B.2.d.

[902] *See* Tradeweb Letter at 6.

[903] *See* Municipal Securities Rulemaking Board, Muni Facts, *available at https://www.msrb.org/News-and-Events/Muni-Facts.*

[904] *See* Municipal Securities Rulemaking Board, Municipal Trade Statistics, *available at https://emma.msrb.org/MunicipalTradeStatistics/ByTradeCharacteristic.aspx.*

[905] *See* ''Trends in Municipal Bond Ownership'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Other-Market-Topics.* Note that this source groups together households and nonprofit organizations. One commenter pointed out the role of registered investment companies (''funds'') in this market, stating that funds held 29 percent of municipal bonds outstanding as of year-end 2019. *See* ICI Letter at 1–2.

[906] *See* Schultz, P. (2012). The market for new issues of municipal bonds: The roles of transparency and limited access to retail investors. Journal of Financial Economics, 106(3), 492–512.

[907] *See* Bessembinder, H., Spatt, C., & Venkataraman, K. (2020). A survey of the microstructure of fixed-income markets. Journal of Financial and Quantitative Analysis, 55(1), 1–45.

[908] *See* ''2021 Municipal Market Trading Update,'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports.*

around one million unique bonds valuing $3.9 trillion.[909]

The market for municipal bonds is largely an OTC market, in which investors place orders with dealers who execute these orders by either committing their own capital (via principal trades) or by searching the market for counterparties (via riskless principal trades or agency trades).[910] Academic research of regulatory data has shown that the interdealer market in municipal bonds has a decentralized network structure composed of between 10 to 30 central dealers and more than 2,000 periphery dealers.[911] Further research shows that the highly geographically localized nature of this market can limit competition between dealers.[912]

a. ATSs in the Market for Municipal Securities

ATSs play an increasingly important role in the municipal bond market. Between August 2016 and April 2021, an estimated 56.4 percent of municipal bond interdealer trades (26 percent in terms of dollar volume) were conducted via ATSs.[913] One commenter stated that, in 2020, more than 1.7 million trades were reported to the MSRB as being executed on an ATS, 1.55 million of which were for $100,000 or less, showing that ATSs are of particular significance for individual investors.[914] The Commission understands that there are currently 6 reporting ATSs trading in municipal securities. One commenter stated that tremendous consolidation in the municipal securities ATS market has occurred over time, such that there are only a few remaining ATSs with significant trading in municipal bonds.[915]

As mentioned in the introduction to Section VIII.B.4 above, municipal bond owners are typically retail investors. Retail investors are unlikely to subscribe directly to ATSs, and so almost all trades executed on ATSs are from dealer quotes.[916] A DERA white paper found that, during a three-month period in 2014, 62 percent of trades on ATSs were between dealers and customers, including both retail and institutional investors, while the remainder were interdealer trades.[917] The white paper also found that large broker-dealers are more likely to post quotes on ATSs than small broker-dealers.[918]

In terms of available protocols, municipal bond ATSs offer LOB-based protocols, but many also offer protocols similar to RFQs. For the latter, quote information is only available to a limited subset of ATS participants. This shortage of public pre-trade information may make it more difficult for retail investors in this market, who may not have access to quote information, to ensure that they are getting the best prices; in fact, the DERA white paper found that smaller retail-sized municipal bond trades tend to receive worse prices than large trades.[919]

80 percent of all quoted municipal bonds have only a single quote offered by a single broker at any given point in time, which corresponds to the heterogeneous nature of this market.[920] Another reason why municipal bonds tend to be thinly quoted may be the difficulty in shorting municipal bonds, as Internal Revenue Service (IRS) rules regulating the shorting of tax-exempt securities and difficulties in locating securities to borrow makes shorting in this market costly.[921] A dealer likely will not quote in a bond unless it already owns that bond.

ATSs that trade in municipal bonds face many of the same regulatory requirements as those that trade in corporate bonds, including complying with Regulation ATS.[922] This includes requirements that ATSs with significant volume in municipal securities markets must comply with the Fair Access Rule[923] and with Rule 301(b)(6) of Regulation ATS (''Capacity, Integrity, and Security Rule'').[924]

Broker-dealers operating in the municipal bond market must be registered with the Municipal Securities Rulemaking Board (MSRB), which creates rules governing their conduct and transparency.[925] Since 2005, all MSRB-registered dealers must report municipal bond trades within 15 minutes of the time of execution to the MSRB's Real-Time Transaction Reporting System (RTRS).[926] Since

[909] *See* Municipal Securities Rulemaking Board, Muni Facts, *available at https://www.msrb.org/News-and-Events/Muni-Facts.* This is compared to the corporate bond market, in which there are around 43,000 unique securities with a total market size around $10.6 trillion. *See* also SIFMA letter at 9 (stating that there are 50,000 issuers of municipal securities and one million unique municipal bonds, compared to 30,000 unique corporate bonds).

[910] *See* ''Analysis of Municipal Securities Pre-Trade Data from Alternative Trading Systems'' (2018), Municipal Securities Rulemaking Board, *available at https://www.sec.gov/spotlight/fixed-income-advisory-committee/msrb-staff-analysis-of-municipal-securities-pre-trade-data.pdf.*

[911] *See* Li, D., & Schürhoff, N. (2019). Dealer networks. The Journal of Finance, 74(1), 91–144.

[912] *See* Schultz, P. (2013). State taxes, limits to arbitrage and differences in municipal bond yields across states. Unpublished working paper. University of Notre Dame.

[913] *See* ''Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports. See* also Letter from Edward J. Sisk, Chair, Municipal Securities Rulemaking Board, dated March 1, 2021 (''MSRB Letter''), stating that MSRB trade data shows that ATSs were involved in 21 percent of all trades and 55 percent of all inter-dealer trades in the municipal bond market.

[914] The commenter also stated that the median size of trades reported as occurring on an ATS was $25,000 and that, for trades of $100,000 or less, ATSs accounted for 24 percent of all trades and 59 percent of all inter-dealer trades. *See* MSRB Letter at 2–3.

[915] *See* SIFMA letter at 11.

[916] *See* ''Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports.*

[917] *See* Craig, L., Kim, A., & Woo, S.W. (2018). Pre-Trade Information in the Municipal Bond Market. DERA White Paper, *available at https://www.sec.gov/files/DERA_WP_Pre-trade_Information_in_the_Municipal_Bond_Market.pdf.*

[918] *See id.*

[919] *See id.* The paper defines institutional-size trades as trades greater than $100,000, and retail-size trades as trades less than $100,000, citing Harris and Piwowar (2006), who use trade size of $100,000 to distinguish retail- and institutional-size customer trades. *See* Harris, L.E., & Piwowar, M.S. (2006). Secondary trading costs in the municipal bond market. The Journal of Finance, 61(3), 1361–1397.

[920] *See* ''Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports.*

[921] *See* ''Municipal Securities Pre-Trade Market Activity: What Has Changed Since 2015?'' (2020), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/~/link.aspx?_id=9089AC4BA1F144B388D090177FADCDD6&_z=z.*

[922] *See supra* note 866 and Section VIII.B.2.a.ii for a discussion of the impact of some of the elements of Regulation ATS.

[923] An ATS trading in municipal debt securities is subject to the Fair Access Rule if, during at least four of the preceding six months, the ATS had five percent or more of the average daily volume in municipal debt securities traded in the United States. *See* 17 CFR 242.301(b)(5)(i) and *https://www.sec.gov/tm/faq-regulation-ats-fair-access-rule. See supra* Section VIII.B.2.a.ii for a discussion of the impact of the Fair Access Rule.

[924] *See* 17 CFR 242.301(b)(6) and *supra* note 157 and corresponding text. Rule 301(b)(6) currently applies to an ATS that trades only municipal debt securities with 20 percent or more of the average daily volume traded in the United States during at least four of the preceding six calendar months. *See supra* Section VIII.B.3.a for a discussion of the current impact of being subjected to Rule 301(b)(6).

[925] The MSRB is an SRO that is overseen by the SEC. *See* Municipal Securities Rulemaking Board, The Role and Jurisdiction of the MSRB, *available at https://www.msrb.org/About-MSRB/About-the-MSRB.*

[926] *See* MSRB Rule G–14 requiring brokers, dealers and municipal securities dealers (''dealers'') to report transactions in municipal securities. The following transactions in municipal debt securities are exempt from reporting requirements: Transactions in securities without assigned CUSIP numbers; transactions in Municipal Fund Securities; and inter-dealer transactions for principal movement of securities between dealers that are not inter-dealer transactions eligible for comparison in a clearing agency registered with the Commission. Dealers are exempt from reporting if they do not affect any transactions in municipal securities or if they only deal in exempt transactions.

2016, dealer-reported trades to the MSRB have been required to include an indicator to identify trades that have been executed on an ATS.[927] Trades that take place on an ATS are required to be reported both by the member dealers that transact with the ATS, as well as by the ATS if that ATS has taken a principal position between the buyer and seller. If the ATS only facilitates the connection between the buyer and seller but does not take a principal or agency position, it has no reporting requirement under MSRB rules.[928]

b. Communication Protocol Systems in the Market for Municipal Securities

At least 43.6 percent of interdealer trades (74.1 percent in terms of dollar volume) in the municipal bond market take place via trading methods that are not ATSs, including 38.3 percent direct dealer-to-dealer and 5.3 percent on broker's broker platforms.[929] At least some of these transaction are likely to take place via Communication Protocol Systems. The Commission estimates that there are currently 3 Communication Protocol Systems operating in the municipal debt market that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16.

Of particular interest in this context are broker's broker platforms. A broker's broker is defined by the MSRB as a dealer that principally effects transactions for other dealers or that holds itself out as a broker's broker.[930] The broker's broker does not participate in the decision to buy or sell and does not exercise discretion as to the price at which a transaction is executed or determine the timing of a trade.[931] While broker's brokers traditionally conducted their activities via bilateral means such as voice trading, they have increasingly made use of electronic systems.[932] Most electronic broker's broker platforms use only quote solicitation protocols and do not post quotes; those that do post quotes typically are registered as an ATS with the SEC.[933] However, only about 1.6 percent of all inter-dealer trades take place on broker's broker platforms that are registered as ATSs.

The Commission estimates that 1 Communication Protocol System trading in municipal bonds is not currently operated by a registered broker-dealer. This system is not subject to exchange registration or the requirements of Regulation ATS, and is not subject to FINRA operational regulatory reporting requirements.[934]

If the Communication Protocol System only facilitates the connection between the buyer and seller but does not take a principal or agency position to the transaction, the Communication Protocol System may not currently be required to report post-trade data under MSRB rules.[935] However, trades that take place on a Communication Protocol System will currently be reported to MSRB's RTRS if at least one party to the transaction is a municipal bond dealer.

c. Other Methods of Trading in the Market for Municipal Securities

Similar to other fixed income markets, the market for municipal securities has traditionally relied on bilateral voice trading.[936] As mentioned above in the introduction to Section VIII.B.4, due to the particularly fragmented and localized nature of the municipal bond market, competition between individual dealers may be limited.[937] Therefore, it is likely that the lack of pre-trade price transparency in a market traditionally dominated by bilateral voice trading has been particularly costly for municipal bond customers, who lack both price information and bargaining power when negotiating prices with their dealers over the phone. In fact, transaction costs in the municipal bond market have typically been large compared to other markets, and academic studies have indeed attributed these large transaction costs to a lack of price transparency and subsequent information asymmetry between dealers and customers.[938] One MSRB report found that technological advancements in this market and the movement away from voice trading and towards electronic trading have helped reduce transaction costs for dealer-customer trades by 51 percent between 2005 and 2018.[939]

Transactions that take place via bilateral negotiations will only be reported to MSRB's RTRS if at least one party to the transaction is a MSRB-member dealer.

d. Competition for Municipal Securities Trading Services

The trading of municipal debt securities takes place through a variety of different methods, including electronic protocols through ATSs and Communication Protocol Systems, as well as more traditional methods such as telephone calls. These various methods compete with one another in attracting order flow.

Due to the buy-and-hold nature of municipal bond trading, usually brokers' main task is to locate investors that are willing to buy new issues.[940] ATSs may help to reduce search costs. Indeed, one study finds that dealers are more likely access ATS systems for trades that are more difficult to price and that face substantial search costs, such as smaller-sized trades and trades involving municipal bonds with complex features.[941] Accordingly, 90 percent of quotes on municipal bond ATSs are offer quotes.[942] On the other hand, the vast majority of RFQs on municipal bond ATSs are requests for

[927] *See* MSRB Letter at 3. One commenter stated that a difference between ATS trade reporting requirements between FINRA and MSRB is that, while the MSRB, like FINRA, requires an ATS flag for reports to their Real-time Trade Reporting System, this only applies to interdealer trades conducted on ATSs, not trades with customers. *See* BDA Letter at 3.

[928] *See* Regulatory Notice 2015–07, Municipal Securities Rulemaking Board, May 26, 2015, *available at https://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices?type=All&filter=2015.*

[929] *See id.*

[930] *See* Municipal Securities Rulemaking Board, MSRB Rule G–43.

[931] *See* SIFMA, ''The Role of Municipal Securities Broker's Brokers in the Municipal Markets,'' 2017.

[932] *See* ''Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports.*

[933] *See* ''Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports.*

[934] In this respect they are similar to Communication Protocol Systems in the market for corporate debt. *See supra* Sections VIII.B.3.b and VIII.B.3.d for a discussion of the impact of not being subject to these regulations.

[935] *See* Regulatory Notice 2015–07, Municipal Securities Rulemaking Board, May 26, 2015, *available at https://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices?type=All&filter=2015.*

[936] One commenter estimated only 15 percent of daily dollar trading volume in municipal bonds is executed electronically. *See* BDA Letter at 1.

[937] *See* Schultz, P. (2012). The market for new issues of municipal bonds: The roles of transparency and limited access to retail investors. Journal of Financial Economics, 106(3), 492–512.

[938] *See* Harris, L.E., & Piwowar, M.S. (2006). Secondary trading costs in the municipal bond market. The Journal of Finance, 61(3), 1361–1397.

[939] *See* ''Transaction Costs for Customer Trades in the Municipal Bond Market: What is Driving the Decline?'' (2018), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/~/link.aspx?_id=9089AC4BA1F144B388D090177FADCDD6&_z=z.*

[940] *See* Schultz, P. (2012). The market for new issues of municipal bonds: The roles of transparency and limited access to retail investors. Journal of Financial Economics, 106(3), 492–512.

[941] *See* ''Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker's Broker Platforms'' (2021), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/Reports.*

[942] *See* ''Municipal Securities Pre-Trade Market Activity: What Has Changed Since 2015?'' (2020), Municipal Securities Rulemaking Board, *available at https://www.msrb.org/Market-Topics/~/link.aspx?_id=9089AC4BA1F144B388D090177FADCDD6&_z=z.*

bids, reflecting that RFQ protocols are more likely to be used when customers want to sell.[943]

Meanwhile, empirical results show that broker's broker platforms, which may have functionalities similar to Communication Protocol Systems, are more likely to be used for large-sized trades, and less likely to be used for municipal bonds with complex features.[944] The study implied that this is because the lower price transparency on many broker's broker platforms, which do not post quotes, makes these systems less useful for trading securities that are difficult to price.

Meanwhile, similar to the case of corporate bond markets, RFQs may instead be preferred by traders that want to limit information leakage, such as in case of large-sized trades.[945] Furthermore, as in the market for corporate bonds, one commenter stated that the majority of municipal bonds are not liquid enough to support order book trading.[946]

More generally, for the reasons described in Section VIII.B.4.c, the movement of municipal bond trading onto electronic platforms has helped to reduce transaction costs. Specifically, an increase in transparency in this market has particularly been beneficial for retail investors who otherwise have little access to municipal bond information.[947]

The Commission preliminarily believes that, as in other fixed income markets, the differences in regulatory regime between ATSs and other trading methods can lead to an uneven competitive landscape and adversely impact the potential for robust competition in the market for municipal debt securities.

5. Current State of the Equity Market

The market for U.S. equity securities represents one of the largest U.S. and global financial markets. As of 2020, the capitalization of the U.S. equity market was estimated to be more than $40 trillion.[948] The market for equity trading services is served by exchanges, ATSs, other trading systems, such as OTC systems, and other liquidity providers (such as internalizers). The type of trading system on which an equity security is eligible to trade will depend on the equity security's characteristics, including whether the issuing company periodically reports its financial information and whether the security is exchange-listed and/or registered with the SEC. U.S. equity securities contain NMS stocks (including ETFs), OTC securities, and restricted stocks, in addition to other types of securities.

a. Categorization and Trading Characteristics of U.S. Equity Securities

The largest and most liquid part of the U.S. equity market consists of national market system (NMS) stocks. In general, NMS stocks are exchange-listed equity securities for which transactions are reported pursuant to an effective transaction reporting plan.[949] As of August 2021, there were around 5,669 equities listed across five exchanges.[950] In September 2021, the average daily trading volume in NMS stocks across all market centers was $545 billion.[951] The market for trading services in NMS stocks consists of 16 national securities exchanges, and 34 ATSs, as well as other off-exchange trading venues, including broker-dealer internalizers and wholesalers.[952]

One subset of NMS stocks that has been increasing in popularity in recent years includes exchange-traded funds (ETFs). ETFs are securities that are registered as open-end investment companies or unit investment trusts under the Investment Company Act of 1940 (the ''1940 Act''),[953] that typically track financial instruments or bundles of financial instruments (such as an index), and are listed on national securities exchanges. ETFs are investment vehicles that issue shares that can be bought or sold throughout the day on securities exchanges in the secondary market at a market-determined price. The ETF market has seen significant growth in the past decade, as the number of ETFs nearly doubled from 1,134 to 2,204 and net assets more than quintupled, from $939 billion to more than $5.3 trillion.[954] ETF secondary market trading made up 26 percent of total daily U.S. stock market trading on average in 2020.[955] At the same time, ETF liquidity may be highly concentrated, with studies estimating that more than 85 percent of all ETF value traded is concentrated in around 150 ETFs, or around five percent of all ETFs.[956] As with other NMS securities, ETFs can be traded on exchanges and at off-exchange venues.

There is also a significant market for stocks that are not listed on a national securities exchange, which are often referred to as over-the-counter (OTC) equities.[957] As of August 2021, there were 8,777 unlisted stocks that fell under FINRA reporting requirements.[958] Unlike NMS stocks, which may trade on- or off-exchange, OTC equities may only trade off-exchange, on ATSs or through Communication Protocol Systems for example.[959] Liquidity in OTC equities can be limited: A 2019 Commission analysis estimated that only 44 percent of quoted OTC equities are traded per day, and two percent did not trade at all during the 2019 calendar year.[960]

OTC equities tend to be held by small investors. One academic study found that institutions only held about 26 percent of OTC stocks, as compared to 71 percent of listed stocks, implying

[943] *See id.*

[944] *See id.*

[945] *See* Section VIII.B.3.

[946] *See* ICI Letter at 6–7.

[947] *See* Craig, L., Kim, A., & Woo, S.W. (2018). Pre-Trade Information in the Municipal Bond Market. DERA White Paper, *available at https://www.sec.gov/files/DERA_WP_Pre-trade_Information_in_the_Municipal_Bond_Market.pdf.*

[948] *See* ''Market capitalization of listed domestic companies (current US$)—United States,'' The World Bank, *available at https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=US.*

[949] *See* Regulation NMS Rules 600(b)(46) and (47) (17 CFR 242.600(b)(46) and (47)).

[950] *See https://www.finra.org/filing-reporting/oats/oats-reportable-securities-list.* This includes NYSE Arca, NYSE MKT, BZX Exchange (BATS), NASDAQ, and New York Stock Exchange (NYSE).

[951] *See* CBOE Historical Market Volume Data, *available at https://www.cboe.com/us/equities/market_statistics/historical_market_volume/market_history_monthly_2019.csv.* The statistic is calculated by summing the ''Total Notional'' value for all entries in September 2021, and then dividing this sum by the number of trading days in September 2021 (21).

[952] There are 34 NMS Stock ATSs operating with a Form ATS–N on file. *See* Form ATS–N Filings and Information, *available at https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm.* Wholesalers are broker-dealers to whom retail brokers send their clients' orders to be filled internally (as opposed to sending the trade orders to an exchange). Typically, a wholesaler promises to provide price improvement relative to the NBBO for filled orders. Wholesalers often pay retail brokers for sending their clients' orders to the wholesaler.

[953] This discussion does not address other types of exchange-traded products that are not registered under the 1940 Act, such as exchange-traded commodity funds or exchange-traded notes. *See https://www.sec.gov/investor/alerts/etfs.pdf.* It is estimated that at year-end 2020, less than 3% of net assets were held in ETFs that are not registered with or regulated by the SEC under the Investment Company Act of 1940; *see https://www.icifactbook.org/21_fb_ch4.html.*

[954] *See https://www.icifactbook.org/21_fb_ch4.html.*

[955] *See id.*

[956] *See id.*

[957] The Commission estimates that quoted OTC securities were valued at approximately $32.3 trillion in 2019, with 94.7 percent of the total market capitalization coming from companies that also have securities listed on public foreign exchanges.

[958] *See https://www.finra.org/filing-reporting/oats/oats-reportable-securities-list/.*

[959] *See* ''Unraveling the Mystery of Over-the-Counter Trading'' (2016), FINRA, *available at https://www.finra.org/investors/insights/unraveling-mystery-over-counter-trading.*

[960] *See* SEC Release No. 34–87115, ''Publication or Submission of Quotations Without Specified Information'' Proposed Rule and Concept Release, *available at https://www.sec.gov/rules/proposed/2019/34-87115.pdf.*

that most owners of OTC stocks are retail investors.[961] A study found that retail investors may be attracted to the low price of OTC equities, which include equities that trade under $5 per share (so-called ''penny stocks'').[962]

Transparency in the market for OTC securities can be limited. While some OTC equity trading systems require issuers to register their securities with the SEC and/or periodically file their financial statements (either with the SEC or with the trading venue), other systems may trade in OTC equities without any reporting standards or eligibility requirements.[963] The market for OTC equities is largely regulated by FINRA under Section 15A of the Securities Exchange Act of 1934, which requires FINRA to, among other things, establish rules governing the form and content of quotations for securities sold otherwise than on an exchange.

One particular type of unlisted securities is referred to as restricted (or sometimes ''control'') stocks. Restricted stocks are either unregistered shares issued by public companies in private placements [964] or shares (both registered and unregistered) held by an issuer or its affiliates (such as insiders and large shareholders). The secondary market for restricted stocks is governed by SEC Rule 144, and allows restricted stocks to be sold to the public if several conditions are met.[965] While investments in restricted stocks are typically limited to only accredited investors, new SEC rules adopted in 2015 under Section 401 of the Jumpstart Our Business Startups (JOBS) Act, often referred to as ''Regulation A+,'' expanded the ability for non-accredited investors to trade in certain unregistered equities. Eligible restricted stocks can be traded on a number of electronic platforms that specialize in the secondary market for restricted shares, as well as through broker-dealers.[966]

b. ATSs in the Equity Market

As mentioned above, NMS stocks that are listed on national securities exchanges may trade both on exchanges and at off-exchange trading venues, including on ATSs. Currently there are 34 NMS Stock ATSs, collectively handling an average of around 453 million trades during Q3 2021.[967] Since the adoption of Regulation NMS in 2005, the market for trading services has become more fragmented, and the proportion of NMS stocks trading off-exchange has increased. For example, as of July 2020, NMS Stock ATSs comprised approximately 10 percent of consolidated dollar volume, and other off-exchange volume totaled approximately 23 percent of consolidated dollar volume.[968]

NMS Stock ATSs generally operate as non-displayed venues, which do not display quotes. Traditionally, market participants that used non-displayed venues to trade listed stocks have been large institutional investors seeking to execute block trades. However, average trade sizes in many ATSs have shrunk from block-size trades to smaller trade sizes that match those of traditional exchanges. In 2018, the Commission found that, while eight NMS Stock ATSs had average trade sizes larger than 10,000 shares, the vast majority had average trade sizes between 100 and 460 shares, which is similar to average trade sizes on the national securities exchanges.[969] One feature, among others, that may attract some market participants to non-displayed venues is their lower information leakage as compared to trades on exchanges.

NMS Stock ATSs are subject to Regulation ATS and are also required to file and publicly disclose Form ATS–N. Furthermore, those with significant volume are required to comply with the requirements of Regulation SCI [970] and the Fair Access Rule.[971] Trades in NMS stocks that are transacted off-exchange, which includes transactions on ATSs, are required to be reported to one of three FINRA Trade Reporting Facilities (TRF).[972] If the execution is handled by an ATS, then in most cases the ATS has the reporting obligation and must report itself as a counterparty to both sides of the trade.[973]

Furthermore, national securities exchanges, national securities associations and Industry Members [974] that receive or originate orders [975] in Eligible Securities [976] are required to

[961] *See* Andrew Ang et al., Asset Pricing in the Dark: The Cross-Section of OTC Stocks, 26 Rev. Fin. Studs. 2985–3028 (2013).

[962] *See* ''Unraveling the Mystery of Over-the-Counter Trading'' (2016), FINRA, *available at https://www.finra.org/investors/insights/unraveling-mystery-over-counter-trading.*

[963] *See https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstockhtm.html.* Note that, as discussed in *infra* Section VIII.5.d, recent amendments to 17 CFR 240.15c2–11 (Rule 15c2–11 of the Exchange Act) adopted in September 2020 limit public quoting in OTC equities for which current financial statement information is not publically available.

[964] Unregistered securities typically avoid SEC registration through one of two exemptions: Regulation D offerings, which are mostly limited to accredited (*i.e.,* institutional or high-net-worth) investors, and Regulation A offerings, which are open to unaccredited investors.

[965] *See https://www.sec.gov/reportspubs/investor-publications/investorpubsrule144htm.html.* These conditions include a minimum holding period, the availability of up-to-date information about the issuing company, and certain limits to the size of the trade. In addition, notice of trades by affiliates are required to be filed with the SEC, and the trades themselves must be handled by a broker as a routine transaction (*e.g.,* no special commissions).

[966] *See, e.g.,* Private Equity Exchange (*http://peqx.com/*); Nasdaq Private Market (*https://www.nasdaq.com/secondmarket*).

[967] *See https://www.finra.org/filing-reporting/otc-transparency/ats-quarterly-statistics.*

[968] *See* Market Data Infrastructure Final Rule, Release No. 90610 (Dec. 9, 2020), *available at https://www.sec.gov/rules/final/2020/34-90610.pdf.*

[969] *See* SEC Release No. 34–83663, ''Regulation of NMS Stock Alternative Trading Systems,'' *available at https://www.sec.gov/rules/final/2018/34-83663.pdf.*

[970] An ATS trading in NMS stock is subject to Regulation SCI if, during at least four of the preceding six months, the ATS had five percent or more in any single NMS stock, and 0.25 percent or more in all NMS stocks, of the average daily dollar volume reported by applicable effective transaction reporting plans, or one percent or more, in all NMS stocks, of the average daily dollar volume reported by applicable effective transaction reporting plans. *See https://www.sec.gov/divisions/marketreg/regulation-sci-faq.shtml. See supra* Section VIII.B.2.a.ii for a discussion of the impact of Regulation SCI.

[971] An ATS trading in NMS stock is subject to the Fair Access Rule if, during at least four of the preceding six months, the ATS had five percent or more of the average daily volume in an NMS stock reported by an effective transaction reporting plan. *See* 17 CFR 242.301(b)(5)(i) and *https://www.sec.gov/tm/faq-regulation-ats-fair-access-rule. See supra* Section VIII.B.2.a.ii for a discussion of the impact of the Fair Access Rule.

[972] These include FINRA/Nasdaq TRF Carteret, FINRA/Nasdaq TRF Chicago, and FINRA/NYSE TRF. *See https://www.finra.org/filing-reporting/trf/trf-exchange-participants.*

[973] *See https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq.* Certain transactions are exempt from FINRA TRF reporting requirements; see *https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq#500* and FINRA Rules 6282(f)(1), 6380A(e)(1), 6380B(e)(1), and 6622(e)(1).

[974] The National Market System Plan Governing the Consolidated Audit Trail (CAT NMS Plan) is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016). The CAT NMS Plan and subsequent amendments to the Plan are *available at https://catnmsplan.com/about-cat/cat-nms-plan.* Section 1.1 of the CAT NMS Plan defines an Industry Member as a member of a national securities exchange or a member of a national securities association. ''CAT Reporters'' include national securities exchanges, national securities associations and Industry Members that are required to record and report information to the Central Repository pursuant to SEC Rule 613(c).

[975] Section 1.1 of the CAT NMS Plan defines the term ''order,'' with respect to Eligible Securities, as having the meaning set forth in 17 CFR 242.613(j)(8) (SEC Rule 613(j)(8)). SEC Rule 613(j)(8) defines an ''order'' as any order received by a member of a national securities exchange or national securities association from any person; any order originated by a member of a national securities exchange or national securities association; or any bid or offer.

[976] Section 1.1 of the CAT NMS Plan defines Eligible Securities as'' (a) all NMS Securities and (b) all OTC Equity Securities,'' where OTC Equity Securities are defined as any equity security, other than an NMS Security, subject to prompt last sale reporting rules of a registered national securities association and reported to one of such

Continued

report any Reportable Event [977] to the Consolidated Audit Trail (CAT), which is designed to capture customer and order event information from the time of order inception through routing, cancellation, modification, or execution in a single, consolidated data source. The Participants [978] have issued guidance stating that trading interest must be ''firm'' to fall within the definition of an ''order,'' and thus be reportable to CAT, and so certain trading interest (*e.g.,* conditional orders) that may be available on some ATSs is not reportable to the CAT until it is ''firmed up''/confirmed.[979]

OTC equities also trade on ATSs. There are currently five ATSs operating in the OTC equity market. As of Q3 2021, FINRA reports that OTC equity ATSs collectively handled around 4 million trades.[980] ATSs that offer trading services in OTC equities also typically operate as interdealer quotation systems (IDQS), which regularly disseminate broker-dealer quotes.[981] The majority of OTC equity trading on ATSs is concentrated on one platform, which executed more than 60 percent of OTC equity ATS trading in Q1 2021. ATSs that trade in OTC equities usually segment securities into different markets or use eligibility status symbols to inform investors regarding issuers' regulatory compliance and disclosure.[982] This is designed to inform investors whether companies are current or delinquent in their filing requirements in the interest of transparency.[983] One academic study found that OTC equities that are subject to stricter disclosure requirements have higher market quality, including higher liquidity and lower crash risk.[984]

FINRA is the SRO that regulates trading in OTC securities. The Commission understands that the current ATS market place for OTC equities has evolved to replace the functions formally performed by the OTC Bulletin Board (OTCBB), a FINRA-operated inter-dealer quotation system for OTC equities that was retired by FINRA in November 2021.[985] In its filing with the SEC, FINRA cited technological advancements and ''the subsequent increase in alternative electronic venues with more extensive functionality than the OTCBB'' as reasons for its retirement, which highlights market participants' preference for electronic trading systems in this market.[986] Concurrently to its retirement of the OTCBB, FINRA has adopted new Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems), which implements additional requirements for firms that operate systems that regularly disseminate quotes in OTC equities, including requirements related to fair access, transparency, and systems integrity.[987] Furthermore, trades to which a FINRA member is a party must be reported to FINRA's OTC Reporting Facility (ORF) within ten seconds of execution.[988] This includes executions in OTC equities, as well as executions in restricted stocks effected under 17 CFR 230.144A (Securities Act Rule 144A); however, trades in restricted equity securities effected under Rule 144A are reported to the ORF for regulatory purposes only and are not publicly disseminated. Similarly to requirements for FINRA's TRF described above, if the execution is handled by an ATS, then in most cases the ATS has the reporting obligation and must report itself as a counterparty to both sides of the trade.[989] In addition, OTC equities fall within the definition of ''Eligible Securities'' under the CAT NMS Plan, and therefore any eligible events in OTC equities are reportable to CAT.[990]

In addition to its requirements under FINRA, ATSs that trade in OTC equities must comply with Regulation ATS, including filing Form ATS and periodically filing Form ATS–R, and complying with Regulation SCI [991] and the Fair Access Rule if volume thresholds are met.[992] However, ATSs that trade in OTC equities are not required to file and publicly disclose Form ATS–N.

c. National Securities Exchanges for NMS Stock

NMS Stock ATSs compete with national securities exchanges in the market for trading services in NMS securities. Currently, 16 national securities exchanges effect transactions in NMS stocks. These exchanges

association's equity trade reporting facilities.'' This includes both OTC Equity Securities and transactions in Restricted Equity Securities effected pursuant to Securities Act Rule 144A. *See* CAT NMS Plan, *supra* note 974.

977 According to Section 1.1 of the CAT NMS Plan, ''Reportable Event'' includes, but is not limited to, the original receipt or origination, modification, cancellation, routing, execution (in whole or in part) and allocation of an order, and receipt of a routed order. *See* CAT NMS Plan, *supra* note 974.

978 The Participants are the national securities exchanges and national securities associations who collectively control and operate the CAT.

979 *See* CAT FAQ B40, *available at https://www.catnmsplan.com/faq*. This release refers to the FAQs published by the Participants because the Commission believes those FAQs are guiding the how Industry Members are reporting information to the CAT. The Commission has not approved the FAQs so is expressing no view in this release regarding such FAQs.

980 *See https://www.finra.org/filing-reporting/otc-transparency/ats-quarterly-statistics*. Note that this dataset aggregates volume across two OTC Link LLC-operated ATSs under the label OTC LINK ECN ATS.

981 Rule 15c2–11 of the Exchange Act defines an inter-dealer quotation system as any system of general circulation to brokers or dealers that regularly disseminates quotations of identified brokers or dealers, and further defines a qualified inter-dealer quotation system as any inter-dealer quotation system that meets the definition of an ''alternative trading system'' and operates pursuant to the exemption from the definition of an ''exchange.''

982 For example, the OTC Link LLC ATS is organized into several market places, broadly organized according to the issuers' regulatory compliance and disclosure: OTCQX, which includes equities that are subject to and current with the reporting requirements of the Exchange Act, and that additionally meet numerous other eligibility requirements; OTCQB, which includes equities that are subject to and current with the reporting requirements of the Exchange Act, but not subject to any additional eligibility requirements; and Pink Sheets, which includes equities without any reporting or eligibility requirements. A fourth tier, the so-called ''Expert Market'' or ''Grey Market,'' contains equities that are not or cannot be publically quoted, either due to regulatory restrictions or lack of investor interest. *See https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstockhtm.html*. Additionally, for another example, *see https://www.globalotc.com/brokers/eligible-securities.*

983 *See* Cass Sanford, *Understanding the Expert Market,* OTC Markets Blog (March 25, 2021), *available at https://blog.otcmarkets.com.*

984 *See* Brüggemann, U., Kaul, A., Leuz, C., & Werner, I.M. (2018). The twilight zone: OTC regulatory regimes and market quality. The Review of Financial Studies, 31(3), 898–942.

985 *See https://www.finra.org/rules-guidance/notices/21-38*.

986 *See* SEC Release No. 34–90067, October 1, 2020, ''Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) and Delete the Rules Related to the OTC Bulletin Board Service,'' *available at https://www.sec.gov/rules/sro/finra/2020/34-90067.pdf*.

987 *See https://www.finra.org/rules-guidance/notices/21-28*.

988 FINRA Rule Series 6620 and 7300 govern OTC and restricted equity trade reporting to FINRA Facilities. *See https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq*.

989 *See supra* note 973.

990 *See supra* notes 974 to 979 and corresponding discussion.

991 An ATS trading in non-NMS stock is subject to Regulation SCI if, during at least four of the preceding six months, the ATS had five percent or more of the average daily volume in transactions that are reported to and calculated by a self-regulatory organization, such as FINRA. *See https://www.sec.gov/divisions/marketreg/regulation-sci-faq.shtml*. *See supra* Section VIII.B.2.a.ii for a discussion of the impact of Regulation SCI.

992 An ATS trading in non-NMS stock is subject to the Fair Access Rule if, during at least four of the preceding six months, the ATS had five percent or more of the average daily volume in non-NMS stock transactions that are reported to and calculated by a self-regulatory organization, such as FINRA. *See* 17 CFR 242.301(b)(5)(i) and *https://www.sec.gov/tm/faq-regulation-ats-fair-access-rule*. *See supra* Section VIII.B.2.a.ii for a discussion of the impact of the Fair Access Rule.

accounted for 58 percent of NMS security share volume and 65 percent of NMS security dollar volume in September 2021.[993] National securities exchanges have greater regulatory obligations than NMS Stock ATSs. They must register with the Commission on Form 1, file proposed rule changes with the Commission under Section 19(b) of the Exchange Act, and are SROs. The proposed rule changes of national securities exchanges must be made available for public comment,[994] and in general, these proposed rule changes publicly disclose, among other things, details relating to the exchange's operations, procedures, and fees. The Commission reviews the rules of national securities exchanges, a process which requires, among other things, that to approve certain rule changes, the Commission find that the national securities exchange's proposed rule changes are consistent with the Exchange Act.[995] National securities exchanges and other SROs also have regulatory obligations, such as enforcing their rules and the Federal securities laws with respect to their members, which do not apply to market participants such as ATSs.[996]

While national securities exchanges have more regulatory obligations than NMS Stock ATSs, they also enjoy certain unique benefits that are not afforded to NMS Stock ATSs. While national securities exchanges are SROs, and are thus subject to surveillance and oversight by the Commission, they can still establish norms regarding conduct, trading, and fee structures for external access. Trading venues that elect to register as national securities exchanges may gain added prestige by establishing listing standards for their securities. Additionally, national securities exchanges can be direct participants in NMS plans, which provides additional sources of revenue and input into the operation of the national market system that is not available to NMS Stock ATSs.[997]

d. Communication Protocol Systems in the Equity Market

The Commission estimates that there are currently 4 Communication Protocol Systems operating in the market for NMS stocks that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16. Furthermore, the Commission understands that some NMS Stock ATSs offer functionalities similar to Communication Protocol Systems, such as conditional orders and indications of interest (IOIs), both of which can interact with their limit order books. As mentioned in Section II.B.2, the Commission has observed that 26 NMS Stock ATSs have disclosed on their public Form ATS–N that they send or receive messages indicating trading interest, such as conditional orders.

While NMS Stock ATSs may make use of Communication Protocol System functionalities, there is limited evidence that Communication Protocol Systems play a significant role in the non-ATS OTC market for liquid NMS stocks in the U.S.[998] One commenter stated that NMS stocks and ETFs with limited liquidity are now beginning to use protocols such as RFQ to bridge liquidity gaps.[999] However, because the Commission lacks data on the use of protocols that would qualify as Communication Protocol Systems by non-ATS trading systems operating in the OTC equity market, it is unable to quantify to what extent Communication Protocol Systems are used in the non-ATS OTC market for NMS stocks. The Commission requests comment on this issue.

Communication Protocol System operators cite their protocols' abilities to service very large orders, the option for participants to pick and choose which aspects of their order to disclose (*e.g.,* price or size), and higher discretion as advantages of these protocols over trading on exchanges or ATSs.[1000] However, some market participants have expressed skepticism over information leakage in the use of RFQs for equity transactions, as their use may signal that the participants are unable to locate ''natural'' sources of liquidity.[1001]

Communication Protocol Systems may also play a role in the trading of U.S.-listed ETFs. However, the Commission lacks data to quantify what proportion of ETF volume trades via Communication Protocol Systems. At least one trading system operator claims to offer several protocols, including RFQ, for trading in U.S.-listed ETFs.[1002] The use of Communication Protocol Systems for trading in ETFs may be motivated by a lack of liquidity in some ETF securities, and associated risks involved in trading in illiquid ETFs.[1003] Similar to the corporate bond market, the use of Communication Protocol Systems may also be used for the trading of bundles of securities in order to facilitate transaction services for participants that may be using the same Communication Protocol System to trade in the securities underlying ETFs.[1004]

Unlike NMS Stock ATSs, Communication Protocol Systems that trade NMS stocks are not subject to any of the requirements of Regulation SCI or Regulation ATS, including the requirement to file the public Form ATS–N. Trades in NMS stocks that are transacted elsewhere than on an exchange, which may include transactions executed on a Communication Protocol System, are required to be reported to FINRA TRF as discussed in Section VIII.B.5.a if at least one of the parties to the transaction is a FINRA member.

Trading interest on Communication Protocol Systems may not be required to be reported to CAT, depending on the nature of the solicitation and/or response(s) as firm or non-firm. CAT guidance issued by the Participants

[993] *See* CBOE Historical Market Volume Data, *available at https://www.cboe.com/us/equities/market_statistics/historical_market_volume/, market_history_monthly_2021.csv.* This statistic is calculated by dividing the sum of all non-FINRA entries for the month of September 2021 divided by the sum of all entries for the month of September 2021.

[994] *See* 15 U.S.C. 78s(b)(1).

[995] *See* 15 U.S.C. 78s(b).

[996] *See, e.g.,* Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b)(1), and Section 6(b) of the Exchange Act, 15 U.S.C. 78f(b).

[997] *See* Regulation ATS Adopting Release, *supra* note 31, at 70880, 70902–70903 (Section discussing generally some of the obligations and benefits of registering as a national securities exchange).

[998] On the contrary, RFQ platforms are increasingly playing a role in block trading in European equities, particularly in the wake of the 2018 adoption of MiFID II, which placed limits on other off-exchange sources of liquidity. *See, e.g.,* Basar, Shanny. (2020, March 31). *MarketsMedia, available at https://www.marketsmedia.com/icap-adds-to-equity-rfqs/.*

[999] *See* Bloomberg Letter at 3, 10, 20, and 23. The commenter also referenced that trading in small and micro NMS stocks on exchanges has been difficult and has not necessarily improved with recent technological changes. *See* Bloomberg Letter at 21, citing *https://www.nasdaq.com/articles/nasdaqs-proposal-improve-trading-environment-small-and-medium-growth-companies-and.*

[1000] *See* ''RFQ for Equities: One Year On,'' (2019), *Tradeweb, available at https://www.tradeweb.com/newsroom/media-center/insights/blog/rfq-for-equities-one-year-on/.*

[1001] *See, e.g.,* McDowell, Hayley. (2018, October 23). ''Buy-side throws doubt on RFQ for equities as 'last chance saloon' for liquidity,'' *THETRADE, available at https://www.thetradenews.com/buy-side-throws-doubt-rfq-equities-last-chance-saloon-liquidity/.*

[1002] *See, e.g.,* ''ETFs'', *Tradeweb, available at https://www.tradeweb.com/our-markets/institutional/equities/ETPs_Funds/.* Additional market participants may also be developing Communication Protocol Systems for U.S.-listed ETFs. *See, e.g.,* Rennison, Joe, April 4, 2019, ''MarketAxess muscles into ETF industry with Virtu tie-up,'' Financial Times, *available at https://www.ft.com/content/b88d53b6-5709-11e9-a3db-1fe89bedc16e.*

[1003] *See, e.g.,* Bae, K., & Kim, D. (2020). Liquidity risk and exchange-traded fund returns, variances, and tracking errors. Journal of Financial Economics, 138(1), 222–253.

[1004] *See supra* Section VIII.B.3.b for a discussion of portfolio trading on Communication Protocol Systems in the corporate bond market.

provides that non-firm expressions of trading interest that contain information about the security name, side, size, capacity and/or price, which includes IOIs and RFQs, do not fall within the definition of an ''order'' and are therefore not reportable to CAT.[1005] However, this guidance also states that any response to an RFQ or other form of solicitation response that is accessible electronically and is immediately actionable (*i.e.,* no further manual or electronic action is required by the responder providing the quote in order to execute or cause a trade to be executed) is reportable whether or not it is ultimately accepted. Furthermore, once an order is ''firmed up'' by the initiating participant and winning bidder, the origination of the new order by the initiating participant, the routing of that new order to the winning bidder, and the acceptance of that order by the winning bidder are all reportable events, with the initiating participant reporting the new order and routing events, and the winning bidder reporting the order acceptance, as well as any subsequent actions taken to process the order.[1006]

The Commission understands that the majority of trading in OTC equities takes place on IDQS, most of which are registered as ATSs. However, there may be some IDQS or other OTC equity trading systems that are not registered as ATSs and that operate using trading protocols that would qualify as Communication Protocol Systems.[1007] The Commission estimates that there may currently be 1 Communication Protocol System operating in the OTC equity market. Such a trading system may not be subject to FINRA Rule 6439 or trade reporting requirements, or quoting requirements under the amended Rule 15c2–11 discussed in the next paragraph, if it is not operated by a FINRA member and does not meet the definition of a ''qualifying'' IDQS. The Commission lacks the data to estimate the number or trading volume of IDQS or other OTC equity trading systems that operate as Communication Protocol Systems and are not registered as broker-dealers. The Commission requests comment on this topic.

Communication Protocol Systems may also play a role in the Grey Market for OTC equities.[1008] Recent amendments to Rule 15c2–11 of the Exchange Act adopted in September 2020 limit public quoting in OTC equities for which current financial statement information is not publically available.[1009] This limits the ability of many OTC equities to trade on ATSs,[1010] but many OTC securities are still traded even without publically available quotes.[1011] However, due to the opacity of this market, the Commission lacks data to estimate the extent to which broker-dealers trading in Grey Market equities are using protocols that would qualify as Communication Protocol Systems and requests comment on this issue.

Communication Protocol Systems may play a role in the secondary market for restricted shares. The Commission preliminarily estimates that there are currently 10 Communication Protocol Systems operating in the market for restricted shares. Furthermore, an estimated 2 of these are run by non-broker-dealers, who therefore would not currently be subject to the associated costs of complying with broker-dealer filing and conduct obligations, including becoming a member of an SRO, such as FINRA.[1012]

Unlike ATSs that trade OTC equities, Communication Protocol Systems that trade OTC equities are not subject to any of the requirements of Regulation ATS. Trades in OTC equities and restricted equities effected under Securities Act Rule 144A that are transacted elsewhere than on an exchange, which may include transactions executed on a Communication Protocol System, are required to be reported to FINRA's OTC ORF as described in Section VIII.B.5.a, if at least one of the parties to the transaction is a FINRA member.

e. Other Methods of Trading in Equities

The majority of off-exchange trading in NMS stocks occurs outside of ATSs. A DERA white paper estimated that, in 2014, non-ATS off-exchange trading in NMS stocks represented nearly 17 percent of total equity market dollar volume;[1013] by July 2020, this number increased to 23 percent, while trading on ATSs was composed of only 10 percent of total equity market dollar volume.[1014] The DERA white paper found that more than a third of non-ATS trading volume in NMS stock comprised of retail orders executed by OTC market makers.[1015] Block trades (*i.e.,* trades larger than 10,000 shares) made up a higher percentage of non-ATS trading volume than ATS trading volume.[1016] Additionally, single-dealer platforms (SDPs) accounted for nine percent of off-exchange trading volume in Q3 2021.[1017]

The Commission believes that manually negotiated trades via the telephone are still taking place in the market for NMS stocks, in particular for large block trades by institutional investors.[1018] A survey taken in April 2014 estimated that more than 55 percent of buy-side U.S. equity trading was still being executed via phone calls.[1019]

Additionally, it is likely that traditional bilateral negotiations are still actively used in the market for OTC equities as well, particularly in the Grey Market and the market for restricted equities, where electronic trading may be limited due to restrictions on public quoting activity. However, due to the opacity of this market, it is difficult to estimate the extent to which voice trading still plays a role in the market for OTC and restricted equities.

As described above in Section VIII.B.5.a, trades in equities that are transacted elsewhere than on an

[1005] *See* CAT FAQ B3, *available at https://www.catnmsplan.com/faq.*

[1006] *See* CAT FAQ B45, *available at https://www.catnmsplan.com/faq.*

[1007] *See* SEC Release No. 34–87115, ''Publication or Submission of Quotations Without Specified Information'' Proposed Rule and Concept Release, *available at https://www.sec.gov/rules/proposed/2019/34-87115.pdf.*

[1008] *See supra* note 982.

[1009] *See https://www.sec.gov/news/press-release/2020-212.*

[1010] In compliance with the amendments, in March 2021 OTC Markets announced that OTC equities without current public information would be moved off its Pink Sheets market place. *See https://blog.otcmarkets.com/2021/03/25/understanding-the-expert-market/.*

[1011] In 2018, the Commission estimated that 5,915 OTC securities were traded at some point during the year without having published quotations, and 3% of these securities had average daily trading volumes above $100,000. *See* SEC Release No. 34–87115, ''Publication or Submission of Quotations Without Specified Information'' Proposed Rule and Concept Release, *available at https://www.sec.gov/rules/proposed/2019/34-87115.pdf.*

[1012] *See supra* Section III.B.1.

[1013] *See* Tuttle, L.A. (2014). OTC trading: Description of non-ATS OTC trading in National Market System stocks. DERA White Paper.

[1014] *See* Market Data Infrastructure Final Rule, Release No. 90610 (Dec. 9, 2020), *available at https://www.sec.gov/rules/final/2020/34-90610.pdf.*

[1015] *See* Tuttle, L.A. (2014). OTC trading: Description of non-ATS OTC trading in National Market System stocks. DERA White Paper. A more recent study found that retail wholesalers accounted for 49.9 percent of off-exchange trading in Q3 2021. *See* Rosenblatt Securities, November 4, 2021, ''A Closer Look at Off Exchange and Retail Market Share.''

[1016] *See* Tuttle, L.A. (2014). OTC trading: Description of non-ATS OTC trading in National Market System stocks. DERA White Paper. Specifically, defining block trades as trades of 10,000 or more shares, block trades comprised only 0.10 percent of dark ATS trading while they comprise 2.53 percent of non-ATS OTC trading.

[1017] SDPs do not permit participants to post liquidity, but rather offer bilateral trading with the counterparty operating the venue. *See id.*

[1018] *See, e.g., https://www.ft.com/content/44841008-3cf7-11e4-a2ab-00144feabdc0.*

[1019] In the survey, market participants cited the expertise and consulting services offered by brokers as some of the benefits of using the phone to conduct ''high touch'' trades. *See https://www.greenwich.com/press-release/high-touch-execution-consulting-services-and-performance-driving-technologies-spell.*

exchange, which may include transactions executed via voice trading, are required to be reported to either FINRA's TRF (in the case of NMS stocks) or ORF (in the case of OTC or restricted equities) if at least one of the parties to the transaction is a FINRA member. As described above, trades in restricted equity securities are reported for regulatory purposes only and are not publicly disseminated.

f. Competition in the Market for Equity Trading Services

As discussed above, since Regulation NMS was adopted in 2005, the market for equity trading services has become more fragmented, with trading fragmented not only across exchanges, but across different trading systems (exchanges, ATSs, and non-ATS off-exchange trading venues). For instance, from 2005 to 2013, there was a decline in the market share of trading volume for exchange-listed stocks on NYSE.[1020] At the same time, there was an increase in the market share of newer national securities exchanges such as NYSE Arca, Cboe BYX, and Cboe BZX.[1021] This development increased competition in the market for trading services. Several academic studies have shown that an increase in competition between exchanges, or between exchanges and ATSs, improves market quality by reducing transactions costs and increasing liquidity.[1022]

Trading venues compete with each other along a number dimensions in order to attract order flow. For example, in addition to other ways, trading venues can compete via fees, rebates, speed, and trading protocols in order to attract order flow.[1023] However, the actual level of competition that any given trading venue faces may depend on multiple factors including the liquidity of a stock as well as the type of trading venue and market participant engaging in the trade. A market participant's preference for where to trade can depend on a number of factors, including, among other things, speed, anonymity, and price impact. The choice of trading venue may also be limited by regulatory restrictions on where certain equities may be traded and by whom, as quoting activities in some OTC stocks are restricted, and some investors are prohibited from trading in certain types of equities, such as restricted stocks.

6. Current State of Options Markets

There are currently 16 exchanges (''options exchanges'') and 1 ATS offering listed options trading services. During the month of October 2021, approximately 39 million options contracts, equating to approximately $21 billion in total premiums, were traded daily on exchanges.[1024] The market for listed options has been historically dominated by institutional investors;[1025] however, the market has seen a dramatic increase in retail investor participation in recent years.[1026]

a. Currently Regulated Trading Systems in the Market for Listed Options

The market for listed options trading services is dominated by registered exchanges. This dominance stems from the role of the Options Clearing Corporation (OCC), which is the sole entity clearing trades for exchange-listed options, security futures, and OTC options.[1027] Central clearing of listed options incentivizes the use of exchanges. Exchanges offer traders a centralized location to interact with other traders in the market. Exchanges compete with each other by offering different cost structures to participate on the exchange, and differing order types to allow customers advanced trading strategies. Largely due to regulation,[1028] options exchanges offer the ability to route orders to competing options exchanges in the event of a competing option exchange having the best price for a given options order. Thus, while there is competition amongst options exchanges for trading services, they are joined together in an integrated market system.

There is one ATS in the market for listed options. As the Commission understands, this ATS offers participants an RFQ protocol.[1029] A customer may accept the quote the ATS returns from the RFQ protocol. However, the orders are routed to an exchange for execution.

As described above, the ATS in the market for listed option trading services competes with exchanges by offering the potential of price improvement on orders, the ability to view market liquidity without submitting a firm order, and the ability to interact with multiple market makers, across multiple exchanges, simultaneously. It should be noted, however, that this competition is not direct; the ATS ultimately sends orders to exchanges, and thus could be seen as complementary to exchanges.

Options exchanges are subject to many of the same regulations as NMS Stock trading systems. Options exchanges are part of the NMS and are required to participate in many NMS plans. Options exchanges also are subject to Regulation SCI.

Similar to other security types, an ATS that trades in listed option securities must comply with Regulation ATS and broker-dealer filing and conduct obligations, including becoming a member of an SRO, such as FINRA. In addition, listed options fall within the definition of ''eligible securities'' under the CAT NMS Plan, and therefore any eligible events in listed options are reportable to CAT.[1030]

b. Communication Protocol Systems in the Market for Listed Options

As the Commission understands, there is currently 1 Communication Protocol System trading in listed options that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16.[1031] This Communication Protocol System operates in a similar fashion to the single ATS in the market for listed options described above in Section VIII.B.6.a. This system offers an RFQ protocol that allows a customer to request a quote for a specified option. The system then surveys market makers

[1020] *See* Securities Exchange Act Release No. 76474 (Nov. 18, 2015), 80 FR 80998, 81112 (Dec. 28, 2015) (Regulation of NMS Stock Alternative Trading Systems Proposing Release).

[1021] *See id.*

[1022] *See, e.g.,* Foucault, T., & Menkveld, A.J. (2008). Competition for order flow and smart order routing systems. The Journal of Finance, 63(1), 119–158; O'Hara, M., & Ye, M. (2011). Is market fragmentation harming market quality? Journal of Financial Economics, 100(3), 459–474.

[1023] *See, e.g.,* Cantillon, E., & Yin, P.L. (2011). Competition between exchanges: A research agenda. International journal of industrial organization, 29(3), 329–336; Budish, E., Lee, R.S., & Shim, J.J. (2019). A Theory of Stock Exchange Competition and Innovation: Will the Market Fix the Market? National Bureau of Economic Research.

[1024] *See* OCC Monthly & Weekly Volume Statistics, *available at https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.* These statistics were calculated by downloading the monthly files for ''Equity,'' ''Index,'' and ''ETF'' options for October 2021. The OCC combined value from each file was added together and divided by the trading days in October 2021 to generate these statistics.

[1025] *See* Bennett, Jay, John Colon, and John Feng. (2010). *FIA, available at https://secure.fia.org/files/css/magazinearticles/article-1446.pdf.*

[1026] *See* Thyagaraju Adinarayan, ''Retail trading fever drives U.S. equity option volumes to record monthly high'', Reuters, (2021, February 3). (Retrieved from Factiva database).

[1027] *See* ''What Is OCC?'' *The Options Clearing Corporation, available at https://www.theocc.com/Company-Information/What-Is-OCC.*

[1028] *See https://www.sec.gov/rules/final/34-43591.htm.*

[1029] *See* ''Liquidity Management Software For US Listed Options Market'', *DASH Financial, available at https://dashfinancial.com/execution-services/dash-ats/.*

[1030] *See* supra notes 974 to 979 and corresponding discussion.

[1031] *See* ''Request-for-Quote Options Trading'', *Tradeweb, available at https://www2.tradeweb.com/optionsweb.*

of options exchanges. The system returns the quotes to the customer, where the customer has the ability to accept one of the proposed trades. The trade is then executed on the option exchange. The Commission requests comment on the full role of Communication Protocol Systems in the market for listed options.

Communication Protocol Systems compete with options exchanges and ATSs for trading services. Similar to ATSs, Communication Protocol Systems in the market for listed options ultimately interact with exchanges in their trading operations; thus, the competition between Communication Protocol Systems and exchanges might be better characterized as a complementary relationship. As the Commission understands, competition between ATSs and Communication Protocol Systems in the market for listed options occurs primarily through the quality of their trading systems, cost structures, and speed of RFQ protocol completion.

Communication Protocol Systems in the market for listed options are not formally regulated by any regulatory authority. This lack of regulation puts listed option ATSs at a disadvantage compared to Communication Protocol Systems. The Commission believes that the participation of the OCC in centrally clearing options trades on exchanges is a major factor contributing to the decision of traders to trade on options exchanges compared to using Communication Protocol Systems and ATSs.

As in the market for equities, trading interest in listed options on Communication Protocol Systems may not be required to be reported to CAT, depending on the nature of the solicitation and/or response(s) as firm or non-firm.[1032]

7. Other Securities

a. Repurchase and Reverse Repurchase Agreements

The market for repurchase and reverse repurchase agreements [1033] plays a role both in the stability of the banking and financial system and in the transmission of U.S. monetary policy. Repurchase agreements account for between $4 trillion and $6 trillion in notional value trades daily.[1034] Moreover, reverse repurchase agreements have become an important tool of monetary policy. Specifically, the market for reverse repurchase agreements is used by banks to lend out excess reserves, while the market for repurchase agreements is used to borrow to meet reserve requirements.[1035]

The Commission estimates that there are currently 4 ATSs [1036] facilitating trades in repurchase and reverse repurchase agreements. Furthermore, the Commission estimates that 3 Communication Protocol Systems facilitate trading in repurchase and reverse repurchase agreements that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16.[1037] The Commission understands that these systems typically use U.S. Treasury securities as collateral for trades in repurchase and reverse repurchase agreements conducted on their systems. The Commission understands that RFQ systems for repurchase and reverse repurchase agreements are a relatively recent and rapidly growing phenomenon.[1038]

Repurchase and reverse repurchase agreement transactions usually involve collateral haircuts and counterparty risk inherent in the contract. Counterparty risk may give market participants an incentive to maintain balances across multiple liquidity providers to reduce exposure to a single liquidity provider. This incentive to maintain balances across multiple liquidity providers may be alleviated, at least partially, if trades in repurchase and reverse repurchase agreements with liquidity providers are centrally cleared as in triparty repo trades.[1039] The interest in maintaining balances across multiple liquidity provider in bilateral transactions has spurred the introduction and adoption of electronic RFQ platforms.[1040]

Under FINRA Rule 6730(e), repurchase and reverse repurchase agreement transactions involving TRACE-Eligible Securities are not reportable to TRACE.[1041] However, repurchase and reverse repurchase agreement holdings and transactions are currently subject to several other reporting requirements.[1042]

The Commission is unable to determine the full scope of the role

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[1032] *See supra* notes 1005 and 1006 and corresponding discussion.

[1033] *See supra* Section III.A for a discussion of ''repos'' (repurchase agreements and reverse repurchase agreements on government securities). While U.S. Treasury Securities are frequently used as the underlying collateral of repurchase and reverse repurchase agreements, other securities may also be used, such as corporate bonds and stocks.

[1034] *See* Board of Governors of the Federal Reserve System (US), All Sectors; Federal Funds and Security Repurchase Agreements; Asset, Level [BOGZ1FL892050005Q], retrieved from FRED, Federal Reserve Bank of St. Louis; *https://fred.stlouisfed.org/series/BOGZ1FL892050005Q,* December 2, 2021.

[1035] *See, e.g.,* Cheng, Jeffrey and David Wessel. ''What is the repo market, and why does it matter?'' (2020). *Brookings Institute, available at https://www.brookings.edu/blog/up-front/2020/01/28/what-is-the-repo-market-and-why-does-it-matter/.*

[1036] These ATSs are Current Government Securities ATSs. *See supra* note 5.

[1037] *See, e.g.,* ''Tradeweb Reports September 2021 Total Volume of $21.7 Trillion and Average Daily Volume of $1.02 Trillion,'' (2021). *Tradeweb, available at https://www.tradeweb.com/newsroom/media-center/news-releases/tradeweb-reports-september-2021-total-volume-of-$21.7-trillion-and-average-daily-volume-of-$1.02-trillion/;* CME Group. (2021, July 2). ''CME Group Reports Q2 and June 2021 Monthly Market Statistics,'' *CME Group, available at https://www.cmegroup.com/media-room/press-releases/2021/7/02/cme_group_reportsq2andjune2021monthlymarket statistics.html;* ''MarketAxess Announces Monthly Volume Statistics for September 2021,'' (2021). *MarketAxess, available at https://investor.marketaxess.com/news-releases/news-release-details/marketaxess-announces-monthly-volume-statistics-september-2021;* ''MarketAxess 3Q21: Stat Sheet,'' (2021), *MarketAxess, available at https://www.marketaxess.com/pdf/match-repo-stat-sheet.pdf;* ''GLMX Gains ATS and Broker-Dealer Status,'' (2018). *THETRADE, available at https://www.thetradenews.com/glmx-gains-ats-broker-dealer-status/.*

[1038] *See* ''Bloomberg launches electronic repo trading system,'' (2005), *Finextra, available at https://www.finextra.com/newsarticle/14580/bloomberg-launches-electronic-repo-trading-system.*

[1039] *See supra* note 521 defining triparty repos.

[1040] *See also* Trott, Tom, (2018), ''Electronic RFQ Repo Markets,'' *Tradeweb, available at https://www.tradeweb.com/newsroom/media-center/insights/commentary/electronic-rfq-repo-markets/* and Trott, Tom, (2018). ''Electronic RFQ Repo Markets: The Solution for Reporting Challenges and Laying the Building Blocks for Automation,'' *Tradeweb, available at https://www.tradeweb.com/4a6f74/globalassets/newsroom/media-center/insights/commentary/repo_-tradeweb.pdf.*

[1041] *See* ''6730. Transaction Reporting'', *FINRA, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/6730.*

[1042] *See https://www.financialresearch.gov/briefs/files/OFRbr-2015-03-repo-sec-lending.pdf.* The Treasury's Office of Financial Research (OFR) requires daily reporting by covered central counterparties of centrally cleared U.S. repurchase and reverse repurchase agreement transactions, which covers about half of the estimate U.S. market for repurchase and reverse repurchase agreements. *See* 84 FR 4975 (Feb. 20, 2019) (*https://www.federalregister.gov/documents/2019/02/20/2019-02639/ongoing-data-collection-of-centrally-cleared-transactions-in-the-us-repurchase-agreement-market*). OFR publishes daily aggregate data on rates and volumes of repurchase and reverse repurchase agreement transactions in each segment, by tenor or collateral. *See https://www.financialresearch.gov/data/us-repo-data/.* The Federal Reserve Bank of New York (FRBNY) reports daily demand, utilization, rates and participants of the Federal Reserve's Reverse Repo Facility. Primary dealers are subject to weekly reporting requirements by the Federal Reserve Bank of New York using Form FR2004, which describes the repurchase and reverse repurchase agreement positions, cumulative transactions, and outstanding financial arrangements and becomes publically available a day after reporting. FR2004 does not, however, include information on haircuts, rates, and counterparty exposures. Non-primary dealers are not required to submit FR2004, and consequently there is less available data on their bilateral transactions. U.S. chartered depository institutions and bank holding companies are required to report netted repurchase and reverse repurchase agreement positions on a quarterly basis, which becomes publically available. Much of the publically available data from regulatory agencies is consolidated and produced quarterly by the Federal Reserve Board in the form of the Financial Accounts of the United States (Z.1).

played by Communication Protocol Systems in the market for repurchase and reverse repurchase agreements because the Commission lacks data on the volume facilitated by these systems. The Commission requests comment on the full role of Communication Protocol Systems in this market.

b. Asset-Backed Securities

Asset-backed securities (ABS) are securities that are collateralized by an underlying pool of assets, usually constructed from bundled loans such as mortgages, leases, credit card balances, and student loans. A broad definition of asset-backed securities may include assets such as Collateralized Bond Obligations (CBO), Collateralized Debt Obligations (CDO), Collateralized Loan Obligations (CLO), and Non-Agency Commercial Mortgage Backed Securities (CMBS), along with non-agency mortgage-backed securities (MBS). The majority of holders of ABS are large institutional investors. Data from 2015 shows that asset managers are the largest holders of ABS, making up around 60 percent of buyers, followed by hedge funds (18 percent) and banks (10 percent).[1043]

The presence of large institutions in this market is also evident in looking at the secondary market trading data. In September 2021, average daily trading volume in the ABS market was around $8 billion. At the same time, there was only an average of 823 trades per day, reflecting that average trade sizes in this market are very large.[1044] Due to the complexity and heterogeneity of ABS products, liquidity in this market tends to be low. The majority of ABS never trade after issuance.[1045]

There is evidence that the size of the ABS market has shrunk since the 2008 financial crisis. Not only have new issues of ABS declined sharply after the financial crisis, but overall daily trading volume in secondary ABS markets fell by 16 percent between 2013 and 2017.[1046] The Commission understands that very little ABS trading takes place on ATSs. In September 2021, less than 0.1 percent of the average daily trading volume in ABS was reported to TRACE as having taken place on ATSs.[1047] The Commission estimates that there are currently 3 ATSs offering trading in ABS. Additionally, the Commission estimates that 1 ATS trades non-agency MBS securities.[1048]

As the data mentioned above shows, 99.9 percent of ABS trading volume takes place through trading methods other than ATSs, and some of this trading volume may take place using protocols that qualify as Communication Protocol Systems. The Commission estimates that there are 3 Communication Protocol Systems trading in ABS that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b–16. As in other fixed income markets, Communication Protocol Systems trading in ABS do not meet the current definition of an exchange and thus are not subject to the exchange regulatory framework. The Commission estimates that 1 Communication Protocol System trading in ABS is not currently operated by a registered broker-dealer. This system does not currently incur the costs of registering with the Commission as well as the costs of SRO membership, and is not subject to FINRA operational regulatory reporting requirements.

It is likely that the vast majority of trading in ABS still takes place via bilateral voice trading. Industry participants have pointed out that the complexity of this market makes it more likely that traders want discussions with and access to individualized guidance from dealers and analysts in deciding whether to trade, which can be difficult to achieve on more automated electronic platforms.[1049]

Since 2011, FINRA has required FINRA members to report transaction prices and quantities in ABS to TRACE.[1050] In 2015, FINRA began publishing post-trade price information for ABS, which is available to the public no later than 15 minutes after the trade is executed.[1051]

C. Economic Effects and Effects on Efficiency, Competition, and Capital Formation

The Commission has considered the economic effects of the proposed amendments to Exchange Act Rule 3b–16, Regulation ATS, and Regulation SCI.

The Commission recognizes that under the proposed amendments, a bank-operated Currently Exempted Government Securities ATS or Communication Protocol System could choose to register as an exchange rather than choose to comply with the Regulation ATS exemption, which includes registering as a broker-dealer.[1052] A bank-operated Currently Exempted Government Securities ATS or Communication Protocol System that chooses to register as an exchange would be an SRO and subject to the requirements under Section 6 of the Exchange Act.[1053] The Commission preliminarily believes that registering as a national securities exchange would enhance regulatory oversight, market surveillance, and investor protection.[1054] Registering as an exchange would also result in costs associated with applying to register as a national securities exchange and complying with the requirements under Section 6(b) of the Exchange Act, such as the requirement to be so organized and have the capacity to carry out the

[1043] *See https://www.greenwich.com/fixed-income-fx-cmds/understanding-us-fixed-income-market.*

[1044] *See https://www.finra.org/finra-data/browse-catalog/trace-volume-reports/trace-monthly-volume-files.* We include trading data for Asset Backed Securities (''ABS'') and Collateralized Bond Obligations (CBO), Collateralized Debt Obligations (CDO), Collateralized Loan Obligations (CLO), and Non-Agency Commercial Mortgage Backed Securities (CMBS). *See https://www.finra.org/finra-data/browse-catalog/trace-volume-reports/about-trace-monthly-volume-reports* for definitions.

[1045] *See* Bessembinder, H., Maxwell, W.F., & Venkataraman, K. (2013). Trading activity and transaction costs in structured credit products. Financial Analysts Journal, 69(6), 55–67.

[1046] *See* He, A., & Mizrach, B. (2017). Analysis of securitized asset liquidity. Research Note, FINRA Office of the Chief Economist.

[1047] *See https://www.finra.org/finra-data/browse-catalog/trace-volume-reports/trace-monthly-volume-files.*

[1048] Note that Form ATS doesn't have a specific category for ABS. The number of ATSs trading in ABS is estimated from a combination of the number of ATSs that report Form ATS–R volume for ''Other Debt Securities,'' which could include asset-backed securities, and TRACE MPIDs with ABS-related volumes and ATS flags.

[1049] *See* ''ABS East 2014: Securitization Shrugs off Electronic Trading,'' (2014). *American Banker, available at https://asreport.americanbanker.com/news/abs-east-2014-securitization-shrugs-off-electronic-trading.*

[1050] *See* FINRA Rule 6730(a)(1) requiring FINRA members to report transactions in TRACE-Eligible Securities, which FINRA Rule 6710 defines to include asset-backed securities. For each transaction in asset-backed securities, a FINRA member would be required to report the CUSIP number or similar numeric identifier or FINRA symbol; size (volume) of the transaction; price of the transaction (or elements necessary to calculate price); symbol indicating whether transaction is a buy or sell; date of trade execution (''as/of'' trades only); contra-party's identifier; capacity (principal or agent); time of execution; reporting side executing broker as ''give-up'' (if any); contra side introducing broker (in case of ''give-up'' trade); the commission (total dollar amount), if applicable; date of settlement; if the member is reporting a transaction that occurred on an ATS pursuant to FINRA Rule 6732, the ATS's separate Market Participant Identifier (''MPID''); and trade modifiers as required. *See* FINRA Rule 6730(c).

[1051] *See https://www.finra.org/media-center/news-releases/2015/finra-brings-transparency-asset-backed-securities-market.*

[1052] As proposed, Currently Exempted Government Securities ATSs that are operated by banks would be required to structure their business to either comply with Regulation ATS or register as a national securities exchange. *See supra* footnote 261. The Commission also expects Currently Exempted Government Securities ATSs currently registered as broker-dealers will continue to operate as broker-dealers under the proposal rather than register as a national securities exchange.

[1053] *See supra* Section II.A.

[1054] *See* Regulation ATS Adopting Release at 70903–07 for a discussion of benefits and costs for registering as a national securities exchange.

purposes of the Exchange Act and enforce member compliance with Federal securities laws and the rules of the exchange.[1055] However, the Commission expects that many Communication Protocol Systems would not elect to register as an exchange but instead would register as a broker-dealer and comply with Regulation ATS because the regulatory costs associated with registering and operating as an exchange would be higher than those associated with registering as a broker-dealer and complying with Regulation ATS.[1056] Similarly, the Commission preliminarily believes that a bank-operated Currently Exempted Government Securities ATS would also choose to structure its business to comply with the relatively lighter regulatory requirements of Regulation ATS.

The Commission has attempted, where possible, to quantify the benefits and costs anticipated to result from the amendments to Exchange Act Rule 3b–16, Regulation ATS, and Regulation SCI. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain data to inform the Commission on certain economic effects, the Commission is unable to quantify certain economic effects. Further, even in cases where the Commission has some data, it might not be practicable to perform a quantitative analysis due to the number and type of assumptions necessary to quantify certain economic effects, which would likely render any such quantification unreliable. Therefore, certain parts of the discussion below are qualitative in nature and focus on the direction of the various effects of the amendments. The inability to quantify certain benefits and costs, however, does not mean that the overall benefits and costs of the proposed amendments are insignificant.

1. Benefits

The Commission has considered the benefits of the proposed amendments to Exchange Act Rule 3b–16, Regulation ATS, and Regulation SCI.

a. Enhancement of Regulatory Oversight and Investor Protection

The proposed amendments to Exchange Act Rule 3b–16, which would include Communication Protocol Systems within the definition of exchange, along with the proposed amendments to remove the exemption from compliance with Regulation ATS for Currently Exempted Government Securities ATSs and apply the enhanced disclosure and filing requirements of Rule 304 to all Government Securities ATSs would enhance regulatory oversight and investor protection.[1057]

The proposed amendments would enhance regulatory oversight and investor protection and help facilitate market surveillance by extending the broker-dealer registration requirement of Regulation ATS to Currently Exempted Government Securities ATSs that are operated by banks (*i.e.,* bank-operated Currently Exempted Government Securities ATSs) and Communication Protocol Systems that are not operated by registered broker-dealers (*i.e.,* non-broker-dealer-operated Communication Protocol Systems).[1058] Registering as a broker-dealer would require, among other things, the filing of Form BD and SRO membership. Such requirements would allow the Commission and an SRO to examine bank-operated Currently Exempted Government Securities ATSs and non-broker-dealer-operated Communication Protocol Systems for compliance with Federal securities laws.[1059] Furthermore, upon registering as broker-dealers and becoming members of an SRO, these Currently Exempted Government Securities ATSs and Communication Protocol Systems would be required to report certain transactions to an SRO for public dissemination, which would help facilitate market surveillance by the SRO.[1060]

The magnitude of benefits from this increase in transaction transparency depends on the portion of transactions executed by bank-operated Currently Exempted Government Securities ATSs and non-broker-dealer-operated Communication Protocol Systems. However, these platforms are not subject to transaction reporting obligations, and thus, the Commission cannot estimate the magnitude of this benefit because the Commission does not have data on transactions executed by the estimated 1 bank-operated Currently Exempted Government Securities ATS and 9 non-broker-dealer-operated Communication Protocol Systems.[1061]

[1055] *See generally supra* Section II.D.1 (discussing the national securities exchange registration requirements under Sections 6 of the Exchange Act).

[1056] *See supra* Section II.B.3.

[1057] The proposed amendments would enhance regulatory oversight and investor protection by requiring: Non-broker-dealer-operated Communication Protocol Systems and bank-operated Currently Exempted Government Securities ATSs to register as a broker-dealers; Communication Protocol Systems and Currently Exempted Government Securities ATSs to safeguard subscribers' confidential trading information; Communication Protocol Systems and Currently Exempted Government Securities ATSs to comply with recordkeeping and reporting requirements; Communication Protocol Systems that are not Government Securities ATSs nor NMS Stock ATSs to file Form ATS; and Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs to file Form ATS–N. One commenter on the 2020 Proposal stated that removing the exemption for Currently Exempted Government Securities ATSs would significantly improve market transparency and resiliency, and that requirements to provide transparency to market participants regarding key aspects of the platform, and comply with fair access requirements would promote market integrity and help to ensure that multilateral U.S. Treasury trading venues are subject to appropriate regulatory oversight. *See* Citadel Letter at 1. Another commenter stated that the extension of Regulation ATS to include Currently Exempted Government Securities ATSs would help foster investor protection and market integrity. *See* FINRA Letter at 2.

[1058] Non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate would be required to register as broker-dealers with the Commission and become members of an SRO under the proposed Rule 301(b)(1). Proposed Rule 301(b)(1) would enhance regulatory oversight over the estimated 1 bank-operated Currently Exempted Government Securities ATS and 9 non-broker-dealer-operated Communication Protocol Systems (6 non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate and 3 non-broker-dealer-operated Communication Protocol Systems with a broker-dealer affiliate). *See also* Section VIII.C.2.a.ii for a discussion about a bank-operated Currently Exempted Government Securities ATS and non-broker-dealer-operated Communication Protocol Systems with a broker-dealer affiliate adopting a registered affiliate structure to comply with the proposed Rule 301(b)(1).

[1059] The broker-dealer registration would enable the Commission to examine the trading operations of registered broker-dealer operators and FINRA to examine its members and markets that its members operate. *See also supra* Section II.D.2.

[1060] FINRA Rule 6730(a)(1) would require its members to report transactions of certain securities to FINRA. *See* FINRA Rule 6730(a)(1) requiring FINRA members to report transactions in TRACE-Eligible Securities, which FINRA Rule 6710 defines to include any debt security that is U.S. dollar-denominated and is: Issued by a U.S. or foreign private issuer, and, if a restricted security, sold pursuant to Securities Act Rule 144A; issued or guaranteed by an Agency or a Government-Sponsored Enterprise; or a U.S. Treasury Security. Debt securities issued by foreign sovereigns and Money Market Instruments are explicitly excluded. Note that, under FINRA Rule 6730(e), repurchase and reverse repurchase transactions involving TRACE-Eligible Securities are not reportable to TRACE. *See also* MSRB Rule G–14 requiring brokers, dealers and municipal securities dealers (''dealers'') to report transactions in municipal securities. *See supra* note 829 describing exemptions for ATS transaction reporting to TRACE and *supra* note 926 describing exemptions for transaction reporting to MSRB's RTRS. Trades in restricted equities effected under Securities Act Rule 144A that are transacted elsewhere than on an exchange are required to be reported to FINRA's OTC Reporting Facility (ORF) if at least one of the parties to the transaction is a FINRA member. *See supra* note 988.

[1061] The Commission estimates that there is currently 1 non-broker-dealer-operated Communication Protocol System trading in government and agency securities, corporate and municipal debt securities, and ABS/MBS. The Commission also estimates that there are 5 additional non-broker-dealer-operated Communication Protocol Systems trading in corporate debt securities, 2 trading in restricted equities, and 1 trading in repos. One commenter on the 2020 Proposal stated that, even if benefits from

Furthermore, the proposed requirements with respect to safeguarding subscribers' confidential trading information would enhance investor protection by helping to prevent Currently Exempted Government Securities ATSs and Communication Protocol Systems from potentially abusing such information. The requirements to establish written safeguards and procedures to protect subscribers' confidential trading information and to separate ATS functions from other broker-dealer functions for Currently Exempted Government Securities ATSs and Communication Protocol Systems would reduce the chance that a subscriber's confidential information is accessed or shared inappropriately.[1062] While the Commission lacks information on the extent to which the confidential trading information of subscribers to Currently Exempted Government Securities ATSs and Communication Protocol Systems is currently accessed or shared inappropriately,[1063] the requirements would promote the protection of confidential information even if such information is not being inappropriately accessed or shared.

Moreover, the proposed amendment to apply the recordkeeping [1064] and reporting requirements [1065] of Regulation ATS to Currently Exempted Government Securities ATSs and Communication Protocol Systems would help improve regulatory oversight because the requirements to keep and preserve records of customer trading interest and transactions would create an audit trail of trading activities on these systems.[1066] This information would allow the Commission to better monitor the types of investors that trade on these systems, help the Commission understand the role these systems play in their respective securities markets, and improve the ability of the Commission or an SRO to detect and investigate potential irregularities that might occur in markets in which these systems operate.

By requiring Currently Exempted Government Securities ATSs and Communication Protocol Systems to provide certain information on Form ATS–R, such as a list of all securities traded and all subscribers that were participants on the ATS during a reporting quarter, the Commission would be able to better monitor the trading on ATSs and evaluate for compliance with the Federal securities laws including Fair Access Rule and Regulation SCI, if applicable. The information collected on Form ATS–R regarding fair access grants, denials, and limitations of access to ATSs along with the proposed amendment to ask the ATS to indicate whether it was subject to the Fair Access Rule during any portion of the period covered by the report would help the Commission oversee those ATSs to evaluate for compliance with the Fair Access Rule. Furthermore, requiring information with respect to repurchase and reverse repurchase transactions on Form ATS–R would help the Commission identify and monitor important ATSs in the market for repurchase and reverse repurchase agreements.

The proposed amendments to require Government Securities ATSs [1067] and Communication Protocol Systems that are NMS Stock ATSs [1068] to file Form ATS–N would help facilitate the Commission's regulatory oversight and enhance investor protection. Under the proposed amendments, Current Government Securities ATSs would file Form ATS–N in lieu of Form ATS for their government securities trading operations. In addition, under the proposed amendments, Currently Exempted Government Securities ATSs and Communication Protocol Systems that are either Government Securities ATSs or NMS Stock ATSs would be required to file Form ATS–N. Information reported on Form ATS–N would provide the Commission with increased and better quality information on Current Government Securities ATSs and improve the effectiveness and efficiency of the examination process of Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs by facilitating the Commission and the ATS SRO's ability to better examine for compliance with the Federal securities laws.

Furthermore, the Commission's review process to declare Form ATS–N ineffective that is set forth in the proposed amendments would help ensure the quality of information disclosed in Form ATS–N. One commenter on the 2020 Proposal stated that market participants are incentivized to make disclosures that are robust, readable and sufficient because of the competitive forces and the variety of regulatory tools the Commission and other regulators have at their disposal to police the quality and content of statements made on the previously proposed Form ATS–G.[1069] While competitive forces would likely incentivize Government Securities ATSs to make robust, readable and sufficient disclosures, the Commission preliminarily believes that extending the ability for the Commission to be able to declare a Government Securities ATS's Form ATS–N or Form ATS–N amendment ineffective would improve the quality of information disclosed by these ATSs as compared to the information currently filed on Form ATS by Current Government Securities ATSs, which is not subject to the Commission's review and effectiveness process. The Commission's recent experience with Form ATS–N for NMS Stock ATSs informs this belief. Since February 2019, the Commission has reviewed initial Form ATS–N filings and amendments thereto and engaged in direct conversation with all NMS Stock

expanding Regulation ATS to bank-operated Currently Exempted Government Securities ATSs are limited by the Commission's estimate that there is only one bank-operated Currently Exempted Government Securities ATS today, the Proposal will also help maintain and promote the integrity of the Treasuries audit trail in the future to the extent it limits the opportunity for trades to be done on non-broker-dealer ATSs to avoid inclusion in the TRACE audit trail. *See* FINRA Letter at 4.

[1062] One commenter on the 2020 Proposal stated that requiring Currently Exempted Government Securities ATSs to adopt written safeguards and written procedures to protect subscribers' confidential trading information and to separate ATS functions from other broker-dealer functions can help protect the integrity of a subscriber's confidential trading information that could otherwise be at risk of unauthorized disclosure and subject to potential misuse, and that such safeguards and practices also can help prevent the sharing of confidential subscriber trading information by ATSs with other customers or having the operator of the ATS use the confidential trading information of other subscribers to advantage its own trading on the ATS. *See* MFA Letter at 3.

[1063] Although the Commission currently lacks this information, we describe above a potential scenario where the confidential trading information of a subscriber could be impermissibly shared with the personnel of the broker-dealer operator or any of its affiliates, and the broker-dealer operator, in turn, could potentially abuse that relationship to provide itself or its affiliates with a direct competitive advantage over that subscriber. *See supra* Section VIII.B.2.a.ii.

[1064] *See supra* Section II.D.2 for a discussion about the requirements of Rule 302 and 303.

[1065] Rule 301(b)(9) would require filing of Form ATS–R.

[1066] One commenter on the 2020 Proposal stated that requiring currently exempted Government Securities ATSs to comply with the recordkeeping and reporting requirements of Regulation ATS and requiring such ATSs to file a confidential Form ATS–R with the Commission would improve the Commission's ability to monitor currently exempted Government Securities ATSs and improve its oversight of the market for government securities execution services overall. *See* MFA Letter 3.

[1067] Government Securities ATSs would include Currently Exempted Government Securities ATSs, Current Government Securities ATSs, and Communication Protocol Systems that trade government securities.

[1068] The filing of Form ATS–N would be a new requirement for Government Securities ATSs. Currently, NMS Stock ATSs are required to file Form ATS–N. *See* NMS Stock ATS Adopting Release, *supra* note 2.

[1069] *See* SIFMA Letter at 4.

ATSs about their Form ATS–N filings. The Commission believes that this review process has helped ensure that such disclosures are complete and comprehensible. Many NMS Stock ATSs have opted to seek the Commission staff's input about pending material amendments prior to filing, which has contributed to clearer and more effective disclosures. When new NMS Stock ATSs seek to begin operations, the initial Form ATS–N provides the Commission with detailed information about how the ATS will operate. With this knowledge, the Commission is better able to monitor for compliance and evaluate how NMS Stock ATSs as a group are evolving. Requiring Communication Protocol Systems that are not NMS Stock ATSs nor Government Securities ATSs to file confidential Form ATS would improve the Commission oversight of those Communication Protocol Systems and promote investor protection. The information regarding the manner of operation, the procedures governing execution, reporting, clearance, and settlement of transactions, types of securities traded, and subscriber information disclosed in Form ATS would help the Commission monitor securities markets for which Communication Protocol Systems provide trading services, and oversee the compliance with Federal securities laws. These benefits from requiring Form ATS, while similar in kind, would be smaller in magnitude compared to the benefits from requiring Form ATS–N because of the differences between the information disclosed in Form ATS and Form ATS–N.[1070]

b. Reduction of Trading Costs and Improvements to Execution Quality

The proposed amendments would help enhance operational transparency, reduce trading costs, and improve execution quality for market participants [1071] by requiring public disclosure of Form ATS–N and applying the Fair Access Rule to certain ATSs. The public disclosure of Form ATS–N for Government Securities ATSs and Communication Protocol Systems that trade NMS stocks would also help enhance operational transparency, and thus, reduce search costs and trading costs for market participants.[1072] The reduced search costs and trading costs would result in better execution quality for market participants. Specifically, based on Commission staff's experience with its review of initial Form ATS–N filings for NMS Stock ATSs, Form ATS–N would result in more standardized public information about Government Securities ATSs and Communication Protocol Systems that trade NMS stocks including how trading interests are handled, fee structures, the ATS's interaction with related markets, liquidity providers, activities the ATS undertakes to surveil and monitor its market, and any potential conflicts of interest that might arise from the activities of the broker-dealer operator or its affiliates. As a result, search costs for market participants would be lower because consistent disclosure requirements for all Government Securities ATSs and NMS Stock ATSs, including Communication Protocol Systems, would facilitate market participants' comparison of Government Securities ATSs and NMS Stock ATSs when deciding which venue best suits their trading objectives. In addition, based on the Commission's experience, fees can be a primary factor for market participants in deciding where to send their orders.[1073] Fee disclosures on Form ATS–N and requiring consistent and timely fee amendments on Form ATS–N would help market participants compare and analyze the fee structures and fee ranges across Government Securities ATSs and NMS Stock ATSs in an expedited manner and decide which ATS offers them the best pricing according to the characteristics of their order flow and the type of participant they are, which would lower their search costs and hence trading costs.

Furthermore, the proposed requirement that Government Securities ATSs [1074] and Communication Protocol Systems that trade NMS stocks file Form ATS–N subject to the Commission's review and effectiveness process would help ensure the quality of information disclosed in Form ATS–N with attendant benefits to market participants who utilize Form ATS–N, including helping market participants select a trading venue that best suits their trading objectives.[1075]

With regard to the Commission's proposal to require Government Securities ATSs and NMS Stock ATSs to file fee amendments with respect to fee changes, under the current filing requirements of Form ATS–N, there could be a considerable lapse of time from the actual fee change to the public disclosure of the fee change on Form ATS–N if an NMS Stock ATS files a fee change as an updating amendment.[1076] If there is such delay in the public disclosure of fee changes on Form ATS–N, requiring NMS Stock ATSs to file a fee amendment no later than the date it makes a change to a fee or fee disclosure would result in more timely public disclosure of fee changes for NMS Stock ATSs. Because the fee is an important factors in the selection of trading venues, the proposed fee amendment on Form ATS–N would allow market participants to use more up-to-date fee information in the selection of trading venues, which could lower trading costs for market participants.

However, the Commission is unable to quantify these benefits to market participants because the Commission lacks data on the amount of information that is currently available to different market participants regarding the operations of Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs operations and the activities of their broker-dealer operators and their affiliates. The magnitude of the anticipated benefits discussed above

[1070] Form ATS–N requires detailed disclosure about the manner of operations of ATSs, including display, execution and priority procedures, order segmentation, counterparty selection, fair access, eligibility of services, fees, and suspension of trading. *See* NMS Stock ATS Adopting Release, *supra* note 2.

[1071] Market participants would include prospective subscribers of Government Securities ATSs and Communication Protocol Systems that trade NMS stocks. For example, prospective subscribers would benefit from the public disclosure of Form ATS–N in their selection of trading venues.

[1072] One commenter on the 2020 Proposal stated that it agrees with the Commission that the proposed public disclosure of the operational aspects of Government Securities ATSs could improve investors' ability to select trading venues and lower trading costs. *See* FINRA Letter at 2. Another commenter stated that increasing accessibility to and standardizing information regarding the operations and activities of fixed income trading venues benefits investors by helping them make more informed decisions about where to send their orders. *See* MFA Letter at 9. A third commenter stated that more operational transparency would aid investors in conducting analysis of executions, and that transparency regarding pricing, market activity and market quality promotes healthy competition in the market place, supports fair and equitable access to potential participants and offers investor protection. *See* SIFMA Letter at 1 and 2.

[1073] As discussed above, market participants may select trading venues based on factors other than fees. For example, investors interested in effecting transactions in U.S. Treasury Securities and corporate debt securities simultaneously may find information regarding a trading venue's interaction with related markets on Form ATS–N useful in the selection of trading venue.

[1074] Government Securities ATSs would include Currently Exempted Government Securities ATSs, Current Government Securities ATSs, and Communication Protocol Systems that trade government securities.

[1075] For more discussion on the impact of the effective process on the quality of Form ATS–N disclosures, *see supra* Section VIII.C.1.a.

[1076] In the Commission staff's experience reviewing Form ATS–N amendments, some NMS Stock ATSs have filed updating amendments no later than 30 days from the end of the calendar quarter in which the ATS implemented the fee change. *See also supra* Section IV.A.

would also depend on a number of factors, including the extent to which market participants would change their behavior as a result of receiving the public disclosure of more comprehensive, comparable, and uniform information of this type in Form ATS–N. It is inherently difficult to predict how different market participants would use the information contained in Form ATS–N in evaluating and choosing the Government Securities ATSs and NMS Stock ATSs that best serve their trading objectives.

The Commission believes that applying the Fair Access Rule to Government Securities ATSs, which would require the establishment and objective application of fair access standards, would increase trading venue options available to market participants who are currently excluded. To the extent that there are market participants that wish to trade on significant Government Securities ATSs but are currently excluded from doing so, applying the Fair Access Rule to Government Securities ATSs would lower their trading costs.[1077] As discussed in Section VIII.B.2.a.ii, market forces alone may not be sufficient to prevent a significant Government Securities ATS from unreasonably denying access to some market participants.[1078] Under the proposed amendments, if a Government Securities ATS meets certain aggregate volume thresholds,[1079] the ATS would be required to establish and apply reasonable written standards for granting, limiting, and denying access to subscribers and applicants.[1080] As a result, for example, there would be a mechanism to prevent a Government Securities ATS that met the aggregate volume thresholds [1081] from unreasonably denying access to one institutional investor while granting access to another similarly-situated institutional investor.[1082]

Significant ATSs that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities are subject to the Fair Access Rule of Regulation ATS.[1083] However, Communication Protocol Systems and passive systems that trade NMS stocks are currently not subject to the Fair Access Rule, but would be under the proposed amendments.[1084] Applying the Fair Access Rule to those significant Communication Protocol Systems would generate the benefits discussed above for market participants in the markets for corporate debt securities, municipal securities, and non-NMS stocks. Additionally, the proposed amendments would help ensure that the benefits of the Fair Access Rule would also apply if a Communication Protocol System or passive system reached significant size and met the aggregate volume thresholds in the future.

To the extent that there are market participants currently excluded from trading on significant ATSs, the proposed amendments to aggregate volume across affiliated ATSs in calculating certain volume thresholds under the Fair Access Rule would increase the number of smaller affiliate ATSs available to market participants who are currently excluded, which would lower their trading costs for them. The proposed amendments to apply certain aggregate volume thresholds would increase the number of smaller affiliate ATSs that would be subject to the Fair Access Rule. Smaller affiliate ATSs that would not have met the current volume thresholds individually would be subject to the Fair Access Rule if they meet the proposed aggregate volume thresholds. The Commission estimates that no current smaller affiliate ATS that trades NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities and does not already currently meet the Fair Access volume thresholds would meet the volume thresholds if volume is aggregated across affiliated ATSs.[1085]

c. Enhancement of Price Discovery and Liquidity

Applying broker-dealer registration requirements of Regulation ATS, Regulation SCI, and the Capacity, Integrity, and Security Rule (*i.e.,* Rule 301(b)(6) of Regulation ATS) under the proposed amendments would help enhance the price discovery process and liquidity in securities markets.[1086]

The proposed broker-dealer registration requirements of Regulation ATS, including SRO membership requirements, for bank-operated Currently Exempted Government Securities ATSs and non-broker-dealer-operated Communication Protocol Systems would enhance the price discovery process in securities markets. As discussed in Section II.B.3, upon registering as broker-dealers and becoming members of an SRO, bank-operated Currently Exempted Government Securities ATSs and non-broker-dealer-operated Communication Protocol Systems would be required to report certain transactions to an SRO for

[1077] The Commission estimates 8 Government Securities ATSs would be subject to the Fair Access Rule. One commenter on the 2020 Proposal stated that registered investment companies generally are not able to directly access liquidity on most Treasury interdealer platforms. *See* ICI Letter at 4. Other commenters stated that applying the Fair Access Rule to Government Securities ATSs would ensure that market participants are not unreasonably denied access from important sources of liquidity for a particular security (*see* SIFMA Letter at 5) and would ensure that qualified market participants have access to the U.S. Government Securities market (*see* FIA PTG Letter at 2). Another commenter stated that including the trading of U.S. Treasury Securities and Agency Securities in the Fair Access Rule can prevent discriminatory actions that would otherwise result in higher trading costs for investors and the reduction in trading efficiency. *See* MFA Letter at 4.

[1078] *See also supra* note 833 and accompanying text.

[1079] The proposed Fair Access threshold for U.S. Treasury Securities is 3 percent or more of the average weekly dollar volume traded in the United States. The proposed Fair Access threshold for Agency Securities is 5 percent or more of the average daily dollar volume traded in the United States. The Fair Access threshold for NMS stocks and equity securities are 5 percent or more of the average daily share volume in an individual security. The Fair Access threshold for corporate debt and municipal securities is 5 percent or more of the average daily dollar volume. *See supra* Section III.B.4 for a discussion about the volume thresholds for government securities in applying the Fair Access Rule. *See also supra* Section V.A.2 for a discussion about the aggregation of volume threshold.

[1080] *See supra* Section V.A.3.

[1081] *See supra* Section III.B.4 for discussion about volume thresholds.

[1082] One commenter on the 2020 Proposal stated that applying fair access requirements to Government Securities ATSs would enhance the ability of funds to onboard and participate on these platforms directly, and that the fair access to these additional pools of liquidity would benefit fund shareholders. *See* ICI Letter at 4.

[1083] The Commission estimates 2 Communication Protocol Systems that trade corporate debt securities and 1 Communication Protocol System that trades municipal securities would be subject to the Fair Access Rule. Furthermore, the Commission estimates that 3 Communication Protocol Systems that trade non-NMS stock equity securities would be subject to the Fair Access Rule, but that no Communication Protocol System and no passive system that trades NMS stocks would be subject to the Fair Access Rule.

[1084] Communication Protocol Systems would be subject to Rule 3b–16 and Regulation ATS. *See supra* Section II.D. The exemption for passive systems under Rule 301(b)(5)(iii) of Regulation ATS would be removed. *See supra* Section V.A.5.

[1085] This estimate is computed using the regulatory version of FINRA's Trade Reporting Facility data and NYSE's TAQ data (accessed via WRDS). *See supra* note 1079 for details on the Fair Access thresholds. *See supra* note 310 for the application of the Fair Access Rule on the trading of NMS stocks, non-NMS stock equity securities, municipal securities, and corporate debt securities. *See also supra* Section V.A.2 for a discussion about the aggregation of volume threshold.

[1086] The proposed amendments would help enhance the price discovery process and liquidity in securities markets through: Applying the broker-dealer registration requirements of Regulation ATS to bank-operated Currently Exempted Government Securities ATSs and non-broker-dealer-operated Communication Protocol Systems; applying Regulation SCI to Government Securities ATSs that meet certain volume thresholds; applying Rule 301(b)(6) to significant Communication Protocol Systems that trade corporate debt securities or municipal securities; and applying Regulation SCI to significant Communication Protocol Systems that trade NMS stocks and non-NMS stock equity securities.

public dissemination, which would help enhance price discovery by providing the market with better post-trade price transparency in the government securities market and other securities markets in which the Communication Protocol Systems provide trading services.[1087]

The Commission believes that applying the proposed requirements of Regulation SCI to Government Securities ATSs that meet certain volume thresholds would help prevent systems issues from occurring and reduce their severity when they do occur, and thus, limit interruptions to the price discovery process and liquidity flow in the government securities market.[1088] As discussed in Section VIII.B.2.a.ii, market forces alone may not be sufficient to induce significant Government Securities ATSs to establish standards that would help significantly reduce systems issues.[1089] A systems outage at a significant Government Securities ATS would not only disrupt price discovery[1090] and liquidity flow, but also would reduce trading venue options resulting in higher trading costs for market participants.

The Commission recognizes that one Government Securities ATS is operated by a broker-dealer operator of an NMS Stock ATS that is a SCI entity, and therefore, might already have modified some of the policies and procedures of Regulation SCI as needed for systems related to trading of U.S. Treasury Securities and Agency Securities.[1091] However, imposing the requirements of Regulation SCI on this ATS's systems related to trading of U.S. Treasury Securities and Agency Securities would further strengthen these policies and procedures, which would help improve the robustness of SCI systems and SCI indirect systems.

Furthermore, extending Regulation SCI to significant Government Securities ATSs would help prevent disruptions in trading of linked fixed income securities, such as corporate debt securities, and thus, enhance the price discovery process and liquidity in those fixed income securities markets. U.S. Treasury Securities are used as a hedging instrument for hedging interest rate risk. The Commission understands that investors trading corporate debt securities simultaneously trade U.S. Treasury Securities in the direction that offsets the interest rate risk from the corporate debt securities trades. Systems issues at significant Government Securities ATSs would disrupt these hedging activities that use U.S. Treasury Securities, which in turn, would disrupt and the price discovery process and liquidity flow in corporate debt securities.

One commenter on the 2020 Proposal stated that it did not support applying Regulation SCI to Government Securities ATSs because trading venues for government securities are not interconnected.[1092] This commenter stated that unlike the equities markets, where linkages among venues under Regulation NMS can cause systems issues at a single ATS with a relatively more modest trading volume to present issues for the broader market, the government securities market has no similar linkages among venues.[1093] Other commenters on the 2020 Proposal expressed the view that application of Regulation SCI is appropriate.[1094]

The Commission believes that a system outage at a significant Government Securities ATS could disrupt trading at another significant Government Securities ATS even if these Government Securities ATSs are not connected. For example, if a significant Government Securities ATS is experiencing a system outage, there could be a sudden surge in message traffic (*e.g.,* quoting activities) and trading at other significant Government Securities ATSs. If a sudden surge in message traffic and trading exceeds the system capacity of the Government Securities ATS, this could result in systems issues and disrupt trading at the ATS. The requirements of Regulation SCI, including the requirements with respect to capacity planning, would help prevent such systems issues at significant Government Securities ATSs and enhance the price discovery process and liquidity in the government securities market.

NMS Stock ATSs that meet certain volume thresholds are subject to the requirements of Regulation SCI for SCI ATS.[1095] Subjecting significant Communication Protocol Systems that are NMS Stock ATSs to Regulation SCI would likely generate the benefits discussed in the Regulation SCI Adopting Release.[1096]

Significant ATSs that trade corporate debt securities or municipal securities are subject to Rule 301(b)(6).[1097] The application of Rule 301(b)(6) to significant Communication Protocol Systems that trade corporate debt securities or municipal securities would help reduce disruptions in the price discovery process of corporate debt

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[1087] FINRA members are subject to transaction reporting obligation under FINRA Rule 6730, while municipal bond dealers are subject to transaction reporting obligations under MSRB Rule G–14. *See supra* note 1060, discussing transaction reporting requirements for fixed income securities and *supra* note 1061, describing the non-broker-dealer-operated Communication Protocol Systems that are not currently subject to reporting requirements. As discussed in *supra* Section VIII.C.1.a, the Commission is unable to estimate the magnitude of this benefit because the Commission lacks the necessary data. Except for government securities, reported transactions in all other TRACE-Eligible Securities (which includes Agency securities, corporate debt securities, and ABS) are publically disseminated via FINRA TRACE. FINRA disseminates weekly summary of U.S. Treasury Securities transactions produced from TRACE data. *See* FINRA Rule 6740. Reported transactions in municipal debt securities are publicly disseminated via EMMA, which is a service operated by the MSRB. *See supra* note 658. Trades in restricted equity securities effected pursuant to Rule 144A are reported to the FINRA's ORF for regulatory purposes only and are not publicly disseminated.

[1088] The Commission estimates that 4 Government Securities ATSs would be subject to Regulation SCI. *See* Table VIII.1 in *supra* Section VIII.B.2.a.i and Section VIII.B.2.d. *See* Sections VIII.B.2.a and VIII.B.2.b for discussions about the importance of real-time price information on Government Securities ATS and indicative quotes on Communication Protocol Systems that trade U.S. Treasury Securities in price discovery of various securities. The proposed amendments to Regulation SCI would promote the establishment of more robust systems that are less likely to experience a system disruption by requiring Government Securities ATSs that meet the definition of SCI entity to establish and enforce written policies and procedures to ensure that their SCI systems have adequate levels of capacity, integrity, resiliency, availability, and security to maintain the SCI entity's operational capability. Furthermore, the extension of Regulation SCI would help strengthen the infrastructure and improve the resiliency of the automated systems of Government Securities ATSs that are important to the government securities markets. *See also* Section III.C.

[1089] *See also supra* note 838 and accompanying text.

[1090] *See supra* Sections VIII.B.2.a and VIII.B.2.b for discussions about the importance of real-time price information on Government Securities ATS and indicative quotes on Communication Protocol Systems that trade U.S. Treasury Securities in price discovery of various securities.

[1091] *See supra* Section VIII.B.2.a.ii for a discussion of Government Securities ATSs of existing SCI entities.

[1092] *See* Tradeweb Letter at 3.

[1093] *See* Tradeweb Letter at 3.

[1094] *See supra* notes 357–362 and corresponding text. One commenter stated that applying Regulation ATS and Regulation SCI to interdealer Treasury platforms is appropriate and would promote operational transparency, fair access, and system security and resiliency and that, given the linkage between the interdealer and the dealer-to-customer segments of the market, these benefits in turn would help dealers and other liquidity providers better facilitate trading with customers such as funds. *See* ICI Letter at 3 and 4. Other commenters on the 2020 Proposal opposed requiring Government Securities ATSs to comply with Regulation SCI. *See supra* notes 363–367 and corresponding text.

[1095] The Commission estimates that no Communication Protocol System that trades NMS stocks would be subject to Regulation SCI.

[1096] *See* Regulation SCI Adopting Release, *supra* note 3.

[1097] *See supra* Section II.D.2 for a discussion about volume threshold for Rule 301(b)(6) of Regulation ATS. The Commission estimates that 2 Communication Protocol Systems that trade corporate debt securities and no Communication Protocol Systems that trade municipal securities would be subject to Rule 301(b)(6).

securities and municipal securities due to failures or capacity issues with respect to automated systems of significant Communication Protocol Systems, and thus, enhance the price discovery process and liquidity in those markets.

d. Electronic Filing Requirements

With respect to the filing location and data language of the proposed disclosure requirements for Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs, requiring these disclosures to be filed on Form ATS–N would benefit market participants by improving the usability, accessibility, and reliability of the new disclosures. Form ATS–N is filed on the EDGAR system in a structured, machine-readable XML-based data language that is specific to Form ATS–N (''custom XML,'' here ''ATS–N-specific XML'').[1098] By requiring a structured data language and a publicly accessible filing location for the required disclosures, the Commission would allow market participants to download the disclosed information directly into their databases and analyze the information using various tools and applications. This would make it easier for market participants to aggregate the information and compare multiple ATSs to help select the venue that best suits their trading objectives, thereby potentially avoiding the cost of paying a third party data vendor to extract and structure the disclosed information on their behalf.

The Commission believes requiring all Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs to submit the required disclosures in ATS–N-specific XML will facilitate more effective and thorough review and analysis of those ATSs by the Commission, which should yield greater insights into the operations of those ATSs and the activities of their operators and affiliates. Additionally, Commission staff would be better able to assemble and review a larger pool of data regarding Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs. Both of these outcomes would benefit market participants by facilitating the Commission's examination process, and thus, would help protect investors and ensure the sufficiency of information in the market related to Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs.

Requiring all Government Securities ATSs to file the required disclosures on EDGAR would benefit market participants by ensuring that the disclosures are in a centralized, publicly accessible filing location with validation capabilities. Providing a centralized filing location would prevent market participants from incurring additional costs to locate and retrieve Government Securities ATS disclosures from various filing or posting locations. Similarly, because EDGAR is a publicly accessible system, an EDGAR requirement would prevent market participants from incurring additional costs that will arise if an operator or other party were to place any barriers to access the Government Securities ATS disclosures (such as a website registration requirement). Because EDGAR provides basic validation capabilities, an EDGAR requirement would reduce the incidence of non-discretionary errors, thereby improving the quality of the Government Securities ATS disclosures.

Requiring all Forms ATS and ATS–R to be filed on EDGAR would provide a centralized filing location with validation capabilities for submitted filings, and would also increase filing efficiencies for ATSs by removing the need to print and mail paper versions.[1099] All ATSs subject to Regulation ATS are required to file a Form ATS–R, and all ATSs that do not trade NMS stocks or government securities (which, under the proposal, would include Communication Protocol Systems), would file a Form ATS.

2. Costs

The Commission has considered the costs of the proposed amendments to Exchange Act Rule 3b–16, Regulation ATS, and Regulation SCI. The aggregate compliance costs are presented in Table VIII.7 below.

TABLE VIII.7—TOTAL IMPLEMENTATION COSTS [a] AND OTHER COMPLIANCE COSTS [b]

Type of entity	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Communication Protocol Systems (Government Securities ATS)	4	$2.4 million ~ $6.6 million [c]	$2.4 million ~ $5.1 million.[d]
Currently Exempted Government Securities ATSs	7	$1.5 million ~ $3.5 million [e]	$1.3 million ~ $2.7 million.[f]
Current Government Securities ATSs	17	$1.4 million ~ $3.5 million [g]	$1.3 million ~ $2.6 million.[h]
Communication Protocol Systems (NMS Stock ATS)	4	$209,000 [i]	$59,000.[j]
Current NMS Stock ATSs	34	$77,000 [k]	$16,000.[l]
Other Communication Protocol Systems	14	$2 million [m]	$660,000.[n]
Other Current ATSs	59	$374,000 [o]	$115,000.[p]
Subscriber			$10,000.[q]
Total	139	$8 million ~ $16 million	$5.9 million ~ $11 million.

[a] *See infra* note 1127.
[b] *See id.*
[c] *See infra* Table VIII.9.
[d] *See id.*
[e] *See infra* Table VIII.10.
[f] *See id.*
[g] *See infra* Table VIII.11.
[h] *See id.*
[i] *See infra* Table VIII.12.
[j] *See id.*
[k] *See infra* Table VIII.13.
[l] *See id.*
[m] *See infra* Table VIII.14.
[n] *See id.*
[o] *See infra* Table VIII.15.
[p] *See id.*
[q] This figure represents costs per ATS subscriber. *See also infra* note aa in Table VII.8.

[1098] *See supra* Section V.B.

[1099] *See id.*

a. Compliance Costs [1100]

The proposed amendments to extend Regulation ATS to Communication Protocol Systems, Currently Exempted Government Securities ATSs, and Current Government Securities ATSs and Regulation SCI to significant Government Securities ATSs and certain Communication Protocol Systems would result in a number of compliance costs. The Commission believes that compliance costs could be passed through (*e.g.,* via higher fees) to market participants, resulting in higher trading costs.

The requirements with respect to becoming a broker-dealer, filing Form ATS and Form ATS–N, and complying with the Fair Access Rule of Regulation ATS and Regulation SCI under the proposed amendments would result in compliance costs.[1101] The initial and ongoing implementation costs and other compliance costs per entity associated with these requirements are presented in Table VIII.8.[1102] The aggregates of these compliance costs are presented in Table VIII.9 through Table VIII.15.

TABLE VIII.8—PER ATS IMPLEMENTATION COSTS AND OTHER COMPLIANCE COSTS FOR EACH PROPOSED AMENDMENT

Rule	Compliance action	Initial costs per entity	Ongoing costs per entity
Reg ATS, 301(b)(1)	Form BD filing	$900 [a]	$300 [d]
	Form ID filing	50 [b]	
	Other compliance costs (non-PRA based)	316,000 [c]	57,700 [e]
Reg ATS, 301(b)(2)	Form ATS filing	6,400 [f]	1,500 [g]
Reg ATS, 301(b)(5)	Fair Access		17,000 [h]
Reg ATS, 301(b)(6)	Capacity, Integrity, and Security of automated systems		5,000 [i]
Reg ATS, 301(b)(9)	Form ATS–R filing		6,000 [j]
			500 [k]
Reg ATS, 301(b)(10)	Written safeguards and procedures to protect subscribers' trading information.	3,200 [l]	1,000 [m]
Reg ATS, 302	Recordkeeping		3,400 [n]
Reg ATS, 303	Record preservation		1,100 [o]
Reg ATS, 304	Form ATS–N filing	49,000 [p]	3,300 [s]
		43,000 [q]	3,300 [t]
		2,300 [r]	
Reg SCI	Implementation costs (PRA based)	777,000 [u]	924,000 [w]
		388,000 [v]	924,000 [x]
Reg SCI	Other compliance costs (non-PRA based)	320,000 ~ 2.4 million [y]	214,000 ~ 1.6 million [z]
Reg SCI	Subscriber costs (non-PRA based)		10,000 [aa]

[a] Compliance Manager at $332 × 2.75 hours = $914. *See also supra* note 787.
[b] Compliance Manager at $332 × 0.15 hour = $50. *See also supra* note 790.
[c] *See infra* note 1120.
[d] Compliance Manager at $332 × 0.95 hour = $316. *See also supra* note 788.
[e] *See infra* note 1120.
[f] (Attorney at $446 × 13 hours) + (Compliance Clerk at $75 × 7.5 hours) = $6,366. *See also supra* note 759.
[g] (Attorney at $446 × 3 hours) + (Compliance Clerk at $75 × 2 hours) = $1,489. *See also supra* note 760.
[h] Attorney at $446 × 37 hours = $16,513. *See also supra* note 764.
[i] Attorney at $446 × 11.25 hours = $5,021. *See also supra* note 766.
[j] ((Attorney at $446 × 3 hours) + (Compliance Manager at $332 × 0.25 hour)) × 4 times = $6,114. *See also supra* note 770.
[k] ((Compliance Manager at $332 × 0.25 hour) + (Compliance Clerk at $75 × 0.5 hour)) × 4 times = $483. *See also supra* note 771.
[l] (Attorney at $446 × 7 hours) + (Compliance Clerk at $75 × 1 hour) = $3,199. *See also supra* note 773.
[m] (Attorney at $446 × 2 hours) + (Compliance Clerk at $75 × 2 hours) = $1,043. *See also supra* note 774.
[n] Compliance Clerk at $75 × 45 hours = $3,383. *See also supra* note 776.
[o] Compliance Clerk at $75 × 15 hours = $1,128. *See also supra* note 777.
[p] (Attorney at $446 × 57.1 hours) + (Chief Compliance Manager at $570 × 0.5 hour) + (Compliance Manager at $332 × 36.05 hours) + (Sr. Systems Analyst at $305 × 33.75 hours) + (Sr. Marketing Manager at $328 × 1 hour) + (Compliance Clerk at $75 × 8 hours) = $48,987. *See also supra* note 781.
[q] (Attorney at $446 × 44.1 hours) + (Chief Compliance Manager at $570 × 0.5 hour) + (Compliance Manager at $332 × 36.05 hours) + (Sr. Systems Analyst at $305 × 33.75 hours) + (Sr. Marketing Manager at $328 × 1 hour) + (Compliance Clerk at $75 × 1 hour) = $42,659. *See also supra* note 782.
[r] (Attorney at $446 × 2.5 hours) + (Compliance Manager at $332 × 1.5 hours) + (Sr. Systems Analyst at $305 × 1.5 hours) + (Compliance Clerk at $75 × 2.5 hours) = $2,260. *See also supra* note 783.

[1100] Compliance costs consist of implementation costs, which are the monetized costs of PRA burdens and other compliance costs (non-PRA based costs).

[1101] The proposed requirements would include: broker-dealer registration requirements for non-broker-dealer-operated Communication Protocol Systems and bank-operated Currently Exempted Government Securities ATSs; the requirements with respect to written safeguards and procedures for subscribers' trading information, recordkeeping, record preservation, and Form ATS–R for Communication Protocol Systems and Currently Exempted Government Securities ATSs; the requirements of Form ATS for Communication Protocol Systems that are not Government Securities ATSs nor NMS Stock ATSs; the requirements with respect to capacity, integrity, and security of automated systems for Communication Protocol Systems that trade corporate debt securities or municipal securities; the requirements of Form ATS–N for Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs; the requirements to amend Form ATS–N for NMS Stock ATSs; the requirements to amend Form ATS and Form ATS–R and such forms be filed electronically; the requirements of the Fair Access Rule for significant Government Securities ATSs and significant Communication Protocol Systems; and the requirements of Regulation SCI for significant Government Securities ATSs and significant Communication Protocol Systems.

[1102] The Commission estimates the wage rate associated with PRA burden hours based on salary information for the securities information compiled by SIFMA. The estimated wage figure for attorneys, for example, is based on published rates for attorneys, modified to account for a 1,800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead yielding an effective hourly rate for 2013 of $380 for attorneys. See Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013, available at *https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/*. The 2013 professional wage rates are adjusted for an inflation rate of 17.45 percent based on the Bureau of Labor Statistics data on Consumer Price Index for all Urban Consumers (CPI–U) between September 2013 and September 2021. Therefore, the current inflation adjusted effective hourly wage rates for attorneys are estimated at $446 ($380 × 1.1745), $570 ($485 × 1.1745) for chief compliance managers, $332 ($283 × 1.1745) for compliance managers, $305 ($260 × 1.1745) for senior systems analysts, $328 ($279 × 1.1745) for senior marketing manager, and $75 ($64 × 1.1745) for compliance clerks.

[s] ((Attorney at $446 × 5.5 hours) + (Compliance Manager at $332 × 2 hours) + (Compliance Clerk at $75 × 1.9 hours)) × 5 times = $3,262. *See also supra* note 784.
[t] *See id.*
[u] The PRA burden hours are based on the 2018 SCI PRA Supporting Statement. The Commission estimates an initial PRA burden for new SCI entities of 2,034.3 hours. *See also supra* note 794. The PRA burden hours are monetized by applying inflation adjusted professional wage rates obtained via the methodology presented in *supra* note 1102.
[v] *See id.* The Commission estimates an initial PRA burden for existing SCI entities of 1,017.15 hours. *See also supra* note 793.
[w] *See id.* The Commission estimates an ongoing PRA burden for all SCI entities of 2,458.65 hours. *See also supra* note 795.
[x] *See id.*
[y] *See infra* Section VIII.C.2.a.vi for discussion about non-PRA based initial compliance costs per entity.
[z] *See infra* Section VIII.C.2.a.vi for discussion about non-PRA based ongoing compliance costs per entity.
[aa] *See infra* Section VIII.C.2.a.vi for discussion about non-PRA based compliance costs per ATS subscriber.

TABLE VIII.9—COMMUNICATION PROTOCOL SYSTEMS THAT ARE GOVERNMENT SECURITIES ATSS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Regulation SCI	2	$2.2 million ~ $6.4 million[a]	$2.3 million ~ $5 million.[b]
BD Registration.			
Fair Access	2		33,000.[c]
Other	4	209,000.[d]	59,000.[e]
Total	4	2.4 million ~ 6.6 million	2.4 million ~ 5.1 million.

[a] This cost figure is obtained by the summing initial implementation costs ($777,000) and non-PRA based compliance costs ($320,000 ~ $2.4 million) associated with Regulation SCI presented in *supra* Table VIII.8 for 2 Communication Protocol Systems that trade government securities.
[b] This cost figure is obtained by summing the ongoing implementation costs ($924,000) and non-PRA based compliance costs ($214,000 ~ $1.6 million) associated with Regulation SCI presented in *supra* Table VIII.8 for 2 Communication Protocol Systems that trade government securities.
[c] This cost figure is the ongoing implementation cost associated with Rule 301(b)(5) presented in *supra* Table VIII.8 for 2 Communication Protocol Systems that trade government securities.
[d] This cost figure is obtained by summing the initial implementation costs associated with Rule 301(b)(10) and 304 ($49,000) presented in *supra* Table VIII.8 for 4 Communication Protocol Systems that trade government securities.
[e] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(9) ($6,000), 301(b)(10), 302, 303, and 304 ($3,300) presented in *supra* Table VIII.8 for 4 Communication Protocol Systems that trade government securities.

TABLE VIII.10—CURRENTLY EXEMPTED GOVERNMENT SECURITIES ATSS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Regulation SCI	1	$1.1 million ~ $3.2 million[a]	$1.1 million ~ $2.5 million.[b]
BD Registration.			
Fair Access	3		50,000.[c]
Other	7	365,000[d]	103,000.[e]
Total	7	1.5 million ~ 3.5 million	1.3 million ~ 2.7 million.

[a] This cost figure is obtained by summing the initial implementation costs ($777,000) and non-PRA based compliance costs ($320,000 ~ $2.4 million) associated with Regulation SCI presented in *supra* Table VIII.8 for 1 Currently Exempted Government Securities ATS.
[b] This cost figure is obtained by summing the ongoing implementation costs ($924,000) and non-PRA based compliance costs ($214,000 ~ $1.6 million) associated with Regulation SCI presented in *supra* Table VIII.8 for 1 Currently Exempted Government Securities ATS.
[c] This cost figure is the ongoing implementation cost associated with Rule 301(b)(5) presented in *supra* Table VIII.8 for 3 Currently Exempted Government Securities ATSs.
[d] This cost figure is obtained by summing the initial implementation costs associated with Rule 301(b)(10) and 304 ($49,000) presented in *supra* Table VIII.8 for 7 Currently Exempted Government Securities ATSs.
[e] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(9) ($6,000), 301(b)(10), 302, 303, and 304 ($3,300) presented in *supra* Table VIII.8 for 7 Currently Exempted Government Securities ATSs.

TABLE VIII.11—CURRENT GOVERNMENT SECURITIES ATS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Regulation SCI	1	$708,000 ~ $2.8 million[a]	$1.1 million ~ $2.5 million.[b]
Fair Access	3		50,000.[c]
Other	17	725,000[d]	64,000.[e]
Total	17	1.4 million ~ 3.5 million	1.3 million ~ 2.6 million.

[a] This cost figure is obtained by summing the ongoing implementation costs ($924,000) and non-PRA based compliance costs ($214,000 ~ $1.6 million) associated with Regulation SCI presented in *supra* Table VIII.8 for 1 Current Government Securities ATS.
[b] This cost figure is obtained by summing the ongoing implementation costs ($924,000) and non-PRA based compliance costs ($214,000 ~ $1.6 million) associated with Regulation SCI presented in *supra* Table VIII.8 for 1 Current Government Securities ATS.
[c] This cost figure is the ongoing implementation cost associated with Rule 301(b)(5) presented in *supra* Table VIII.8 for 3 Current Government Securities ATSs.
[d] This cost figure is the initial implementation cost associated with Rule 304 ($43,000) presented in supra Table VIII.8 for 17 Current Government Securities ATSs.
[e] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(9) ($500) and 304 ($3,300) presented in *supra* Table VIII.8 for 17 Current Government Securities ATSs.

TABLE VIII.12—COMMUNICATION PROTOCOL SYSTEMS THAT ARE NMS STOCK ATSS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Regulation SCI. Fair Access. BD Registration. Other	4	209,000 [a]	59,000.[b]
Total	4	209,000	59,000.

[a] This cost figure is obtained by summing the initial implementation costs associated with Rule 301(b)(10) and 304 ($49,000) presented in *supra* Table VIII.8 for 4 Communication Protocol Systems that trade NMS stocks.
[b] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(9), 301(b)(10), 302, 303, and 304 ($3,300) presented in *supra* Table VIII.8 for 4 Communication Protocol Systems that trade NMS stocks.

TABLE VIII.13—CURRENT NMS STOCK ATSS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Regulation SCI. Fair Access. Other	34	77,000 [a]	16,000.[b]
Total	34	77,000	16,000.

[a] This cost figure is the initial implementation cost associated with Rule 304 ($2,300) presented in *supra* Table VIII.8 for 34 Current NMS Stock ATSs.
[b] This cost figure is the ongoing implementation cost associated with Rule 301(b)(9) ($500) presented in *supra* Table VIII.8 for 34 Current NMS Stock ATSs.

TABLE VIII.14—OTHER COMMUNICATION PROTOCOL SYSTEMS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Rule 301(b)(6)	2		$10,000.[a]
Fair Access	6		99,000.[b]
BD Registration	6	1.9 million [c]	360,000.[d]
Other	14	133,000 [e]	191,000.[f]
Total	14	2 million	660,000.

[a] This cost figure is the ongoing implementation cost associated with Rule 301(b)(6) presented in *supra* Table VIII.8 for 2 Communication Protocol Systems that trade corporate debt securities.
[b] This cost figure is the ongoing implementation cost associated with Rule 301(b)(5) presented in *supra* Table VIII.8 for 6 Communication Protocol Systems that trade corporate debt securities or municipal securities.
[c] This cost figure is obtained by summing the initial implementation costs associated with Rule 301(b)(1) presented in *supra* Table VIII.8 for 6 Communication Protocol Systems that trade neither government securities nor NMS stocks.
[d] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(1) presented in *supra* Table VIII.8 for 6 Communication Protocol Systems that trade neither government securities nor NMS stocks.
[e] This cost figure is obtained by summing the initial implementation costs associated with Rule 301(b)(2) and 301(b)(10) presented in *supra* Table VIII.8 for 14 Communication Protocol Systems that trade neither government securities nor NMS stocks.
[f] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(2), 301(b)(9) ($6,000), 301(b)(10), 302, and 303 presented in *supra* Table VIII.8 for 14 Communication Protocol Systems that trade neither government securities nor NMS stocks.

TABLE VIII.15—OTHER CURRENT ATSS

Compliance	Number of entities	Aggregate initial costs	Aggregate ongoing costs
Rule 301(b)(6). Fair Access. Other	59	374,000 [a]	115,000.[b]
Total	59	374,000	115,000.

[a] This cost figure is the initial implementation cost associated with Rule 301(b)(2) presented in *supra* Table VIII.8 for 59 Current ATSs that trade neither government securities nor NMS stocks.
[b] This cost figure is obtained by summing the ongoing implementation costs associated with Rule 301(b)(2) and 301(b)(9) ($500) presented in *supra* Table VIII.8 for 59 Current ATSs that trade neither government securities nor NMS stocks.

One commenter stated that the proposed amendments in the 2020 Proposal would require a Legacy Government Securities ATS to separate trading activity in government securities and repos from non-NMS stock trading activity, which could impose administrative and operational burdens on both Government Securities ATSs

and subscribers.[1103] The Commission believes that the proposed amendments do not require separating operations, and thus, Legacy Government Securities ATSs would not incur costs associated with separating operations.[1104]

i. Implementation Costs: [1105]

Currently Exempted Government Securities ATSs and Communication Protocol Systems that would be newly subject to the requirements of Regulation ATS would incur implementation costs associated with, among other things, written safeguards and procedures to protect subscribers' trading information,[1106] recordkeeping,[1107] record preservation,[1108] and Form ATS–R.[1109] Currently Exempted Government Securities ATSs and Communication Protocol Systems that trade NMS stocks or government securities would incur higher implementation costs due to the heightened requirements of filing Form ATS–N compared to other Communication Protocol Systems that would file Form ATS.[1110]

Current ATSs and Communication Protocol Systems that trade neither NMS stocks nor government securities would incur implementation costs associated with re-filing or filing the modernized Form ATS.[1111] Current NMS Stock ATSs would incur implementation costs associated with amending revised Form ATS–N.[1112] Furthermore, all current ATSs, Currently Exempted Government Securities ATSs, and Communication Protocol Systems would incur implementation costs to re-file or file the revised electronic Form ATS–R.[1113]

Government Securities ATSs that meet certain volume thresholds would be subject to the Fair Access Rule of Regulation ATS. The Commission estimates 3 Currently Exempted Government Securities ATSs, 3 Current Government Securities ATSs, and 2 Communication Protocol Systems that trade government securities would be subject to the Fair Access Rule. These entities would incur the implementation costs per entity presented in Table VIII.8.

Significant NMS Stock ATSs and ATSs that trade corporate debt securities, municipal securities, or non-NMS stock equity securities are subject to the Fair Access Rule. The Commission estimates 2 Communication Protocol Systems that trade corporate debt securities, 1 Communication Protocol System that trades municipal securities, and 3 Communication Protocol Systems that trade non-NMS stock equity securities would be subject to the Fair Access Rule. These entities would incur the same implementation costs per entity presented in Table VIII.8.

Significant ATSs that trade corporate debt securities or municipal securities are subject to Rule 301(b)(6). The Commission estimates that 2 Communication Protocol Systems that trade corporate debt securities would be subject to Rule 301(b)(6) and incur the implementation costs per entity presented in Table VIII.8.

The Commission believes that the 2018 estimates of initial PRA burdens for new SCI entities and ongoing PRA burdens for all SCI entities under Regulation SCI are largely applicable to Government Securities ATSs.[1114] For the purpose of implementation cost estimation, two groups of Government Securities ATSs are considered: [1115] Government Securities ATSs that are existing SCI entities; and Government Securities ATSs that are entirely new SCI entities currently not subject to Regulation SCI. For the first group (Government Securities ATSs that are existing SCI entities), the Commission believes that such entities would incur approximately 50 percent of the Commission's initial PRA burden estimates for entirely new SCI entities. Furthermore, for the second group (Government Securities ATSs that are new SCI entities currently not subject to Regulation SCI), the Commission believes that such entities would incur the same estimated initial PRA burdens as those estimated for new SCI entities in the 2018 SCI PRA Supporting Statement. The Commission also believes that the same ongoing PRA burdens for all SCI entities estimated in the 2018 SCI PRA Supporting Statement are applicable to Government Securities ATSs in both the first and the second group.

The Commission estimates that 4 Government Securities ATSs would be subject to the requirements of Regulation SCI and incur the implementation costs per entity presented in Table VIII.8. Among the four Government Securities ATSs that satisfy the volume thresholds, the Commission believes that one Government Securities ATS (referred as the first group above) would incur approximately 50 percent of initial PRA burden estimates for an entirely new SCI entity included in the 2018 SCI PRA Supporting Statement, and three Government Securities ATSs (referred as the second group above) would incur the same estimated initial PRA burdens as those estimated for new SCI entities included in the 2018 SCI PRA Supporting Statement. In addition, the Commission believes that all four Government Securities ATSs would incur the same ongoing PRA burdens as all other SCI entities included in the 2018 SCI PRA Supporting Statement.

Significant ATSs that trade either NMS stocks or non-NMS stock equity securities are subject to the requirements of Regulation SCI. The Commission estimates that no Communication Protocol System that trades NMS stocks or non-NMS stock equity securities would be subject to Regulation SCI. If a significant Communication Protocol System that trades NMS stocks or equity securities that are not NMS stocks exists, it would incur the same range of implementation costs per entity presented in Table VIII.8.

The estimated implementation costs for Communication Protocol Systems and Currently Exempted Government Securities ATSs associated with Rule

[1103] *See* ICE Bonds Letter I at 3 and 4. The commenter on the 2020 Proposal stated that this separation requirement would result in fewer venues and higher trading costs for subscribers to trade and hedge and concentrate trading among a few large Government Securities ATSs because smaller Legacy Government Securities ATSs may determine to exit due to the prohibitive costs associated with this separation requirement. This commenter also provided a list of costs associated with separating operation. *See also supra* Section III.B.1 and note 250.

[1104] *See supra* Section III.B.I.

[1105] Implementation costs are the monetized costs of PRA burdens. *See also supra* note 1100.

[1106] *See* the implementation costs associated with Rule 301(b)(10) in *supra* Table VIII.8.

[1107] *See* the implementation costs associated with Rule 302 in *supra* Table VIII.8.

[1108] *See* the implementation costs associated with Rule 303 in *supra* Table VIII.8.

[1109] *See* the implementation costs associated with Rule 301(b)(9) in *supra* Table VIII.8.

[1110] *See* the implementation costs associated with Rule 301(b)(2) and Rule 304 in *supra* Table VIII.8.

[1111] The initial and ongoing implementation costs per entity associated with Rule 301(b)(2) are approximately $6,400 and $1,500, respectively. *See supra* notes f and g in Table VIII.8. *See also supra* Section VII.D.1.a for a discussion about the implementation costs associated with Rule 301(b)(2).

[1112] The implementation cost associated with amending revised Form ATS–N is approximately $2,300 per entity. *See supra* note r in Table VII.8. *See also supra* Section VII.D.3 for a discussion about the implementation costs associated with Rule 304.

[1113] The implementation costs associated with filing or re-filing electronic Form ATS–R is approximately $500 per entity. *See supra* note k in Table VII.8. *See supra* Section VII.D.1.d for a discussion about the implementation costs associated with Rule 301(b)(9).

[1114] *See* 2018 SCI PRA Supporting Statement, *supra* notes 793, 794, and 795.

[1115] Government Securities ATSs are divided into two groups in discussing implementation costs because Government Securities ATSs operated by a broker-dealer operator of an NMS Stock ATS that is a SCI entity would have lower initial implementation costs. *See also* 2018 SCI PRA Supporting Statement, *supra* note 793.

301(b)(9) and (10), Rule 302, and Rule 303 would represent a larger fraction of revenue for a small (measured in trading volume) ATS relative to that for a large ATS. This is because these costs would be fixed costs that these ATSs would incur regardless of the amount of trading activity that takes place on them. Furthermore, regardless of their size and transaction volume, all Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs would need to ensure that their disclosures meet the requirements of Form ATS–N and that they correctly file their Form ATS–N under Rule 304. Such Government Securities ATSs and Communication Protocol Systems might develop internal processes to ensure correct and complete reporting on Form ATS–N, which would result in a fixed implementation cost. These implementation costs would fall disproportionately on smaller (measured in trading volume) such Government Securities ATSs and Communication Protocol Systems in terms of implementation costs relative to trading volume (as opposed to larger such Government Securities ATSs and Communication Protocol Systems in terms of implementation costs relative to trading volume), because all Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs would likely incur these fixed implementation costs. However, smaller such Government Securities ATSs and Communication Protocol Systems that are not operated by multi-service broker-dealer operators and that generally do not engage in other brokerage or dealing activities in addition to their ATSs would likely incur lower implementation costs because certain sections of revised Form ATS–N would not be applicable to Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs.

The implementation costs associated with Rule 304 would also vary across Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs depending on the complexity of the ATS and the services that it offers. For example, some such ATSs might not segment subscriber order flow or offer counterparty selection protocols. These ATSs would not be required to complete Part III, Items 13 and 14 of revised Form ATS–N. As a result, such Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs would incur lower implementation costs because these ATSs would apply lesser burden hours to complete their Form ATS–N.

ii. Costs Associated With Broker-Dealer Requirements

Under the proposed Rule 301(b)(1), Currently Exempted Government Securities ATSs that are banks (*i.e.,* bank-operated Currently Exempted Government Securities ATSs) and Communication Protocol Systems that are non-broker-dealers (*i.e.,* non-broker-dealer-operated Communication Protocol Systems) would be subject to broker-dealer registration requirements.

The Commission believes that non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate would incur additional compliance costs related to registering with the Commission as broker-dealers, becoming members of an SRO, such as FINRA, and maintaining broker-dealer registration and SRO membership, compared to those operated by broker-dealers and those with a broker-dealer affiliate. The initial costs would include the costs associated with filing Form BD and Form ID, FINRA membership application fees, and any legal or consulting costs necessary for effectively completing the application to be a member of FINRA (*e.g.,* ensuring compliance with FINRA rules [1116] including drafting policies and procedures as may be required). The ongoing costs would include the costs associated with amending Form BD, and ongoing fees associated with FINRA membership and legal work relating to FINRA membership.

The Commission recognizes that the costs associated with obtaining and maintaining FINRA membership would vary significantly depending on entity characteristics, activities, and the degree of the firm's reliance on outside legal or consulting for effectively completing the application process and maintaining FINRA membership. The initial registration costs for FINRA membership [1117] would depend on, among other things, the number of associated persons being registered. The ongoing costs to remain a FINRA member would vary based on the scope of brokerage activities, revenue,[1118] size (*i.e.,* the number of registered persons and the number of branch offices), and trading volume.[1119] Thus, entities with a smaller number of registered persons, fewer brokerage activities, smaller trading volume, and lower revenue would face lower costs.

As outlined in Table VIII.8, the Commission estimates an initial cost of approximately $317,000 to register as a broker-dealer with the Commission and become a member of FINRA.[1120] Additionally, the Commission estimates an ongoing annual cost of approximately $58,000 to maintain the broker-dealer registration and FINRA membership.[1121] The Commission preliminarily believes that these costs related to broker-dealer registration and FINRA membership are relevant to non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate. However, these cost estimates are uncertain because the

[1116] *See supra* Section II.D.2 for a discussion about FINRA rules.

[1117] *See https://www.finra.org/registration-exams-ce/classic-crd/fee-schedule#examfees* for the schedule of FINRA registration fees.

[1118] FINRA imposes a Gross Income Assessment as follows: $1,200 on a Member Firm's annual gross revenue up to $1 million; a charge of 0.1215% on a Member Firm's annual gross revenue between $1 million and $25 million; a charge of 0.2599% on a Member Firm's annual gross revenue between $25 million and $50 million; a charge of 0.0518% on a Member Firm's annual gross revenue between $50 million and $100 million; a charge of 0.0365% on a Member Firm's annual gross revenue between $100 million and $5 billion; a charge of 0.0397% on a Member Firm's annual gross revenue between $5 and $25 billion; and a charge of 0.0855% on a Member Firm's annual gross revenue greater than $25 billion. When a firm's annual gross revenue exceeds $25 million, the maximum of current year's revenue and average of the last three years' revenue is used as the basis for the income assessment. *See also https://www.finra.org/rules-guidance/notices/09–68.*

[1119] Fees for reporting trades to FINRA may depend on the types of security, the size of trade, and the types of message (*e.g.,* cancellation message, correction message). For example, fees for reporting trades to FINRA TRACE as follows: $0.475/trade for trade size up to and including $200,000 par value; $0.000002375 times the par value of the transaction (*i.e.,* $0.002375/$1,000) for trade size over $200,000 and up to and including $999,999.99 par value; $2.375/trade for trade size of $1,000,000 par value or more; $1.50/trade for all transactions in securitized products that are Agency Pass-Through Mortgage-Backed Securities traded to be announced (''TBA'') or SBA-Backed ABS traded TBA (each ''TBA transaction''); $1.50/trade for cancellation or correction; and $3/trade for late trades. *See also https://www.finra.org/rules-guidance/rulebooks/finra-rules/7730.*

[1120] *See* Exchange Act Release No. 33–9974 (October 30, 2015), 80 FR 71388, 71509 (November 16, 2015) (''Regulation Crowdfunding Adopting Release''). These estimates are adjusted for an inflation rate of 15.33 percent based on the Bureau of Labor Statistics data on CPI–U between October 2015 and September 2021. In addition to the initial costs to become a member of FINRA, this cost includes the initial implementation costs of $950 for filing Form BD and Form ID tabulated in Table VIII.8. The Commission recognizes that the cost of registering and becoming a member of a national securities association varies significantly among brokers, depending on facts and circumstances. The Commission estimates the range of cost to be between $57,500 and $576,500, and thus, chose the average amount of $317,000 for purposes of this discussion.

[1121] *See id. See also* Regulation Crowdfunding Adopting Release at 71509. In addition to the ongoing annual costs to maintain a membership with FINRA, this cost includes the ongoing annual implementation costs of $300 to amend Form BD tabulated in Table VIII.8.

Commission does not have information on the estimated 6 non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate, such as the number of associated persons of the broker entity and their licensing requirements, the scope of the proposed brokerage activities, and the degree of reliance on outside legal or consulting expertise necessary for effectively completing the application to be a member of FINRA. Furthermore, the Commission is unable to provide cost estimates related to trade reporting obligations [1122] because these costs would depend on various factors, such as the number of trades and the costs of updating systems for trade reporting requirements, for which the Commission does not have information.

In addition to the costs associated with broker-dealer registration and FINRA membership, a non-broker-dealer-operated Communication Protocol System without a broker-dealer affiliate could incur costs related to restructuring its business and incorporating itself or a separate entity (*i.e.,* an affiliate) to be registered as a broker-dealer. Such restructuring costs would include any costs that may be associated with making necessary changes to its business practices, fees for consulting and legal services, fees for incorporation and the amendment of its certificate of incorporation and its bylaws, and tax consequences. Fees for incorporation and amending the certificate of incorporation and its bylaws may be minimal. For example, fees for incorporation and amending the certificate of incorporation and its bylaws in the state of Delaware would range approximately between $89 and $200 depending on the entity type of incorporation.[1123] However, certain restructuring costs, such as costs associated with making changes to business practices to comply with the broker-dealer registration requirements, could be significant. The Commission estimates that up to 6 non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate could be required to restructure their business in order to comply with the broker-dealer registration requirements. The Commission is unable to provide estimates on certain restructuring related costs for a non-broker-dealer-operated Communication Protocol System because the Commission does not have information regarding the scope of its restructuring, such as the need and the extent of required changes in current business practices, the need and the extent of consulting services, and its choice of entity type for incorporation.

Upon becoming broker-dealers, operators of these Communication Protocol Systems would be subject to certain broker-dealer requirements with respect to maintaining net capital, reporting, and recordkeeping.[1124] The compliance costs associated with maintaining net capital, reporting, and recordkeeping would depend on the business structure of a broker-dealer (*i.e.,* the capital structure of a broker-dealer and the scope of a broker-dealer's activities). For example, the costs would vary significantly depending on the types of securities a broker-dealer holds, the level of net capital a broker-dealer maintains, and whether a broker-dealer carries customer accounts, carries for other broker-dealers, is a registered investment adviser, is affiliated with an investment adviser, or transacts in principal capacity. However, to the extent that an operator of Communication Protocol System limits its activities to trading operations and does not expand into these other business activities, the operator would incur minimal costs with respect to net capital, reporting, and recordkeeping requirements upon registering as a broker-dealer. The Commission is unable to estimate the costs associated with these broker-dealer requirements because the Commission does not have information about whether or how the current business structures of the estimated 6 Communication Protocol Systems that are not operated by a registered broker-dealer nor how a broker-dealer affiliate might change upon registering as a broker-dealer.

The Commission believes that a bank-operated Currently Exempted Government Securities ATS or a non-broker-dealer-operated Communication Protocol System would not incur compliance costs associated with registering as a broker-dealer and becoming a member of an SRO (*e.g.,* FINRA) if it has a broker-dealer affiliate. It is the Commission's understanding that ATSs that are banks often are operated by bank affiliates that are themselves registered broker-dealers, rather than by the banks themselves.[1125] A bank-operated Currently Exempted Government Securities ATS might adopt a similar registered affiliate structure for its government securities trading operations. For a non-broker-dealer-operated Communication Protocol System that is affiliated with an existing broker-dealer, it would be more cost-effective for the Communication Protocol System to move its operations to an existing broker-dealer affiliate rather than restructure itself to become a broker-dealer or create a new broker-dealer entity to comply with the broker-dealer registration requirements. Thus, the Commission expects that such non-broker-dealer-operated Communication Protocol Systems would choose the more cost-effective way of moving its trading operations to its registered broker-dealer affiliate.

A broker-dealer affiliate that is adding ATS or Communication Protocol System operations would incur additional ongoing costs associated with maintaining FINRA membership if adding trading operations increases revenue, the number of registered persons or branch offices, trading volume, or expands the scope of brokerage activities.[1126] Furthermore, a broker-dealer affiliate that is adding ATS or Communication Protocol System operations could incur additional costs associated with maintaining adequate net capital level, reporting, and recordkeeping depending on the changes in business structure of the broker-dealer. For the reasons discussed above, the Commission is unable to provide estimates on these additional costs for the estimated 1 bank-operated Currently Exempted Government Securities ATS and 2 non-broker-operated Communication Protocol Systems that are affiliated with an existing broker-dealer.

iii. Costs Associated With Ineffectiveness Declaration

In addition to the implementation costs associated with filing and amending Form ATS–N, the Commission preliminarily believes that the proposed ability for the Commission to declare a Form ATS–N or Form ATS–

[1122] *See supra* note 1119 for fees for reporting trades to FINRA. The Commission estimates that 2 non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate trade restricted securities, which may be subject to FINRA transaction reporting requirements. Thus, with respect to those restricted securities, these Communication Protocol Systems may incur costs associated with reporting trades to FINRA.

[1123] *See* fee schedules for incorporation and amending the certificate of incorporation and its bylaws in the state of Delaware at: *https://corpfiles.delaware.gov/Aug09feesch.pdf.*

[1124] Registered Broker-dealers would be subject to requirements under the rules, such as 17 CFR 240.15c3–1, 204.17a–1, 204.17a–3, 240.17a–4, and 240.17a–5 (Rule 15c3–1, Rule 17a–1, Rule 17a–3, Rule 17a–4, and Rule 17a–5).

[1125] *See supra* Section III.B.2 for a discussion about ATSs that are banks.

[1126] For an entity that may adopt a registered affiliate structure, it is possible that it may have to file a Continuing Membership Application with FINRA noticing material changes to business operations resulting from adding ATS operations. *See* (under material change) *https://www.finra.org/registration-exams-ce/classic-crd/fee-schedule* regarding the fees for the Continuing Membership Application with FINRA.

N amendment ineffective could result in direct costs for Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs.[1127] If the Commission declares a Government Securities ATS's or an NMS Stock ATS's Form ATS–N or Form ATS–N amendment ineffective, then the ATS might have to cease operations, roll back a change in operations, or delay the start of operations until it is able to address the deficiencies in the previously filed form.

An ineffective Form ATS–N could also impose indirect costs on the overall market for government securities and NMS stock trading services resulting from a potential reduction in competition or the removal of a sole provider of a niche service within the market.[1128]

However, the Commission believes that there would not be a substantial burden imposed in connection with resubmitting Form ATS–N or a Form ATS–N amendment or from an ineffective declaration in general.[1129] Because Government Securities ATSs, Communication Protocol Systems that are NMS Stock ATSs, and market participants would not incur these costs unless the Commission declares a Form ATS–N or amendment ineffective, such Government Securities ATSs and Communication Protocol Systems would be incentivized to comply with the requirements of Form ATS–N, as well as Federal securities laws, including the other requirements of Regulation ATS, to avoid an ineffectiveness declaration. These incentives would encourage such Government Securities ATSs and Communication Protocol Systems to initially submit a more accurate and complete Form ATS–N and amendments thereto, which would reduce the likelihood that they are declared ineffective.

Additionally, Current Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs would not have to bear the costs of immediately ceasing operations under the proposal without having an effective Form ATS–N on file with the Commission because Current Government Securities ATSs would be able to continue operations pursuant to a previously filed initial operation report on Form ATS and Currently Exempted Government Securities ATSs and Communication Protocol Systems that trade NMS stocks would also be able to continue operations pending the Commission's review of their initial Form ATS–N. However, if after notice and opportunity for hearing, the Commission declares an initial Form ATS–N filed by a Current Government Securities ATS, Currently Exempted Government Securities ATS, or Communication Protocol System ineffective, the ATS would be required to cease operations until an initial Form ATS–N is effective.

One commenter stated that the Commission's imposition of an ''effectiveness'' regime to previously proposed Form ATS–G under the 2020 proposal is an unnecessary administrative burden on Government Securities ATSs, and will be particularly burdensome on those Government Securities ATSs with limited volumes in government securities.[1130] The implementation costs associated with the requirements of Form ATS–N, including the costs for developing internal processes to ensure correct and complete reporting on Form ATS–N to avoid an ineffectiveness declaration, would be fixed costs, and thus, would represent a larger fraction of revenue for a small (measured in trading volume) ATS relative to that for a large ATS. However, the Commission preliminarily believes that this adverse effect on small ATSs would be mitigated to some extent, because, as discussed in Section VIII.C.2.a.i, the Commission believes that certain smaller Government Securities ATSs and Communication Protocol Systems that trade NMS stocks would likely incur lower implementation costs.[1131]

iv. Costs Associated With the Fair Access Rule

The Commission preliminarily believes that applying the Fair Access Rule could impose compliance costs (non-PRA based) on Government Securities ATSs, Communication Protocol Systems that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities, and passive systems that trade NMS stocks. Under the proposal, Government Securities ATSs, Communication Protocol Systems that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities, and passive systems that trade NMS stocks that meet the specified aggregate volume thresholds could no longer treat subscribers differently with respect to access to the services of the ATS without a reasonable basis. For example, an ATS could not offer one class of subscriber a service (*e.g.,* an order interaction procedure, order type, trading protocol, or connectivity method) without offering the service to all subscribers unless the ATS had a reasonable basis for the differential treatment. In addition, an ATS could not charge fees that unreasonably prohibit certain market participants from accessing the services of the ATS.[1132] If ATSs must change fee structures, order interaction procedures, trading protocols, or access provisions and adapt their operating model due to the Fair Access Rule, those ATSs would incur costs related to changing business operations.

The Commission, however, is unable to quantify the potential compliance costs discussed above. In particular, the Commission lacks data on the extent to which Communication Protocol Systems that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities, passive systems that trade NMS stocks, and Government Securities ATSs that meet the aggregate volume thresholds currently grant access to the ATS services to all subscribers on the same terms, and on the specific types of services and subscribers in question. In addition, the Commission lacks similar data for other trading venues in the government securities, corporate debt securities, and municipal securities market, which might offer differential access to services. Thus, the Commission is not able to estimate the costs associated with changing fee structures and adapting operating models.

Significant ATSs that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities are subject to the Fair Access

[1127] *See* Rule 304(a)(1)(iv)(B).

[1128] *See infra* Section VIII.C.3.a.i.d for a discussion about the impact of a declaration of ineffectiveness on competition in the market for government securities and repo trading services.

[1129] One commenter on the 2020 Proposal stated that the use of the same initial filing, amendment review, and effectiveness process for the previously proposed Form ATS–G as is currently in place for the Form ATS–N should reduce compliance burdens for market participants and reduce potential market confusion. *See* Tradeweb Letter at 10.

[1130] *See* ICE Bonds Letter I at 5.

[1131] Smaller Government Securities ATSs and Communication Protocol Systems that trade NMS stocks that are not operated by multi-service broker-dealer operators and that generally do not engage in other brokerage or dealing activities in addition to their ATSs would likely incur lower implementation costs because certain sections of revised Form ATS–N would not be applicable to these ATSs. Furthermore, smaller such Government Securities ATSs and Communication Protocol Systems that operate simpler systems would likely incur lower implementation costs associated with the requirements of Form ATS–N because certain sections of revised Form ATS–N would not be applicable to these ATSs.

[1132] *See supra* Section V.A.3 for a discussion about reasonableness and fees under the proposed amendments to the Fair Access Rule.

Rule. The proposed amendments to aggregate volume across affiliated ATSs in calculating certain volume thresholds could increase the number of smaller affiliate ATSs that would be subject to the Fair Access Rule. Smaller affiliate ATSs that would not have met the current volume thresholds individually would be subject to the Fair Access Rule if they meet the proposed aggregate volume thresholds. As discussed above, if ATSs must adapt their operating models as a result of being subject to the Fair Access Rule, those ATSs would incur costs related to changing business operations. The Commission estimates that no current smaller affiliate ATS that trades NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities and does not already currently meet the Fair Access volume thresholds would meet the volume thresholds [1133] and be subject to the Fair Access Rule if volume is aggregated across affiliated ATSs.[1134]

v. Costs Associated With Rule 301(b)(6)

In addition to the implementation costs associated with reporting outages and recordkeeping under the proposed Rule 301(b)(6), the Commission preliminarily believes that significant Communication Protocol Systems that trade corporate debt securities or municipal securities could incur compliance costs (non-PRA based) to ensure adequate capacity, integrity, and security with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison.[1135] To the extent that these significant Communication Protocol Systems currently do not meet certain standards under the proposed Rule 301(b)(6), they would incur compliance costs associated with, among other things, capacity planning, and conducting periodic capacity stress tests of critical systems that process transactions.[1136] For example, a Communication Protocol System would incur the costs associated with upgrading systems (*e.g.,* investing in computer hardware and software) if its critical systems that process transactions do not have adequate capacity. In addition, significant Communication Protocol Systems would incur costs associated with the independent review of their systems on an annual basis.

The Commission believes that the compliance costs for one of these significant Communication Protocol Systems would depend on the extent to which its existing policies with respect to maintaining adequate capacity, integrity, and security of systems that support order entry, order routing, order execution, transaction reporting, and trade comparison already comply with the standards under the proposed Rule 301(b)(6). The Commission is unable to estimate these compliance costs because it lacks information on the existing policies for maintaining adequate capacity, integrity, and security of such systems for significant Communication Protocol Systems that trade corporate debt securities or municipal securities.[1137] However, the Commission believes that compliance costs associated with Rule 301(b)(6) would be significantly less than those of Regulation SCI because the scope and requirements of Rule 301(b)(6) would be narrower than those of Regulation SCI.[1138]

vi. Costs Associated With Regulation SCI

Government Securities ATSs that meet certain volume thresholds would incur compliance costs (non-PRA based costs) as SCI entities.[1139] The Regulation SCI Adopting Release in 2014 estimated that an SCI entity would incur an initial cost of between approximately $320,000 and $2.4 million. Additionally, an SCI entity would incur an ongoing annual cost of between approximately $214,000 and $1.6 million. The Commission believes that these compliance costs are largely applicable to Government Securities ATSs.

One commenter on the 2020 Proposal stated that Regulation SCI imposes a specific manner in which SCI Entities must organize their asset inventories, and that redesigning and implementing new asset inventories to comply with Regulation SCI would require significant investment and would impose material upfront compliance costs that may divert resources rather than encourage meaningful investment.[1140] Although Regulation SCI would require SCI Entities to identify systems based on their functionality, as discussed above, the Commission believes that Regulation SCI is designed to provide flexibility in applying industry standards to establish policies and procedures.[1141] This flexibility may not require SCI Entities to redesign their systems to comply with Regulation SCI. However, to the extent that an SCI Entity would be required to redesign its systems, the Commission believes that the costs would be included in the compliance costs associated with Regulation SCI discussed above.[1142]

However, the Commission is uncertain about the actual level of costs Government Securities ATSs would incur because these costs might differ from the types of SCI entities considered in the Regulation SCI Adopting Release, which did not include fixed income ATSs.[1143] The Commission is also uncertain about the actual level of costs Government Securities ATSs would incur because the actual costs might differ based on various factors, such as complexity of SCI entities' systems and the degree to which SCI entities employ third-party systems. The Commission believes that Government Securities ATSs with relatively simpler systems would incur lower compliance costs compared to those with more complex systems.[1144] Also, any SCI systems operated by a third-party on behalf of an SCI entity would be subject to the requirements of Regulation SCI. The Commission believes that Government Securities ATSs with higher dependency on SCI systems operated by

[1133] *See supra* note 1079 for details on the Fair Access thresholds. *See supra* note 310 for the application of the Fair Access Rule on the trading of NMS stocks, non-NMS stock equity securities, municipal securities, and corporate debt securities. *See also supra* Section V.A.2 for a discussion about the aggregation of volume threshold.

[1134] *See supra* note 1085.

[1135] The Commission estimates that 2 Communication Protocol Systems that trade corporate debt securities or municipal securities would exceed the thresholds under the proposed Rule 301(b)(6). *See supra* Section VIII.C.2.a.i.

[1136] *See supra* note 157.

[1137] *See supra* note 888 (discussing commenter statements on the extent to which fixed incomes systems already comply with the provisions of Rule 301(b)(6)).

[1138] For example, Rule 301(b)(6) would apply to a narrower set of systems, as compared to Regulation SCI: Rule 301(b)(6) of Regulation ATS applies only to systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, which is narrower than the definition of SCI system. Furthermore, Rule 301(b)(6) would not require significant Communication Protocol Systems that trade corporate debt securities or municipal securities to maintain a geographically diverse backup facility.

[1139] While NMS Stock ATSs that meet certain volume thresholds are also subject to Regulation SCI, the Commission estimates that no Communication Protocol Systems that trade NMS stocks would be subject to Regulation SCI. The Commission preliminarily believes that a Communication Protocol System that trades NMS stocks would incur the same implementation costs and other compliance costs (non-PRA based), including ATS's participant costs, in the same range as those presented in Table VIII.8.

[1140] *See* BrokerTec Letter at 7.

[1141] *See supra* note 374 and accompanying text.

[1142] *See supra* Table VIII.8 for the compliance costs associated with Regulation SCI.

[1143] *See* Regulation SCI Adopting Release, *supra* note 3. In the Regulation SCI Adopting Release, fixed income ATSs are excluded from the regulation.

[1144] *See id.* The Regulation SCI Adopting Release explains that compliance costs would depend on the complexity of SCI entities' systems and they would be higher for SCI entities with more complex systems.

third-party vendors might incur higher compliance costs compared to those with lower dependency on third-party systems.[1145]

In addition, the Commission believes that some Government Securities ATSs' participants required to participate in the testing of business continuity and disaster recovery plans would incur Regulation SCI-related connectivity costs of approximately $10,000 apiece.[1146] If larger members or participants of SCI Government Securities ATSs already maintain connections to backup facilities including for testing purposes, the compliance costs associated with the business continuity and disaster recovery plans testing requirements in Rule 1004 for those larger member or participants might be limited.

The Commission believes that the costs to comply with Regulation SCI discussed above would also fall on third-party vendors employed by Government Securities ATSs to provide services used in their SCI systems. The costs for third-party vendors imposed by Regulation SCI would depend on the extent to which Government Securities ATSs use third-party systems that fall under the definition of SCI systems and the portion of third-party vendors operating SCI systems on behalf of large (*i.e.,* over the volume threshold) Government Securities ATSs that already comply with the requirements of Regulation SCI. It is possible that some third-party vendors operating SCI systems on behalf of large Government Securities ATSs already comply with the requirements of Regulation SCI because they also operate the SCI systems for other SCI (*e.g.,* SCI ATSs, SCI SROs). The additional compliance costs from the proposed amendments of Regulation SCI for these third-party vendors would be minimal. However, at this time, it is difficult to estimate the cost for third-party vendors because the Commission does not know the extent to which Government Securities ATSs use third-party systems that fall under the definition of SCI systems.

b. Indirect Costs

The Commission believes that the proposed amendments could result in indirect costs for market participants and certain Government Securities ATSs and Communication Protocol Systems.

The public disclosure requirements of Form ATS–N under the proposal could generate indirect costs for some subscribers by causing Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs to stop sharing information that they might currently offer to only some subscribers. Form ATS–N would require Government Securities ATSs and NMS Stock ATSs to publicly disclose any platform-wide order execution metrics that they share with any subscriber. To avoid publicly disclosing this information, an ATS might stop sharing the information with subscribers. The trading costs of subscribers that currently use this information to help make trading decisions would increase if the information is no longer available to them. The risk of ATSs disclosing less information than they currently do depends on several factors, such as the commercial purpose for releasing such information. If the subscribers who receive such information demand the information as a condition of subscribing, ATSs would have a commercial incentive to continue disclosing it. Thus, the Commission believes that this risk might be low.

The Commission believes that the public disclosure of Form ATS–N would generate indirect costs, in the form of transfers, for some subscribers of Government Securities ATSs or Communication Protocol Systems that are NMS Stock ATSs who might currently have more information regarding some ATS features, such as order priority and matching procedures, than other subscribers. The public disclosure of these features would reduce informed subscribers' information advantage over other subscribers on such Government Securities ATSs or Communication Protocol Systems and increase their trading costs. In this regard, the Commission recognizes that this effect would be a transfer to those subscribers who would receive the proposed information, from those subscribers currently exclusively receive such information.

Some Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs would experience indirect costs from the public disclosure of Form ATS–N to the extent that this form would reveal information to competitors. If a Government Securities ATS or NMS Stock ATS in part relies on certain operational characteristics (*e.g.,* order types, trading functionalities) to attract customer order flow and generate trading revenues, it is possible that the public disclosure of these characteristics in Form ATS–N would make it easier for other trading venues to adopt the operational characteristics, which would lower trading volume and reduce revenue of the disclosing ATS. Such costs to the disclosing ATS would constitute transfers to competing ATSs rather than a net cost to the market.

That said, the Commission believes that the risk of these transfers is low because it is not likely the responsive information to the revised Form ATS–N would include detailed enough information regarding operational facets such that the public disclosure of the information would allow another ATS to replicate the functionality to the extent it would adversely affect the competitive position of the disclosing ATS in the market.[1147]

The Commission believes that Government Securities ATSs and Communication Protocol Systems that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities, and passive systems that trade NMS stocks could indirectly experience costs in the form of lost revenue if they meet or exceed the Fair Access Rule thresholds and need to alter their business model to comply with the requirements of the Fair Access Rule. If they need to alter their terms of service or operations it may lead some subscribers that currently trade on the venue and benefit from the existing terms of service or operations to reduce the order flow they route to the venue or even leave the venue entirely, which could reduce the ATS's revenue. However, this revenue loss may be mitigated if the ATS is also able to attract new subscribers or additional order flow that was previously not able to access the venue.[1148] The Commission is not able to estimate the loss of revenues that Government Securities ATSs, Communication Protocol Systems that trade NMS stocks, and passive systems that meet the aggregate volume thresholds could incur as a result of applying the Fair Access Rule, because the venues may alter their business operations in response to being subject

[1145] *See id.* The Regulation SCI Adopting Release discusses that compliance costs could in part depend on the extent to which an SCI entity uses third-party systems because ensuring compliance of systems operated by a third-party with Regulation SCI may be more costly than ensuring compliance of internal systems with Regulation SCI.

[1146] *See id.* The Regulation SCI Adopting Release estimated connectivity costs as part of business continuity and disaster recovery plans to be approximately $10,000 per SCI entity member or participant.

[1147] *See supra* note 467 and accompanying text.

[1148] The Commission believes that, even if, an ATS has to change its business operations as a result of exceeding the Fair Access Rule threshold and is able to attract additional order flow or subscribers, the ATS's profits will likely be lower. If an ATS could have increased its profits by altering its business model before it was subject to the Fair Access Requirements, it would presumably have done so.

to the requirements of the Fair Access Rule and how the venue's existing subscribers may consequently alter their order flow or subscription to the ATS.

The Commission believes that market participants could incur indirect costs related to Government Securities ATSs, Communication Protocol Systems that trade NMS stocks, non-NMS stock equity securities, corporate debt securities, or municipal securities, and passive systems that trade NMS stocks being subject to the Fair Access Rule. As discussed in Section VIII.C.1.b, applying the Fair Access Rule could lower trading costs for market participants who are able to gain access to a trading venue from which they were previously excluded. This could impose costs on existing subscribers who may currently benefit from limiting access to the trading venue, though the Commission recognizes these costs would amount to transfers. To the extent this occurs, it is possible that some existing subscribers may redirect some or all of their trading interest to another trading venue that is not subject to the Fair Access Rule in order to preserve some of the benefits they may receive from a trading venue limiting access. These existing subscribers may incur search costs to find other venues to trade on as well as costs associated with administrative and operational procedures (*e.g.,* means of access, connectivity, order entry) to trade on a new trading venue. To the extent that existing subscribers shift their trading from the trading venue that is subject to the Fair Access Rule to a trading venue that is not subject to the rule, the benefits marker participants receive from gaining access to trading venues subject to the Fair Access Rule could be reduced.

Furthermore, compared to larger and more established ATSs, it is possible that younger ATSs rely more on providing catered services, including more advantageous access, to specific clients or a clientele, in order to grow their businesses. If being subject to the Fair Access Rule prohibits these ATSs from doing this, these ATSs could restrict trading on their systems when they are close to meeting the volume thresholds under the Fair Access Rule. This may not result in a significant increase in trading costs for market participants, because the order flow that was being sent to those ATSs would likely be absorbed and redistributed amongst other ATSs or non-ATS venues. However, if an ATS that is the sole provider of a niche service limits the trading in certain securities to avoid being subject to the Fair Access Rule, it could be more difficult for some market participants to find an alternative trading venue for that niche service, which would result in a larger increase in trading costs.

Similarly, the proposed amendments to apply certain aggregate volume thresholds to the Fair Access Rule in the markets for government securities, corporate debt and municipal securities, and equity securities could also cause market participants to incur similar indirect costs. If the aggregate volume of ATSs operated by a common broker-dealer or operated by affiliated broker-dealers approaches the Fair Access volume thresholds, then the operators could restrict trading in one or more securities on their systems in order to avoid being subject to the requirements of the Fair Access Rule. However, ATSs in the markets for government securities, corporate debt securities, and municipal securities may be unlikely to restrict trading in individual securities on their systems because the aggregated volume threshold is applied categorically rather than to individual securities.

Market participants could also incur indirect costs from the proposed amendments to apply certain aggregate volume thresholds to the Fair Access Rule if it causes a broker-dealer or affiliated broker-dealers that operate multiple ATSs to shut down one or more their smaller ATSs in order to avoid triggering the Fair Access threshold. This could cause market participants that subscribed to one of the shutdown platforms to incur search costs to find another venue to trade on.

The Commission believes that market participants could incur indirect costs related to applying Regulation SCI to Government Securities ATSs and Communication Protocol Systems in equity securities and with applying Rule 301(b)(6) to Communication Protocol Systems in the market for corporate debt securities or municipal securities. If a Government Securities ATS or Communication Protocol System that trades NMS stocks is close to satisfying the volume thresholds of Regulation SCI or Rule 301(b)(6), it could limit the trading in certain securities on its systems to stay below the volume thresholds in order to avoid being subject to Regulation SCI or Rule 301(b)(6). If this occurs for a Government Securities ATS or Communication Protocol System that is the sole provider of a niche service, as discussed above, some market participants would incur higher trading costs.

Additionally, in order to stay below the volume thresholds under Regulation SCI or Rule 301(b)(6), an ATS could break itself up into smaller ATSs. If this results in its subscribers changing their administrative and operational procedures (*e.g.,* means of access, connectivity, order entry), the subscribers would incur costs associated with making those administrative and operational changes to utilize the ATS, or otherwise incur search costs to find another venue to trade.

3. Efficiency, Competition, and Capital Formation

The Commission has considered the effects of the proposed amendments on efficiency, competition, and capital formation, and discussed these effects below.

a. Competition

The Commission preliminarily believes that the proposed amendments to Regulation ATS and Regulation SCI would affect competition in the market for trading services.[1149]

i. Regulation ATS

The Commission believes that the proposed amendments to Rule 3b–16 and Regulation ATS would promote competition by requiring current ATSs and Communication Protocol Systems to operate on a more equal basis. Additionally, the Commission believes that the regulatory requirements and compliance costs associated with the proposed amendments to Rule 3b–16 and Regulation ATS could act as a deterrent or a barrier to entry for potential ATSs or cause some smaller existing trading venues to exit the market for trading services.[1150] However, based on the estimated costs in Section VIII.C.2.a.i above, the burdens imposed by these regulatory requirements or compliance costs may not be large enough for these effects to be significant. Even if a smaller trading venue ceased operating, the Commission believes it may not have a significant adverse effect on overall competition among trading venues, because the market for trading services is competitive and the trading volume from the venue would likely be

[1149] *See supra* Section VIII.C.1 for a discussion about benefits from the requirements of Regulation ATS and Regulation SCI and Section VIII.C.2 for a discussion about costs of the requirements of Regulation ATS and Regulation SCI.

[1150] The expected compliance costs of Regulation SCI could act as a barrier to entry for new entrants who expect to eventually become SCI ATSs. If the expected compliance costs reduce the number of potential new entrants, this would reduce the potential competition from new entrants. However, these effects may not be significant because the entry decision at the margin, when the venue is small, may not be significantly influenced by what would happen if the venue later became large enough and met the requirements of Regulation SCI.

absorbed and redistributed amongst other ATSs or non-ATS venues.[1151]

Although the proposed amendments to Exchange Act Rule 3b–16 and Regulation ATS may not significantly increase the barriers to entry for new trading venues or cause some existing smaller trading venues to exit the market, the Commission lacks certain information necessary to quantify the extent to which entities that otherwise would seek to operate as a trading venue in the markets for government securities, repos, corporate, municipal, or equity securities would be dissuaded from doing so. Specifically the decision for a trading venue to continue operating or to cease operating depends on numerous factors and the Commission lacks information about many of those factors. For example, the Commission does not have information on the extent to which an existing Communication Protocol Systems would potentially need to alter its operations or business model as a result of the proposed amendments to Rule 3b–16 and Regulation ATS.

(a) Regulatory Framework

To the extent that current ATSs and Communication Protocol Systems compete,[1152] the proposed changes to Exchange Act Rule 3b–16, which would subject Communication Protocol Systems to the exchange regulatory framework, which can include complying with Regulation ATS,[1153] would promote competition by requiring current ATSs and Communication Protocol Systems to operate on a more equal basis in securities markets. One commenter on the Concept Release stated that non-ATS trading platforms that are neither registered as exchanges nor as ATSs perform core market place functions in fixed income securities (*e.g.,* corporate and municipal bonds) trading.[1154] This commenter also noted that these non-ATS trading platforms are operated by either broker-dealers or unregulated entities. Furthermore, this commenter stated that the significant regulatory burdens on ATSs put ATSs at a competitive disadvantage to non-ATS trading platforms that are not subject to the same regulatory obligations. Extending the requirements of Regulation ATS to Communication Protocol Systems would help eliminate a competitive disadvantage for ATSs arising from uneven regulatory requirements in the market for trading services.[1155] As discussed in Section II.B.3, the proposed amendment would subject both broker-dealer-operated and non-broker-dealer-operated Communication Protocol Systems to the requirements of Regulation ATS. To comply with the broker-dealer registration requirements of Regulation ATS, a non-broker-dealer-operated Communication Protocol System would be required to become a member of an SRO (*e.g.,* FINRA) and comply with the requirements of the SRO, to which ATSs are currently required.

Similarly, extending Regulation ATS to Currently Exempted Government Securities ATSs [1156] and Communication Protocol Systems that trade government securities would help promote competition by eliminating a Current Government Securities ATS's competitive disadvantage that might arise due to uneven regulatory requirements in the market for government securities and repo trading services.[1157]

The Commission acknowledges that some Government Securities ATSs and Communication Protocol Systems could restructure their operations to be non-ATSs to avoid being subject to Regulation ATS and Regulation SCI if the requirements are too burdensome or impair the ability of the trading venue to compete. However, the risk of this occurring may be mitigated because the proposed amendments to Rule 3b–16 may make it difficult for Government Securities ATSs and Communication Protocol Systems to restructure their operations to be non-ATSs.[1158] To the extent this does occur, the benefits and enhancements to competition discussed above would be reduced.[1159]

One commenter on the Concept Release stated that the flexibility of the current regulatory framework allows financial technology firms[1160] to

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[1151] The competitive effects would vary based on the types of securities and the role that ATSs and Communication Protocol Systems play in each securities market. *See supra* Sections VIII.B.2.d, VIII.B.3.d, VIII.B.4.d, and VIII.B.5.f for a discussion about competition in the market for trading services in different securities markets. Furthermore, the Commission acknowledges that the effects on competition could be greater if a smaller trading venue that is the sole provider of a niche service were shut down. To the extent this occurs, it could adversely impact competition because it would require some market participants to find other venues to trade on that may not minimize their trading costs to the same extent. However, even in this case, the overall effects on competition may still be limited because a competitor could create similar business models if demand were adequate, and if it did not do so, it seems likely new entrants would do so if demand were sufficient.

[1152] *See supra* Sections VIII.B.2.d, VIII.B.2.d, VIII.B.2.d, and VIII.B.7 (discussing how current ATSs in some markets tend to be interdealer markets and Communication Protocol Systems tend to be dealer-to-customer markets).

[1153] Under the proposal, Communication Protocol Systems that choose not to register as exchanges can instead register as broker-dealers and comply with Regulation ATS. Furthermore, under the proposal, Communication Protocol Systems operated by non-broker-dealers would be subject to the same regulatory requirements as ATSs, including the broker-dealer registration requirement of Regulation ATS. The Commission estimates that 6 non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate exist. The Commission assumes that, under the proposed amendments, Communication Protocol Systems would choose to register as broker-dealers and comply with Regulation ATS, rather than register as exchanges. *See supra* note 1056 and accompanying text.

[1154] *See* ICE Bonds Letter II at 2 and 3.

[1155] *See supra* Sections VIII.B.2, VIII.B.3, VIII.B.4, VIII.B.5, and VIII.B.6 for discussions regarding regulatory requirements for ATSs in the government securities, corporate debt securities, municipal securities, equities, and options market, respectively. One commenter on the Concept Release stated that applying a consistent regulatory framework to trading platforms that provide equivalent services to market participants, while also distinguishing between platforms that offer distinct trading protocols, would level the competitive landscape and allow market participants to choose trading platforms and protocols based on the merits of the services provided. Furthermore, this commenter also stated that it would not be appropriate to regulate all types of electronic trading protocols in the same manner regardless of their systemic risk profiles or to regulate electronic trading protocols more strictly than equivalent non-electronic trading protocols. *See* Tradeweb Letter at 4.

[1156] Under the proposal, bank-operated Currently Exempted Government Securities ATSs would be subject to the same regulatory requirements as non-bank-operated Currently Exempted Government Securities ATSs and Current Government Securities ATSs. The Commission estimates that 1 bank-operated Currently Exempted Government Securities ATS exists.

[1157] Current Government Securities ATSs might be at a competitive disadvantage to Currently Exempted Government Securities ATSs and Communication Protocol Systems, which do not currently incur compliance costs associated with the requirements of Regulation ATS. As discussed above, Currently Exempted Government Securities ATSs, bank-operated Currently Exempted Government Securities ATSs, Communication Protocol Systems, and Current Government Securities ATSs compete in the market for government securities and repo trading services with different regulatory requirements. For example, due to reporting requirements of Regulation ATS, it would be more difficult or costly for a Current Government Securities ATS to implement significant operational changes to compete with Currently Exempted Government Securities ATSs and Communication Protocol Systems if the Current Government Securities ATS's competitive advantage is driven by operational facets that would be reported on Form ATS. *See also supra* Sections II, III, VIII.B.2.a, and VIII.B.2.b for a discussion about the differences in regulatory requirements between Current Government Securities ATSs, Currently Exempted Government Securities ATSs, and Communication Protocol Systems under the current regulatory framework.

[1158] Additionally, although non-ATS venues would compete with ATSs in the market for government securities and repo trading services, non-ATS venues cannot offer the same services as ATSs without becoming ATSs.

[1159] *See supra* Section VIII.C.1 for a discussion about benefits from the requirements of Regulation ATS and Regulation SCI.

[1160] For the purpose of this discussion, financial technology firm is interpreted to be a type of Communication Protocol System (*e.g.,* RFQ system).

innovate and compete fiercely.[1161] This commenter also stated that this structure creates relatively low costs for entry (and exit) in the development of new technologies.[1162] Subjecting Communication Protocol Systems to the requirements of Regulation ATS could reduce operational flexibility. For example, it would be more costly for a Communication Protocol System to implement significant changes to operational facets that would be required to be reported on Form ATS or Form ATS–N. The Commission acknowledges that this reduction in operational flexibility could, under certain circumstances, make it more difficult to innovate.[1163] That said, in addition to the other benefits discussed above,[1164] the Commission believes that the proposed amendments would foster competition by requiring current ATSs and Communication Protocol Systems to operate on a more equal basis in the market for trading services. This, in turn, would help promote innovation.

(b) Compliance Costs of Regulation ATS

The Commission preliminarily believes that the compliance costs associated with the requirements of Regulation ATS would have different effects on the competitive position of ATSs depending on their size. However, the Commission believes that these initial and ongoing compliance costs may not have a significant adverse impact on overall competition in the market for trading services.

As a result of the proposed extension of Regulation ATS to Communication Protocol Systems and Currently Exempted Government Securities ATSs, these ATSs would be subject to Rule 301(b)(9) and (10), Rule 302, and Rule 303. Most of the estimated compliance costs [1165] associated with these rules would be fixed costs to those ATSs regardless of the amount of trading activity that takes place on them, and thus, these compliance costs would represent a larger fraction of revenue for a small (measured in trading volume) ATS relative to that for a large ATS.[1166] Furthermore, most of the estimated compliance costs associated with the requirements of Form ATS–N under Rule 304, which all Government Securities ATSs and Communication Protocol Systems that trade NMS stocks would incur, would be fixed costs. This could have an adverse impact on small ATSs in competing against larger ATSs, which could act as a deterrent or a barrier to entry for potential ATSs or result in small ATSs exiting the market for trading services.[1167] However, if small Government Securities ATSs and Communication Protocol Systems that trade NMS stocks engage in providing simpler services, these small ATSs are likely to incur lower compliance costs.[1168]

One commenter on the Concept Release stated that the regulatory burdens associated with subjecting all electronic platforms to the requirements of Regulation ATS could ultimately reduce the number of different platforms available.[1169] Another commenter on the Concept Release stated that the changes contemplated to Rule 3b–16 could end up raising costs for new financial technology (*i.e.,* fintech) [1170] entrants (liquidity solutions) to enter, stifle innovation and damage the current ability of market participants to locate liquidity in all illiquid security markets.[1171] This commenter also stated that a change in the definition of exchange would insert unnecessary intermediation between dealers and their customers and damage liquidity formation.[1172]

As discussed above, the compliance costs from the proposed amendments to Regulation ATS may not significantly increase the barriers to entry for new trading venues or cause some existing Communication Protocol Systems and Currently Exempted Government Securities ATSs to exit the market. Therefore, the Commission believes that the compliance costs associated with Regulation ATS may not have a significant adverse impact on competition in the markets for trading services. As discussed above, while the Commission acknowledges the proposed amendments could reduce operational flexibility, which could, under certain circumstances, make it more difficult to innovate, the Commission believes increased competition from the proposed amendments providing a more equal regulatory basis would help promote innovation.[1173] To the extent the proposed amendments force an innovative fintech to exit the market, it may be able to restructure itself (rather than operate as an ATS) as a third-party vendor and continue to provide certain innovative services, or otherwise sell its technology to another ATS, which would mitigate to some extent any adverse impact the proposed amendments may have on innovation.

To the extent the proposed amendments result in a Communication Protocol System that trades less liquid securities exiting the market for trading services, it could increase the trading costs of its subscribers if they need to find a new trading venue or are forced to go through multiple intermediaries (*i.e.,* broker-dealers) to find counterparties. However, as discussed above, the Commission preliminarily believes this may not result in a significant increase in trading costs for market participants because the trading

[1161] *See* Bloomberg Letter at 10 and 17.

[1162] *See* Bloomberg Letter at 23.

[1163] For example, it would take longer for a Communication Protocol System that trades government securities to implement an innovative operational facet that required a significant change to its systems, *e.g.* an innovative trading protocol, because they it need to file a Form ATS–N material amendment 30 days before implementing the system change. *See supra* IV.A.

[1164] *See supra* Section VIII.C.1.

[1165] The compliance costs associated with the requirements of Regulation ATS are generally represented by implementation costs (the monetized costs of PRA burdens). *See also supra* note 1100. *See supra* Section VIII.C.2.a.i for a discussion on the implementation costs associated with Rule 301(b)(9) and (10), Rule 302, and Rule 303. Communication Protocol Systems that are not broker-dealers and Currently Exempted Government Securities ATSs that are banks would incur additional compliance costs associated with the broker-dealer registration requirements under Rule 301(b)(1). *See infra* Section VIII.C.3.1.i.c) for a discussion of the competitive effects of broker-dealer registration requirements.

[1166] *See supra* Section VIII.2.a.i for a discussion about the impact of implementation costs for small ATSs.

[1167] Based on the estimated costs in Section VIII.C.2.a.i above, the Commission preliminarily believes that the compliance costs may not be large enough for these effects to be significant. *See supra* note 1151 and accompanying text.

[1168] *See supra* Section VIII.C.2.

[1169] *See* SIFMA Letter at 9 and 11. Another commenter on the Concept Release stated that the revision of the definition of ''exchange'' in Exchange Act Rule 3b–16 (''Rule 3b–16'') to expand the applicability of Regulation ATS to firms currently regulated as non-ATS broker-dealers may cause disruption if not undertaken carefully. *See* Tradeweb Letter at 2. An additional commenter stated that the Commission must be careful in implementing any reforms to the oversight of corporate bond and municipal securities trading venues to ensure that there are no unintended consequences for investors, such as the reduction in the availability of the types of platforms that investors utilize to effect transactions in these securities. *See* MFA Letter at 8.

[1170] For the purpose of this discussion, fintech is interpreted to be a type of Communication Protocol System (*e.g.,* RFQ system).

[1171] *See* Bloomberg Letter at 3. This commenter on the Concept Release stated that adding fintechs, such as RFQ systems, to the definition of exchange would erect high regulatory hurdles for innovation and new fintech entrants. *See also* Bloomberg Letter at 28. Another commenter on the Concept Release similarly expressed concern that any revisions to the regulatory framework for fixed income electronic trading should not stifle the investment and innovation that has led to the variety of existing trading protocols, and that it would be a mistake to interrupt this evolution through the increased imposition of an equity-based regulatory framework. *See* MarketAxess Letter at 3.

[1172] *See* Bloomberg Letter at 20. This commenter also stated that a change in the definition of exchange would threaten to distort the market structure by creating a one-size-fits-all approach that is biased against the trading of less-liquid instruments, damaging liquidity formation. *See id.*

[1173] *See supra* Section VIII.C.3.a.i.a).

interest that was being sent to the Communication Protocol System would likely be absorbed and redistributed amongst other ATSs or non-ATS venues.[1174]

(c) Broker-Dealer Registration Requirements

In addition to the compliance costs associated with the requirements of Regulation ATS, non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate would incur additional compliance costs related to registering with the Commission as broker-dealers, becoming members of an SRO, such as FINRA, and maintaining broker-dealer registration and SRO membership.[1175] Although these additional compliance costs could harm the competitive position of these Communication Protocol Systems and raise barriers to entry for entrants who are not broker-dealers nor affiliated with another broker-dealer, the Commission preliminarily believes that the compliance costs associated with the proposed broker-dealer registration requirements may not have a significant adverse effect on overall competition in the market for trading services.

Although the Commission acknowledges uncertainty about the compliance costs associated with the proposed broker-dealer registration requirements,[1176] there are two reasons why these costs may not be significant enough to make a non-broker-dealer-operated Communication Protocol Systems exiting the market likely. First, the Commission believes that the estimated average costs may not be significant enough to make exiting the market likely.[1177] Second, the Commission believes that the adverse effect on competition may be limited to existing small Communication Protocol Systems and this adverse effect may be mitigated to some extent because small Communication Protocol Systems would incur lower compliance costs associated with the broker-dealer registration requirements.[1178] To the extent that one of these Communication Protocol Systems ceased operating, the Commission believes it may not have a significant adverse effect on overall competition among trading venues, because the market for trading services is competitive and the trading volume from the venue would likely be absorbed and redistributed amongst other ATSs or non-ATS venues.[1179]

(d) Ineffectiveness Declaration

The proposed ability for the Commission to be able to declare a Form ATS–N or Form ATS–N amendment ineffective could result in compliance costs for Government Securities ATSs and Communication Protocol Systems that are NMS Stock ATSs and may affect competition in the market for government securities, repos, and NMS stock trading services. However, based on Commission staff's experience with NMS Stock ATSs that filed an initial Form ATS–N, the Commission preliminarily believes this would be an unlikely result.[1180] To the extent the Commission declares an initial Form ATS–N or amendment ineffective, the ATS would either have to cease operations [1181] or, in the case of an amendment, roll back any changes it made and operate pursuant to its previous Form ATS–N that is effective until it is able to address the deficiencies and file a new Form ATS–N that becomes effective.[1182] To the extent the Commission declares an initial Form ATS–N or amendment ineffective, some broker-dealer operators of Government Securities ATSs and Communication Protocol Systems in NMS Stocks might find that the costs of addressing deficiencies in Form ATS–N outweigh the benefits of continuing to operate the trading venue, particularly if the trading venue does not constitute a significant source of profit for a broker-dealer operator.

The ability of the Commission to declare Form ATS–N ineffective could also raise barriers to entry for new ATSs, as it might create uncertainty as to whether the Commission would declare its initial Form ATS–N effective or ineffective and as to the cost of avoiding an ineffective declaration. If a new ATS's initial Form ATS–N is declared ineffective, it would require time and additional expenditures to address the deficiencies delaying the commencing of operations, which would deter some potential ATSs from entry into the market for trading services. However, because an ineffectiveness declaration would be an unlikely result,[1183] the Commission believes it would not significantly raise the barriers to entry for new ATSs.

(e) Fair Access

The Commission believes that applying the Fair Access Rule to Government Securities ATSs, Communication Protocol Systems, and passive systems could increase competition between market participants in the markets for government securities, repos, corporate and municipal securities, and equity securities. As discussed above, to the extent that there are market participants currently excluded from trading on significant Government Securities ATSs, Communication Protocol Systems, or passive systems, applying the Fair Access Rule to Government Securities ATSs, Communication Protocol Systems, and passive systems could increase trading venue options available to these market participants, which could lower their trading costs.[1184] This, in turn, could increase competition among market participants trading on these platforms, which could be significant sources of liquidity and represent a significant portion of trading volume in their respective markets.[1185] However, these competitive effects may be reduced to the extent that some existing subscribers of trading venues that are subject to the Fair Access Rule redirect their trading interest to other trading venues not subject to the Fair Access Rule in order to preserve some of the benefits they may receive from a trading venue limiting access.[1186] If the

[1174] *See supra* Section VIII.C.2.b.

[1175] The Commission estimates there are 6 non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate. *See supra* Section VIII.C.2.a.ii.

[1176] As discussed above, the costs would vary significantly across firms and the Commission's estimate is uncertain because it does not have information on the non-broker-dealer-operated Communication Protocol Systems without a broker-dealer affiliate. *See id.*

[1177] The Commission estimates an initial cost of approximately $317,000 to register as a broker-dealer with the Commission and become a member of FINRA and an ongoing annual cost of approximately $58,000 to maintain the broker-dealer registration and FINRA membership. *See id.*

[1178] *See id* for a discussion about the costs associated with the broker-dealer registration requirements under Rule 301(b)(1).

[1179] *See supra* note 1151 and accompanying text.

[1180] Unlike the current rules applicable to NMS Stock ATSs under Rule 304 of Regulation ATS with respect to ineffectiveness, the Commission does not have a process to declare a Form ATS ineffective because of the quality of the disclosures and cause the ATS cease operating pursuant the exemption. *See* Rule 304(a)(1)(iv)(B).

[1181] *See* Rule 304(a)(1)(iv)(B).

[1182] *See id.*

[1183] *See supra* Section VIII.C.2.a.iii (discussing the Commission's belief that the potential costs of an ineffectiveness declaration would incentivize Government Securities ATSs and Communication Protocol Systems to initially submit a more accurate and complete Form ATS–N and amendments, which would reduce the likelihood that they are declared ineffective).

[1184] *See supra* Section VIII.C.1.b.

[1185] One commenter on the 2020 Proposal stated that, since the bilateral fixed-income market is a heavily relationship-driven business, the Fair Access rule would better ensure that broker-dealers and their affiliates cannot engage in retaliatory behavior, and thus improve access and competition for the largest, most systemically important markets. *See* AFREF Letter at 3.

[1186] *See supra* Section VIII.C.2.b (discussing the indirect costs to market participants related to the requirements of the Fair Access Rule).

proposed amendments to apply certain aggregate volume thresholds increase the number of smaller affiliate ATSs that would be subject to the Fair Access Rule, it could also increase competition among market participants, to the extent certain market participants are currently excluded from accessing these platforms.

The Commission believes that the proposed amendments to apply certain aggregate volume thresholds to the Fair Access Rule could harm competition among trading venues in the markets for government securities, corporate debt and municipal securities, and equity securities. As discussed above, if the aggregate volume of ATSs operated by a common broker-dealer or operated by affiliated broker-dealers approaches the Fair Access volume thresholds, then the operators could restrict trading on their systems in one or more securities in order to avoid being subject to the requirements of the Fair Access Rule.[1187] However, ATSs in the markets for government securities and corporate debt and municipal securities may be unlikely to restrict trading in individual securities on their systems because the aggregated volume threshold is applied categorically rather than to individual securities. If these venues restrict trading in some securities, it would reduce competition among trading venues to attract order flow in these securities.

Additionally, the proposed amendments to apply certain aggregate volume thresholds to the Fair Access Rule could also harm competition among trading venues if they cause a broker-dealer or affiliated broker-dealers that operate multiple ATSs to shut down one or more their smaller ATSs in order to avoid triggering the Fair Access threshold.[1188] However, because the trading volume on these smaller ATSs would likely be absorbed and redistributed amongst other ATSs or non-ATS venues, the Commission believes that the overall effects on competition among trading venues may not be significant.

(f) Public Disclosure

The increase in transparency due to the public disclosure of Form ATS–N would promote competition in the markets for government securities, repos, and NMS stock trading services. The increase in competition could result in lower venue fees, improve the efficiency in customer trading interest or order handling procedures, and promote innovation. For instance, because the public disclosure of Form ATS–N would make it easier for market participants to compare fees across ATSs,[1189] market participants could choose to send their orders to ATSs that offer lower fees, which in turn, could induce ATSs to lower their fees to attract new subscribers. If non-ATS venues compete with ATSs for trading services, the increased operational transparency of ATSs might also incentivize non-ATS trading venues to reduce their fees to compete with ATSs.

Because the public disclosure of Form ATS–N would make it easier for market participants to compare the quality of trading services, such as innovative trading functionalities, order handling procedures, and execution statistics—if they are made available, across venues,[1190] market participants would be more likely to send their trading interests or orders to ATSs that offer better trading services. This would promote greater competition in the market for trading services and incentivize ATSs to innovate, including, in particular, technology related to trading services to improve the quality of such services to attract more subscribers.

Similarly, the public disclosure of Form ATS–N would also result in market participants redirecting their trading interest away from ATSs that offer lower quality trading services compared to other ATSs, which could result in these ATSs earning less revenue. If the loss in revenue causes these ATSs to become unprofitable, they might choose to exit the market.[1191]

The proposed amendment to require timely fee change disclosure on Form ATS–N would promote competition between current NMS Stock ATSs and other trading venues in the market for NMS stocks, including exchanges.[1192] In the Commission staff's experience, NMS Stock ATSs have taken varied approaches to the reporting of fees. Current NMS Stock ATSs that treat fee changes as material changes in filing Form ATS–N are required to wait 30 calendar days from the filing date to implement a fee change.[1193] In other cases, NMS Stock ATSs have filed updating amendments no later than 30 days following the end of the calendar quarter in which a fee change was made. The Commission believes that requiring NMS Stock ATSs to file a fee amendment no later than the date it makes the change to a fee or fee disclosure would require those NMS Stock ATSs to provide the public with sufficient notice about a fee change while enabling those NMS Stock ATSs to nimbly change fees in competing against other trading venues. Furthermore, under Section 19(b) of the Exchange Act, national securities exchanges can implement fee changes upon filing with the Commission.[1194] To the extent that NMS Stock ATSs compete with exchanges in fees to attract order flow, the proposed amendment would promote competition by helping to level the playing field between NMS Stock ATSs and exchanges in terms of the timeframes in which they can initiate and disclose fee changes.[1195]

[1187] *See supra* Section VIII.C.2.b.

[1188] *See id.*

[1189] Under the proposed amendments, Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed) and Communication Protocol Systems that trade NMS stocks would need to begin disclosing their Form ATS–N. Current NMS Stock ATSs already publically disclose their Form ATS–N.

[1190] *See supra* Section VIII.C.1.b for a discussion about benefits from public disclosure of Form ATS–N.

[1191] *See supra* note 1151 and accompanying text for a discussion on the effects of ATSs exiting the market for trading services.

[1192] Under the proposed amendments, Government Securities ATSs would also be required to file fee amendments on Form ATS–N. This could promote competition among Government Securities ATSs because timely fee disclosure of fee changes by Government ATSs would make it easier for market participants to compare fees between trading venues. This could incentivize trading venues in the market for Government Securities to reduce their fees to compete to attract order flow.

[1193] *See supra* Section IV.A for a discussion about fee amendments on Form ATS–N.

[1194] Under Section 19(b)(3), SRO rule changes that: Constitute a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO; establish or changing a due, fee, or other charge imposed by the SRO; or are concerned solely with the administration of the SRO, are immediately effective upon filing. However, the Commission may suspend one of these SRO rule changes within 60 days of the date the SRO rule change is filed with the Commission, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act. If the Commission does suspend a SRO rule change, then it shall institute proceedings under Section 19(b)(2)(B) to determine whether the proposed SRO rule change should be approved or disapproved. *See* 15 U.S.C. 78s(b)(2) and 15 U.S.C. 78s(b)(3).

[1195] Currently, an amendment to a fee could result in an ATS filing an updating amendment or a material amendment, depending on the nature of the change and the ATS's assessment of whether such change was material. If an NMS Stock ATS would file an updating amendment to disclose a fee change, then the proposed amendment would help level the playing field by reducing the amount of time that the NMS Stock ATS would have before it had to disclose a fee change, bringing it more in line with the disclosure timeframes of exchanges. If an NMS Stock ATS would file a material amendment to disclose a fee change, then the proposed amendment would help level the playing field because the NMS Stock ATS would no longer have to give 30 days' notice before initiating the fee

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The public disclosure of a Government Securities ATS's or Communication Protocol System that trades NMS stock's previously non-public information regarding innovative operational facets could adversely impact competition in the market for trading services and also reduce the incentives for these trading venues to innovate. If the competitive advantage of an ATS in the market is driven by certain operational innovations, the disclosure of this information could result in other competing ATSs with similar operational platforms implementing similar methodologies, which could cause market participants to send their trading interest or orders to those other ATSs. To the extent some ATSs may rely on these innovations to attract trading interest, this could cause some existing ATSs to exit the market or raise the barriers to entry for new ATSs, which could adversely impact competition.[1196] Additionally, it could reduce the incentives for ATSs to innovate if publicly disclosing new innovations results in the disclosing ATS earning less revenue from new innovations it develops. However, the Commission believes that the risk of these adverse effects occurring would be low, because the information disclosed on Form ATS–N is not likely to include detailed enough information regarding operational facets or innovations such that the public disclosure would adversely affect the competitive position of the disclosing ATS.[1197]

One commenter on the 2020 Proposal stated that the Commission should not require making commercially sensitive information filed on the previously proposed Form ATS–G publicly available, which the commenter classified as information on certain fees or charges for use of the ATS's services and on aggregate, platform-wide order flow and execution statistics that the ATS already otherwise collects and publishes to one or more subscribers.[1198] The commenter stated that the public disclosure of such information would have a negative impact on innovation and competition among ATSs. As discussed above, the Commission believes that the responsive information to the Form ATS–N is not likely to include commercially sensitive or other information the public disclosure of which would result in the disclosing ATSs exiting the market for trading services and ultimately reduce transparency.

One commenter on the 2020 Proposal stated that if the disclosure requirements of previously proposed Form ATS–G are too burdensome or impair the ability of Government Securities ATSs to compete, it will discourage the expansion of ATSs and potentially encourage operators of Government Securities ATS to restructure their operations to avoid being characterized as an ATS, which would ultimately result in less transparency rather than more.[1199] As discussed above, although the Commission acknowledges that some Government Securities ATSs could restructure their operations to be non-ATSs to avoid being subject to the public disclosure of Form ATS–N, the risk of this occurring may be mitigated because the proposed amendments to Rule 3b–16 may make it difficult for them to restructure their operations to be non-ATSs.[1200]

ii. Regulation SCI

The Commission believes that the requirements imposed by Regulation SCI may not have a significant adverse effect on competition in the market for trading services or on market participants' trading costs.

The Commission believes that the compliance costs imposed by Regulation SCI may not have a significant adverse effect on competition among SCI ATSs, non-SCI ATSs, and non-ATS venues in the government securities market due to mitigating factors.[1201] The compliance costs imposed by Regulation SCI would have some impact on competition in the market for government securities trading services. Specifically, because non-SCI ATSs do not have to incur the compliance costs associated with Regulation SCI, non-SCI ATSs and non-ATS venues would gain a competitive advantage in the market for trading services over SCI ATSs, with which they compete.[1202] If SCI ATSs pass on the compliance costs to their subscribers in the form of higher fees, SCI ATSs would lose order flow or their subscribers to other non-SCI ATSs and non-ATS venues with lower fees. Adverse competitive effects, however, would be mitigated because an SCI ATS would likely have more robust systems, fewer disruptive systems issues, and better up-time compared to non-SCI ATSs. Furthermore, any adverse competitive effect may be minor if an SCI ATS is large and has a more stable and established subscriber base than other ATSs and non-ATS venues.

The compliance costs associated with participating in business continuity and disaster recovery plan testing would affect competition among subscribers of SCI ATSs and also would raise barriers to entry for new subscribers. Because some subscribers would incur compliance costs associated with Rule 1004 and others would not, it would adversely impact the ability for those subscribers of SCI ATSs to compete. However, it is difficult to gauge the extent of impact on competition because the Commission does not have sufficient information, for example, on whether certain subscribers of SCI ATSs currently maintain connections to backup facilities, including for testing purposes. If larger subscribers of SCI ATSs already maintain connections to backup facilities including for testing purposes, the adverse impact on competition would be mitigated because the incremental compliance costs associated with the business continuity and disaster recovery plan testing requirements under Rule 1004 would be limited for those larger subscribers. The Commission believes that new subscribers are less likely to be designated immediately to participate in business continuity and disaster recovery plan testing than are existing larger subscribers because new subscribers might not initially satisfy the ATS's designation standards as they establish their businesses.

It is difficult to estimate the costs of Regulation SCI for third-party vendors that operate SCI systems or indirect SCI systems [1203] on behalf of SCI ATSs.[1204] If Regulation SCI imposes compliance costs on such vendors, the compliance costs would affect the competition

change, bringing it more in line with the notice timeline in which exchanges can initiate fee changes.

[1196] *See supra* note 1151 and accompanying text for a discussion on the effects of ATSs exiting the market for trading services.

[1197] *See supra* note 467 and accompanying text.

[1198] *See* Tradeweb Letter at 3, 10, and 11. Similarly, another commenter stated that publication of compliance procedures/processes is not commonplace and risks requiring disclosure of proprietary information. *See* ICE Bonds Letter I at 6.

[1199] *See* ICE Bonds Letter I at 5 and ICE Bonds Letter II at 4.

[1200] *See supra* Section VIII.C.3.a.i.a).

[1201] NMS Stock ATSs that meet certain volume thresholds are subject to Regulation SCI. The Commission estimates that no Communication Protocol System that is an NMS Stock ATS would be subject to Regulation SCI. The Commission preliminarily believes that subjecting significant Communication Protocol Systems that are NMS Stock ATSs to Regulation SCI would affect competition as discussed in the Regulation SCI Adopting Release.

[1202] The expected compliance costs could act as a barrier to entry for new entrants who expect to eventually become SCI ATSs, but the Commission preliminarily believes this would not be a likely possibility. *See supra* note 1150.

[1203] *See supra* note 348 for the definition of indirect SCI systems.

[1204] *See supra* Section VIII.C.2.a.vi.

among third-party vendors in the market for SCI systems or indirect SCI systems. If the costs associated with Regulation SCI for third-party vendors outweigh the benefits of continuing to operate SCI systems or indirect SCI systems on behalf of SCI ATSs, these third-party vendors would exit the market for SCI systems or indirect systems. In this respect, Regulation SCI would adversely impact such vendors and reduce the ability for some third-party vendors to compete in the market for SCI systems and indirect SCI systems, with attendant costs to SCI ATSs. If this happens, SCI ATSs would incur costs from having to find a new vendor, form a new business relationship, and adapt their systems to those of the new vendor. SCI ATSs might also elect to perform the relevant functions internally. If the current third-party vendors are the most efficient means of performing certain functions for SCI ATSs, and to the extent that any third-party vendor exits the market, finding new vendors or performing the functions internally would represent a reduction in efficiency for SCI ATSs.

b. Efficiency and Capital Formation

The Commission believes the proposed amendments to Rule 3b–16, Regulation ATS, and Regulation SCI could promote price efficiency and capital formation by reducing trading costs and the potential for systems disruptions on ATSs that capture a significant portion of trading volume.[1205] However, if ATSs restrict trading volume in certain securities to stay below the Fair Access Rule, Regulation SCI, and Rule 301(b)(6) thresholds, it could adversely affect price efficiency and capital formation.

As discussed above, the proposed requirement for certain Communication Protocol Systems and Government Securities ATSs to publically disclose Form ATS–N could help reduce trading costs for market participants.[1206] Additionally, subjecting significant Communication Protocol Systems and Government Securities ATS to the Fair Access Rule could also help reduce market participants' trading costs.[1207] A reduction in trading costs could, in turn, reduce limits to arbitrage and help facilitate informed traders impounding information into security prices, which could enhance price efficiency.[1208] Furthermore, extending Regulation SCI and Rule 301(b)(6) would help improve systems up-time [1209] for ATSs and would also promote more robust systems that directly support execution facilities, order matching, and the dissemination of market data, which could also enhance price efficiency.[1210] In particular, enhanced price efficiency in the secondary market for on-the-run U.S. Treasury Securities might also enhance the price efficiency of risky securities because the transaction prices of on-the-run U.S. Treasury Securities are used as risk-free rate benchmarks to price risky securities transactions.[1211]

Enhanced price efficiency could also promote capital formation. Price efficiency of securities is important because prices that accurately convey information about fundamental value improve the efficiency in allocating capital across projects and entities, which helps promote capital formation.

On the other hand, the Commission believes that the proposed amendments of the Fair Access Rule, Regulation SCI, and Rule 301(b)(6) could also adversely affect price efficiency and capital formation if ATSs that are close to satisfying the volume threshold limit trading over some period restrict trading or cease operating to stay below the volume thresholds and avoid being subject to these rules.[1212] To the extent that this keeps ATSs from getting larger, it would increase fragmentation, and thus, adversely affect price efficiency in those markets, harming capital formation.

D. Reasonable Alternatives

The Commission considered several alternatives to the proposal: (1) Require Currently Exempted Government Securities ATSs and certain Communication Protocol Systems to file Form ATS, but not publicly disclose Form ATS; (2) require differing levels of public disclosure by Government Securities ATSs depending on their trading volume; (3) extend the transparency requirements (*i.e.,* Form ATS–N) of Regulation ATS to all ATSs and Communication Protocol Systems; (4) apply Rule 301(b)(6) of Regulation ATS to Government Securities ATSs; (5) alter the volume thresholds for the Fair Access Rule; (6) alter the Government Securities ATS volume thresholds for Regulation SCI; (7) exclude Communication Protocol Systems from the definition of ''exchange'' but require them to register as broker-dealers; (8) require Forms ATS–N, ATS, and ATS–R to be submitted in Inline XBRL; and (9) require the content of Form ATS–N to be posted on individual ATS websites.

1. Require Government Securities ATSS To File a Non-Public Form ATS

One alternative could require Government Securities ATSs (inclusive of Communication Protocol Systems, as proposed) to file Form ATS and subsequent amendments with the Commission, instead of filing Form ATS–N. This alternative would allow Current Government Securities ATSs to continue to file current Form ATS. However, Form ATS would be deemed confidential for all Government Securities ATSs and would not have to be publicly disclosed. Under this alternative, compliance costs would be lower because the costs to prepare a Form ATS for Government Securities ATSs is less than preparing a Form ATS–N. Furthermore, Government Securities ATSs would not incur additional costs associated with amending Form ATS–N to address any deficiencies to avoid an ineffectiveness determination, because Rule 304 of Regulation ATS does not apply to Form ATS filings. However, this alternative would reduce regulators' insight into Government Securities ATSs compared to the proposal because Form ATS would require the disclosure of less information about the operations of Government Securities ATSs and the activities of their broker-dealer operators and their affiliates, as compared to Form ATS–N.

The lack of public disclosure of Form ATS under the alternative could result in market participants making less informed decisions regarding where to send their orders, and thus, could result in lower execution quality than they would obtain under the proposal. Additionally, this alternative could result in higher search costs for subscribers to identify potential trading venues for their orders. Because Government Securities ATSs would not have to publicly disclose their fees or details about their operations, there would be less competition among Government Securities ATSs and

[1205] *See supra* Sections VIII.B.2.a and VIII.B.2.b for discussions about the importance of real-time price information on Government Securities ATS and indicative quotes on Communication Protocol Systems that trade U.S. Treasury Securities in price discovery of various securities. *See supra* Section VIII.C.1.c, discussing the benefits of reducing system disruptions through Regulation SCI and Rule 301(b)(6).

[1206] *See supra* Section VIII.C.1.b

[1207] *See id.*

[1208] *See, e.g.,* Shleifer, A. and Vishny, R. (1997). The Limits of Arbitrage. *The Journal of Finance,* 52(1), 35–55 (discussing limits to arbitrage); Grossman, S. and Stiglitz, J. (1980). On the impossibility of informationally efficient markets. American Economic Review, 70, 393–408 (discussing informed traders and price efficiency).

[1209] Systems up-time is a measure of the time that a computer system is running and available.

[1210] *See supra* Section VIII.C.1.c.

[1211] Based on the Commission's understanding, Government Securities ATSs disseminate their Treasury trades via private feeds and third-party vendors. These prices also serve as benchmarks for pricing other financial products. *See* October 15 Staff Report, *supra* note 188.

[1212] *See supra* Section VIII.C.2.b.

between Government Securities ATSs and non-ATS trading venues compared to the proposal. If there is less competition for order flow in the market for government securities and repo trading services, there could also be less incentive for Government Securities ATSs to innovate.

2. Initiate Differing Levels of Public Disclosure Depending on Government Securities ATS Dollar Volume

The Commission could require different levels of disclosure (*i.e.,* under Rule 304) among Government Securities ATSs based on the dollar volume in government securities traded on the platform. In particular, this alternative would subject Government Securities ATSs with lower dollar volumes to lower levels of disclosure on the revised Form ATS–N. This alternative could provide smaller Government Securities ATSs with a competitive advantage over larger ones because smaller Government Securities ATSs would incur lower compliance costs relative to the proposal, which could translate into lower entry barriers relative to such barriers under the proposal. Because these small Government Securities ATSs would not have to disclose as much information pertaining to their operational facets to their competitors, they would have a competitive advantage over more established Government Securities ATSs and other trading venues. This approach therefore would promote competition in the market. To the extent the public disclosure of Form ATS–N would have discouraged innovation,[1213] this alternative also would promote innovation because these small Government Securities ATSs would not be deterred from innovating by the possibility of having to disclose certain operational facets, which could also benefit market participants who trade on these ATSs by improving the execution quality of their trades. However, because some Government Securities ATS would not have to publicly disclose as much information on their Form ATS–N, market participants may not be as able to compare Government Securities ATSs to select the most appropriate venue for the their trading objectives, which could increase market participant search costs and trading costs relative to the proposal.[1214] Additionally, this alternative could incentivize small Government Securities ATSs to limit the trading in government securities on their ATSs to stay small and not trigger additional disclosure requirements. If this were to happen, it could limit market participants' options for trading venues, which could result in higher trading costs relative to the proposal.

3. Extend the Transparency Requirements of Regulation ATS to All ATSs and Communication Protocol Systems

As another alternative, the Commission could extend the transparency requirements (*i.e.,* the public disclosure on Form ATS–N under Rule 304) of Regulation ATS to all ATSs and Communication Protocol Systems. Under this alternative, investors would receive information about the ATS operations and the activities of the broker-dealer operators and affiliates of all ATSs and Communication Protocol Systems. While the disclosure requirements of individual systems would be similar to what is required under the proposal, investors would be able to access detailed information on ATSs and Communication Protocol Systems that currently do not file Form ATS–N. This could help market participants make better-informed decisions about where to send their orders to achieve their trading objectives as compared to under the proposal. Compared to the proposal, the public disclosure of Form ATS–N by all ATSs and Communication Protocol Systems would further promote competition, which could result in lower venue fees, improve the efficiency in handling of customer trading interest procedures, and promote innovation.

Under this alternative, ATSs and Communication Protocol Systems that currently do not file Form ATS–N would incur the compliance costs discussed in Section VIII.C.2.a to comply with Regulation ATS. Additionally, the public disclosure of details regarding the operational facets of these ATSs and Communication Protocol Systems could adversely impact competition and raise barriers to entry in the market for trading services, and could also lower the incentives for these ATSs and Communication Protocol Systems to innovate. However, the Commission believes that the risk of this is likely to be low.[1215]

4. Apply Rule 301(b)(6) of Regulation ATS to Government Securities ATSs

Another alternative for the Commission is to apply the Capacity, Integrity, and Security Rule in Rule 301(b)(6) [1216] of Regulation ATS to Government Securities ATSs instead of extending Regulation SCI. The scope and requirements of the Capacity, Integrity, and Security Rule would be narrower than those of Regulation SCI. For example, Rule 301(b)(6) of Regulation ATS would apply to a narrower set of systems, as compared to Regulation SCI. Rule 301(b)(6) of Regulation ATS applies only to systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, which is narrower than the definition of SCI system. This could result in the establishment of less robust systems in Government Securities ATSs compared to the proposal. This may increase the duration and severity of any system distributions, and result in more system issues occurring on Government Securities ATSs, which may, in turn, cause more interruptions in the price discovery process and liquidity flows and increase the occurrence of periods with pricing inefficiencies compared to the proposal.[1217] Furthermore, the Commission believes that compliance costs associated with the Capacity, Integrity, and Security Rule would be significantly less than those under the proposal because the scope and requirements of the Capacity, Integrity, and Security Rule would be narrower than those of Regulation SCI. For example, the Capacity, Integrity, and Security Rule would not require Government Securities ATSs to maintain a backup facility to comply with the requirements of Regulation SCI related to business continuity and disaster recovery plans. To the extent that Government Securities ATSs pass on these compliance costs to their subscribers, the significantly lower compliance costs of this alternative could result in lower trading costs for market participants compared to the proposal. Furthermore, the lower compliance costs of this alternative could lower barriers to entry in the market for government securities trading services and increase competition compared to the proposal, which would

[1213] As discussed above, the risk that the public disclosure of Form ATS–N would reduce the incentives for ATSs to is likely to be low. *See supra* Section VIII.C.3.a.i.f).

[1214] *See supra* Section VIII.C.1.b.

[1215] *See supra* Section VIII.C.3.a.i.f) for a discussion about the risk that the responsive information to the revised Form ATS–N would include information regarding operational facets such that the public disclosure of the information would adversely affect the competitive position of the disclosing ATS or Communication Protocol Systems and why the Commission believes that this risk is likely to be low. *See also supra* note 467 and accompanying text.

[1216] As also explained above, Rule 301(b)(6) addresses the capacity, integrity, and security requirements of automated systems for ATSs that meet certain volume thresholds. *See supra* note 157.

[1217] *See supra* Section VIII.C.1.c.

also result in lower trading costs for market participants.

As another alternative, the Commission could apply the Capacity, Integrity, and Security Rule in Rule 301(b)(6) to smaller Government Securities ATSs and extend Regulation SCI to larger Government Securities ATSs as proposed. For example, the Commission could require a Government Securities ATS that falls within a volume range for U.S. Treasury Securities of 5 percent and 10 percent to comply with Rule 301(b)(6) of Regulation ATS and a Government Securities ATS that exceeds a 10 percent volume threshold for U.S. Treasury Securities to comply with Regulation SCI. Under this alternative, the Commission believes that the smaller Government Securities ATSs subject to Rule 301(b)(6) would incur significantly lower compliance costs, as compared to the proposal, where these smaller Government Securities ATSs would be subject to Regulation SCI.[1218] To the extent that Government Securities ATSs pass on the additional compliance costs associated with Rule 301(b)(6) or Regulation ATS to their subscribers, the Commission believes that the trading costs for subscribers to these smaller Government Securities ATSs would be smaller, as compared to the proposal. Furthermore, the lower compliance costs of this alternative incurred by smaller Government Securities ATSs could lower barriers to entry in the market for government securities trading services and increase competition compared to the proposal, which could also result in lower trading costs for market participants.

5. Alter the Volume Thresholds for the Fair Access Rule

Another alternative for the Commission is to alter the volume thresholds for the Fair Access Rule.[1219] A higher aggregate volume threshold for the Fair Access Rule would result in a smaller number of ATSs and Communication Protocol Systems that are subject to the Fair Access Rule than under the proposal. With fewer ATSs and Communication Protocol Systems subject to the Fair Access Rule, some market participants may not be able to trade on as many ATSs and Communication Protocol Systems as they could have under the proposal, which could result in these market participants experiencing higher trading costs or worse execution quality than they would under the proposal. With a higher aggregate volume threshold for the Fair Access Rule, fewer ATSs and Communication Protocol Systems would incur compliance costs discussed in Section VIII.C.2.a to comply with the Fair Access Rule than under the proposal. This could lower the barriers to entry for new ATSs compared to the proposal.[1220] Additionally, a higher aggregate volume threshold could result in fewer broker-dealers shutting down some of their ATSs to avoid being subject to the Fair Access Rule compared to the proposal.[1221] Both lower barriers to entry and fewer ATSs exiting the market could increase competition compared to the proposal, resulting in lower trading costs for market participants. Since the aggregate volume threshold would be higher, broker-dealers operators would be less likely to restrict trading in certain securities in one or more of their systems in order to avoid the requirements of the Fair Access Rule. This would cause less order flow to be absorbed and redistributed amongst other trading venues, which could result in lower trading costs compared to the proposal, especially if the sole provider of a niche service is less likely to limit the trading in certain securities.

A lower aggregate volume threshold for the Fair Access Rule would cause a greater number of small ATSs and Communication Protocol Systems to be subject to the Fair Access Rule compared to the proposal. This would allow market participants that currently may be restricted in their access to access a greater number of ATSs and Communication Protocol Systems and provide them with more options in the selection of trading venues than under the proposal. Thus, compared to the proposal, these market participants could better access the trading venue that best meets their trading objectives, which result in the experiencing lower trading costs. With a lower aggregate volume threshold for the Fair Access Rule, ATSs and Communication Protocol Systems would incur greater compliance costs discussed in Section VIII.C.2.a to comply with the Fair Access Rule than under the proposal, which could increase the barriers to entry for new ATSs. Additionally, a lower aggregate volume threshold for the Fair Access Rule could cause a greater number of small ATSs and Communication Protocol Systems to exit the market for trading services compared to the proposal. Both higher barriers to entry and more ATSs shutting down could result in less competition compared to the proposal, which could result in market participants facing higher trading costs. Broker-dealers operators that are near the lower volume threshold would be more likely to restrict trading in one or more of their systems in order to avoid the requirements of the Fair Access Rule. This would result in more order flow being absorbed and redistributed amongst other trading venues compared to the proposal, which could result in higher trading costs, especially if the sole provider of a niche service is more likely to limit the trading in certain securities.

6. Alter the Government Securities ATS Volume Thresholds for Regulation SCI

Another alternative for the Commission is to alter the Government Securities ATS volume thresholds for Regulation SCI.[1222] A higher volume threshold for Regulation SCI would result in a smaller number of Government Securities ATSs being subject to Regulation SCI than under the proposal. Compared to the proposal, this could result in the establishment of less robust systems in Government Securities ATSs that would be subject to Regulation SCI under the proposal but fall below the higher volume threshold. This may increase the duration and severity of any system distributions, and result in more system issues occurring on these Government Securities ATSs, which may, in turn, cause more interruptions in the price discovery process and liquidity flows and increase the occurrence of periods with pricing inefficiencies compared to the proposal.[1223] With a higher volume threshold for Regulation SCI, the Commission believes that a smaller number of Government Securities ATSs would incur compliance costs discussed in Section VIII.C.2.a to comply with Regulation SCI requirements than under the proposal. This could lower barriers to entry in the market for government securities execution services compared to the proposal, which could increase competition, resulting in lower trading costs or better execution quality for investors. Compared to the proposal, a higher volume threshold for Regulation

[1218] *See supra* Section VIII.C.2.a.

[1219] *See supra* Sections VII.D.1.b and VIII.C.2.a for estimates of the number of additional trading venues that would be subject to the Fair Access Rule under the proposal.

[1220] The Commission believes that this would lower the barriers to entry compared to the proposal for both new ATSs that are the sole ATS operated by a broker-dealer, as well as new ATSs that are operated by a broker-dealer or affiliated broker-dealers that already operate one or more ATSs.

[1221] *See supra* Sections VIII.C.2.a.iv and VIII.C.3.a.i.e.

[1222] *See supra* Sections VII.D.6 and VIII.C.2.a for estimates of the number of additional trading venues that would be subject to Regulation SCI under the proposal.

[1223] *See supra* Section VIII.C.1.c.

SCI could also lead to less Government Securities ATSs restricting trading in certain government securities on their platform in order to stay below the volume threshold. This would cause less order flow to be absorbed and redistributed amongst other trading venues, which could result in lower trading costs compared to the proposal, especially if the sole provider of a niche service is less likely to limit the trading in certain securities.

A lower volume threshold for Regulation SCI would result in a larger number of Government Securities ATSs being subject to Regulation SCI than under the proposal. Compared to the proposal, a lower volume threshold for Regulation SCI likely would promote the establishment of more robust systems, help reduce the duration and severity of any system distributions, and help prevent system issues from occurring on smaller Government Securities ATSs that met the lower volume thresholds. This, in turn, could help prevent interruptions in the price discovery process and liquidity flows and thus may reduce the chance of periods with pricing inefficiencies occurring compared to the proposal. With a lower volume threshold for Regulation SCI, more Government Securities ATSs would incur compliance costs discussed in Section VIII.C.2.a to comply with Regulation SCI requirements than under the proposal, which could increase the barriers to entry for new Government Securities ATSs. This could decrease competition, resulting in higher trading costs or worse execution quality for investors compared to the proposal. Compared to the proposal, a lower volume threshold for Regulation SCI could also lead to more Government Securities ATSs restricting trading in certain government securities on their platform in order to stay below the volume threshold. This would cause more order flow to be absorbed and redistributed amongst other trading venues, which could result in higher trading costs compared to the proposal, especially if the sole provider of a niche service is more likely to limit the trading in certain securities.

7. Exclude Communication Protocol Systems From the Definition of ''Exchange'' but Require Them To Register as Broker-Dealers

The proposed amendments to Exchange Act Rule 3b–16 would require Communication Protocol Systems to either register as an exchange or register as a broker-dealer and comply with Regulation ATS.[1224] As an alternative, the Commission could require Communication Protocol Systems to register as broker-dealers, but continue to exclude them from the definition of ''exchange'' under Rule 3b–16, and thus, the requirements of Regulation ATS and Regulation SCI.[1225] Under this alternative, operators of Communication Protocol Systems would still need to register as broker-dealers with the Commission and FINRA, so they would still be subject to Commission and FINRA inspections and examinations. However, the benefits of enhanced regulatory oversight and investor protection would be less than in the proposal because Communication Protocol Systems would not be subject to the additional reports and requirements of Regulation ATS, which include having to report additional information to the Commission on Form ATS and Form ATR, or, if applicable, Form ATS–N.[1226]

Additionally, compared to the proposal, the reduction in market participant trading costs and improvements in their execution quality would not be as large because Communication Protocol Systems that trade government securities or NMS stocks would not be required to file and publicly disclose Form ATS–N and because significant Communication Protocol Systems would not be subject to the Fair Access Rule.[1227] Furthermore, because significant Communication Protocol Systems would not be subject to Regulation SCI or Rule 301(b)(6) of Regulation ATS, the enhancements to the price discovery process and liquidity in securities markets would be reduced relative to the proposal.[1228]

Under this alternative, Communications Protocol Systems would still incur the costs of registering as a broker-dealer, but would not incur the additional costs associated with Regulation ATS, including the costs associated with the Fair Access Rule and Regulation SCI and Rule 301(b)(6).[1229] This could result in less Communication Protocol Systems exiting the market and create lower barriers to entry for new Communication Protocol Systems compared to the proposal, which, relative to the proposal, could increase competition. Increased competition, in turn, could lower market participant trading costs and increase innovation among Communication Protocol Systems relative to the proposal. Since significant Communication Protocol Systems would not be subject to the Fair Access Rule or Regulation SCI and Capacity, Integrity, and Security Rule, Communication Protocol Systems would not have an incentive to restrict trading volume in certain securities to avoid reaching the volume threshold associated with these rules. This could cause less order flow to be absorbed and redistributed amongst other trading venues, which could result in lower trading costs compared to the proposal, especially if a Communication Protocol System that is the sole provider of a niche service is less likely to limit the trading in certain securities.[1230]

8. Require Forms ATS–N, ATS, and ATS–R To Be Submitted in Inline XBRL

The proposal would require Government Securities ATSs to file Form ATS–N, which is submitted in ATS–N-specific XML. In addition, the proposal would require confidential Forms ATS and ATS–R, which are currently submitted as paper documents, to be submitted to the Commission electronically via EDGAR in unstructured HTML or ASCII.[1231] As an alternative, the Commission might require Form ATS–N, as well as Forms ATS and ATS–R, to be submitted in the Inline eXtensible Business Reporting Language (''Inline XBRL'') data language. Inline XBRL is a derivation of XML that is designed for business reporting information and is both machine-readable and human-readable.[1232] This alternative might

[1224] As discussed above, Communication Protocol Systems function similarly to exchanges as market places and that including them within the definition of ''exchange'', rather than only subjecting them to the requirements of broker-dealers, would appropriately regulate a market place that brings together buyers and sellers of securities. *See supra* Section II.

[1225] The Commission assumes that, under the proposed amendments, Communication Protocol Systems would choose to register as broker-dealers and comply with Regulation ATS, rather than register as national securities exchanges. *See supra* note 1056 and accompanying text.

[1226] *See supra* Section VIII.C.1.a.

[1227] *See supra* Section VIII.C.1.b. Under this alternative, significant Communication Protocol Systems in the NMS stock market would also not be required to display their best quotes in the SIP, because they would not be subject to the order display and execution access requirements of Rule 301(b)(3) of Regulation ATS.

[1228] *See supra* Section VIII.C.1.c.

[1229] *See supra* Section VIII.C.2.

[1230] *See supra* Section VIII.C.2.b.

[1231] *See supra* Section V.B. The EDGAR system generally requires filers to use ASCII or HTML for their document submissions, subject to certain exceptions. *See* Regulation S–T, 17 CFR 232.101(a)(1)(iv); 17 CFR 232.301; EDGAR Filer Manual (Volume II) version 60 (December 2021), at 5–1.

[1232] Such a requirement would be implemented by revising Regulation S–T (17 CFR part 232) and including an Instruction to Forms ATS–N, ATS, and ATS–R which cites to Regulation S–T. In conjunction with the EDGAR Filer Manual,

include numerical detail tagging of quantitative disclosures (*e.g.,* platform-wide statistics) and text block tagging for narrative disclosures (*e.g.,* trade reporting arrangements).[1233] Compared to the proposal, the Inline XBRL alternative for Forms ATS–N, ATS, and ATS–R would provide more sophisticated validation, presentation, and reference features for filers and data users. However, the Inline XBRL alternative would also impose initial implementation costs (*e.g.,* training staff to prepare filings in Inline XBRL, licensing Inline XBRL filing preparation software) upon filers that do not have prior experience structuring data in the Inline XBRL data language. By contrast, because Form ATS–N may be filed using a fillable web form, filers that lack experience structuring data in EDGAR Form-specific XML would not incur technical implementation costs related to filing Form ATS–N under the proposal.

9. Require the Content of Form ATS–N To Be Posted on Individual ATS Websites

Under the proposal, Form ATS–N would be filed on the EDGAR system. Alternatively, the Commission might require the content of Form ATS–N to be posted on the individual ATSs' websites. Requiring the content of Form ATS–N to be posted on the individual ATSs' websites rather than EDGAR would impose additional direct costs on data users, who would need to navigate to and manually retrieve data from different ATSs' websites to aggregate, compare, and analyze the data. In addition, individual websites would not provide the validation capabilities that an EDGAR requirement would enable, and would thus, impose on data users the indirect costs associated with lower reliability of the data. An individual website requirement would provide a small benefit to bank-operated Government Securities ATSs relative to the proposal's EDGAR requirement, as those entities would not be required to incur the $50 compliance cost of submitting a Form ID to begin making EDGAR filings.[1234]

Regulation S–T governs the electronic submission of documents filed with the Commission. Modifying a structured data language requirement for a Commission filing or series of filings can generally be accomplished through changes to Regulation S–T, and would not require dispersed changes to the various rules and forms that would be impacted by the data language modification.

[1233] *See supra* Sections IV.D.4.y and IV.D.4.t.

[1234] *See supra* Section VIII.C.2.a.i. The Commission estimates that one Currently Exempted Government Securities ATS is operated by a bank. *See supra* Section VII.C.1.

E. Request for Comments

The Commission is sensitive to the potential economic effects, including costs and benefits, of the proposed Rule. The Commission has identified certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis, including with respect to the specific questions below. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.

177. Do you agree with the Commission's characterization of the relevant baseline against which it considered the effects of the proposed amendments?

178. Do you agree with the Commission's characterization of Communication Protocol Systems? Please provide any relevant details that you believe are missing from the Commission's description.

179. Do you agree with the Commission's characterization of the current state of the government securities market?

180. Do you agree that PTFs provide liquidity to Government Securities ATSs?

181. Do you agree that trading in the Treasury securities market is concentrated in a few large ATSs? Please provide data to support your position.

182. The Commission invites comment on the role of PTFs in trading Agency Securities. The Commission also requests comment on the providers of liquidity in the market for Agency Securities.

183. Do you agree with the Commission's characterization of the regulatory environment for Government Securities ATSs? Please provide any details you feel are relevant to understanding the impact of the variation in regulation across different ATSs in this market. Also, do you agree that the differences in regulation across different entities providing trading services in this market has placed some of them at a competitive disadvantage?

184. Please provide any additional details you feel are relevant to the role of Communication Protocol Systems in the government securities market.

185. Do you agree with the Commission's characterization of the role played by the RFQ indicative quote streams? Please provide any details you feel are important to understanding their role in the market.

186. Do you agree with the Commission's characterization of the competition baseline for government securities trading services?

187. Do you agree with the Commission's characterization of the state of the corporate debt market? Please provide any additional details you believe are relevant to understanding this market.

188. Do you agree with the Commission's description of the implications of the difference in regulation for Communication Protocol Systems compared to ATSs in the corporate debt market?

189. Do you agree with the Commission's description of the competition baseline for providing trading services in the corporate debt market? Do you agree with the Commission's characterization of the role of the existing regulatory regime in creating the current competitive environment?

190. Do you agree with the Commission's description of the municipal debt market?

191. Do you agree with the Commission's description of broker's brokers and their role in the municipal bond market? Please provide any details you feel are necessary to fully understanding this point.

192. The Commission requests any information pertaining to the role of Communication Protocol Systems in the market for municipal debt generally.

193. Do you agree with the Commission's description of the equity market? In particular, please provide any additional details you feel are relevant to understanding the role of Communication Protocol Systems in this market.

194. The Commission requests comment on the extent to which Communication Protocol Systems are used in the non-ATS OTC market for NMS stocks.

195. The Commission lacks the data to estimate the number or trading volume of IDQS or other OTC equity trading systems that operate Communication Protocol Systems and are not registered as ATSs or with FINRA, and requests comment on this topic.

196. Do you agree with the Commission's description of the options market?

197. The Commission requests comment on the full role of Communication Protocol Systems in the market for listed options.

198. Do you agree with the Commission's description of the market for repurchase and reverse repurchase agreements?

199. The Commission requests comment on the full role of Communication Protocol Systems in the

market for repurchase and reverse repurchase agreements.

200. Do you agree with the Commission's description of the market for asset-backed securities?

201. The Commission requests comment on the full role of Communication Protocol Systems in the asset-backed securities market.

202. The Commission requests comment on whether Communication Protocol Systems play a role in the trading of to-be-announced mortgage-backed securities.

203. The Commission requests comment on whether Communication Protocol Systems play a role in asset classes besides those discussed in Section VIII.B, and on what role they play in those asset classes.

204. Do you agree that the proposed amendments would enhance regulatory oversight and investor protection? Do you agree that requiring Communication Protocol Systems to register as broker-dealers would help lead to these benefits? Do you believe that the proposed amendments would lead to improvements in the safeguarding of confidential information?

205. Do you agree that the proposed amendments would reduce trading costs and improve execution quality for market participants? Do you agree that Regulation SCI would improve the resiliency of the systems that provide trading services in the government securities markets? Do you agree that Rule 301(b)(6) would improve the resiliency of systems in the applicable securities markets?

206. Do you agree with the Commission's assessment of the costs of the proposed amendments? If not, please provide as many quantitative estimates to support your position on costs as possible.

207. The Commission requests that commenters provide any insights or data they may have on the costs associated with the proposed broker-dealer requirements for Communication Protocol Systems that are operated by non-broker-dealers?

208. Are the initial implementation cost estimates for new and existing SCI entities and the ongoing implementation cost estimates for all SCI entities under Regulation SCI largely applicable to Government Securities ATSs? How would these costs vary between Current Government Securities ATSs and Communication Protocol Systems that trade government securities? Please explain.

209. Would Government Securities ATSs also incur direct compliance costs (non-PRA based) as SCI entities? The Regulation SCI Adopting Release in 2014 estimated that an SCI entity would incur an initial cost of between approximately $320,000 and $2.4 million. Additionally, an SCI entity would incur an ongoing annual cost of between approximately $213,600 and $1.6 million. Are these estimated costs applicable to Government Securities ATSs? How might the actual level of costs Government Securities ATSs would incur differ from the estimates in the Regulation SCI Adopting Release because they differ from existing SCI entities? How might other factors, such as the complexity of SCI entities' systems and the degree to which SCI entities employ third-party systems, affect the estimated costs? How would these costs vary between Current Government Securities ATSs and Communication Protocol Systems that trade government securities? Please explain and provide cost estimates or a range for cost estimates, if possible.

210. Do you agree with the Commission's assessment of the indirect costs of applying the Fair Access rule?

211. Do you agree that ATSs could break themselves up to stay below the volume threshold for Regulation SCI? Please explain.

212. Do you agree with the Commission's assessment of the impact of the proposed amendments on efficiency, competition and capital formation? Do you agree that the proposed amendments would allow for competition among trading systems on a more equal basis? Do you agree with the Commission's assessment as to the risks of increasing barriers to entry and causing current trading systems to exit the market?

213. To what extent would the proposed amendments to Exchange Act Rule 3b–16 and Regulation ATS increase the barriers to entry for new trading venues or cause some existing trading venues to exit the market? How would these effects vary based on the size and/or type of trading venue and the securities market in which it operates? Please explain in detail.

214. How would the proposed amendments affect innovation? Please explain. If so, which provisions of the proposed amendments would affect innovation the most and how? Please explain.

215. Do you agree with the Commission's assessment of the effects of an alternative to require Currently Exempted Government Securities ATSs and certain Communication Protocol Systems to file a non-public Form ATS?

216. Do you agree with the Commission's assessment of the effects of an alternative to initiate differing levels of public disclosure depending on Government Securities ATS (inclusive of a Communication Protocol System, as proposed) or other Communication Protocol System dollar volume?

217. Do you agree with the Commission's assessment of the effects of an alternative to extend the transparency requirements of Regulation ATS to all ATSs and Communication Protocol Systems?

218. Do you agree with the Commission's assessment of the effects of an alternative to apply Rule 301(b)(6) of Regulation ATS to Government Securities ATSs?

219. Do you agree with the Commission's assessment of the effects of an alternative to alter the volume thresholds for the Fair Access Rule?

220. Do you agree with the Commission's assessment of the effects of an alternative to alter the Government Securities ATS volume thresholds for Regulation SCI?

221. Do you agree with the Commission's assessment of the effects of an alternative to require Communication Protocol Systems to register as broker-dealers but exempt them from the requirements of Rule 3b–16, Regulation ATS, and Regulation SCI?

222. Do you agree with the Commission's assessment of the effects of an alternative to require Forms ATS–N, ATS, and ATS–R to be submitted in Inline XBRL?

223. Do you agree with the Commission's assessment of the effects of an alternative to require the content of Form ATS–N to be posted on individual ATS websites?

224. How would the economic effects of the proposal differ if Forms ATS–N, ATS, and ATS–R were proposed to be submitted using the Commission's Electronic Form Filing System/SRO Rule Tracking System (''EFFS/SRTS'')?

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[1235] the Commission requests comment on the potential effect of the proposed amendments on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[1235] 5 U.S.C. 603.

X. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 [1236] (''RFA'') requires the Commission to undertake an initial regulatory flexibility analysis of the impact of the proposed rule amendments on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[1237] For purposes of Commission rulemaking in connection with the RFA,[1238] a small entity includes a broker or dealer that: (1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[1239] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1240]

All Government Securities ATSs would be required to register as broker-dealers, including those that are currently exempt from such requirement.[1241] In addition, all Communications Protocol Systems that choose to comply with Regulation ATS in lieu of exchange registration will be required to register as broker-dealers.[1242] The Commission examined recent FOCUS data for the 17 broker-dealers that currently operate Legacy Government Securities ATSs and concluded that 1 of the broker-dealer operators of these ATSs had total capital of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter). The Commission notes that this broker-dealer operator has never reported any transaction volume in any government security or repo to the Commission on Form ATS–R. Given that this ATS has never reported any transaction volume in government securities to the Commission, the Commission believes that this ATSs is unlikely to submit a Form ATS–N if the proposed amendments to Regulation ATS are adopted.[1243] The Commission has recently examined recent FOCUS data for 4 broker-dealers that the Commission estimates are Currently Exempted Government Securities ATSs and concluded that none of the broker-dealer operators of ATSs that currently trade government securities had total capital of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter). The Commission has also recently examined recent FOCUS data for 7 systems that the Commission estimates are Communication Protocol Systems operated by broker-dealers or affiliates of broker-dealers and trade various securities asset classes including, among others, government securities. The Commission concluded that none of these broker-dealer operators of ATSs had total capital of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter). Consequently, the Commission certifies that the proposed amendments to Regulation ATS would not, if adopted, have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed amendments could have impacts on small entities that have not been considered. The Commission requests that commenters describe the nature of any impacts on small entities and provide empirical data to support the extent of such effect. Such comments will be placed in the same public file as comments on the proposed amendments to Regulation ATS. Persons wishing to submit written comments should refer to the instructions for submitting comments in the front of this release.

XI. Statutory Authority and Text of Proposed Amendments

Pursuant to Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly Sections 3(b), 5, 6, 11A, 15, 15C, 17(a), 17(b), 19, 23(a), and 36 thereof (15 U.S.C. 78c(b), 78e, 78f, 78*o,* 78*o*–5, 78q(a), 78q(b), 78s, 78w(a), and 78mm), the Commission proposes amendments to Form ATS–N under the Exchange Act, Regulation ATS under the Exchange Act, and 17 CFR parts 232, 240, 242, and 249.

List of Subjects in 17 CFR Parts 232, 240, 242, and 249

Administrative practices and procedure, Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

For the reasons stated in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 232.101 by:
■ a. Removing the periods at the end of paragraphs (a)(1)(xiii) and (xiv) and adding semicolons in their places;
■ b. Removing the word ''and'' at the end of paragraphs (a)(1)(xviii) and (xix);
■ c. Removing the periods at the end of paragraphs (a)(1)(xx) and (xxi) and adding semicolons in their places; and
■ d. Adding paragraphs (a)(1)(xxii) and (xxiii).

The additions read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xxii) Form ATS (§ 249.637 of this chapter); and

(xxiii) Form ATS–R (§ 249.638 of this chapter).

* * * * *

[1236] 5 U.S.C. 603(a).

[1237] 5 U.S.C. 605(b).

[1238] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10 under the Exchange Act, 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

[1239] 17 CFR 240.17a–5(d).

[1240] *See* 17 CFR 240.0–10(c). *See also* 17 CFR 240.0–10(i) (providing that a broker or dealer is affiliated with another person if: Such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis).

[1241] *See supra* Section III.B.2. *See also* 17 CFR 242.301(b)(1).

[1242] *See supra* Section II.D.2.

[1243] In order to be as inclusive as is reasonable, the Commission is nevertheless counting this ATS for purposes of projecting expected costs under the PRA.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1934

■ 3. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 4. Amend § 240.3b–16 by:
■ a. Revising paragraphs (a)(1) and (2) and (b)(1) and (2);
■ b. Adding paragraph (b)(3);
■ c. Redesignating paragraph (e) as paragraph (f); and
■ d. Adding new paragraph (e).

The revisions and additions read as follows:

§ 240.3b–16 Definitions of terms used in Section 3(a)(1) of the Act.

(a) * * *

(1) Brings together buyers and sellers of securities using trading interest; and

(2) Makes available established, non-discretionary methods (whether by providing a trading facility or communication protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade.

(b) * * *

(1) Routes trading interest to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution;

(2) Allows persons to enter trading interest for execution against the bids and offers of a single dealer; and

(i) As an incidental part of these activities, matches trading interest that is not displayed to any person other than the dealer and its employees; or

(ii) In the course of acting as a market maker registered with a self-regulatory organization, displays the limit orders of such market maker's, or other broker-dealer's, customers; and

(A) Matches customer orders with such displayed limit orders; and

(B) As an incidental part of its market making activities, crosses or matches orders that are not displayed to any person other than the market maker and its employees; or

(3) Allows an issuer to sell its securities to investors.

* * * * *

(e) For purposes of this section, the term *trading interest* means an order as the term is defined under paragraph (c) of this section or any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price.

* * * * *

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 5. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78*o*(b), 78*o*(c), 78*o*(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 6. Amend § 242.300 by:
■ a. In paragraph (b), removing ''orders'' and adding in its place ''trading interest'';
■ b. Revising paragraph (c);
■ c. Adding a sentence at the end of paragraph (k); and
■ d. Adding paragraphs (l) through (s).

The revision and additions read as follows:

§ 242.300 Definitions.

* * * * *

(c) *Affiliate* means, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person.

* * * * *

(k) * * * An NMS Stock ATS shall not trade securities other than NMS stocks.

(l) *Government Securities ATS* means an alternative trading system, as defined in paragraph (a) of this section, that trades government securities, as defined in section 3(a)(42) of the Act (15 U.S.C. 78c(a)(42)) or repurchase and reverse repurchase agreements on government securities. A Government Securities ATS shall not trade securities other than government securities or repurchase and reverse repurchase agreements on government securities.

(m) *Covered ATS* means an NMS Stock ATS or Government Securities ATS, as applicable.

(n) *Legacy Government Securities ATS* means a Government Securities ATS operating as of [effective date of the final rule] that was either:

(1) Formerly not required to comply with this section and §§ 242.301 through 242.304 (Regulation ATS) pursuant to the exemption under § 240.3a1–1(a)(3) of this chapter prior to [effective date of the final rule]; or

(2) Operating pursuant to an initial operation report on Form ATS on file with the Commission as of [effective date of the final rule].

(o) *U.S. Treasury Security* means a security issued by the U.S. Department of the Treasury.

(p) *Agency Security* means a debt security issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8).

(q) *Trading Interest* means an order, as defined in paragraph (e) of this section, or any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price.

(r) *Newly Designated ATS* means an alternative trading system operating as of [effective date of the final rule] that meets the criteria under § 240.3b–16(a) of this chapter as of [effective date of the final rule] but did not meet the criteria under § 240.3b–16(a) of this chapter in effect prior to [effective date of the final rule].

(s) *Covered Newly Designated ATS* means a Newly Designated ATS that is a Government Securities ATS or NMS Stock ATS.

■ 7. Amend § 242.301 by:
■ a. Removing and reserving paragraphs (a)(4)(ii)(A) through (C);
■ b. Revising paragraphs (b)(1) and (b)(2)(i);
■ c. In paragraph (b)(2)(vi), adding the words ''and information filed pursuant to paragraph (b)(9) of this section'' after the words ''pursuant to this paragraph (b)(2)'';
■ d. Revising paragraphs (b)(2)(vii) and (viii) and (b)(5)(i) introducotry text;
■ e. In paragraph (b)(5)(i)(A), adding the word ''share'' after the phrase ''average daily'';
■ f. In paragraph (b)(5)(i)(B), adding the word ''share'' after the phrase ''average daily trading'';
■ g. In paragraphs (b)(5)(i)(C):
■ i. Adding the word ''dollar'' after the phrase ''average daily'';
■ ii. Adding the phrase ''as provided by the self-regulatory organization to which such transactions are reported'' after the phrase ''in the United States''; and
■ iii. Removing the word ''or'' at the end of the paragraph;
■ h. In paragraph (b)(5)(i)(D):
■ i. Adding the word ''dollar'' after the phrase ''average daily'';
■ ii. Adding the phrase ''as provided by self-regulatory organizations to which such transactions are reported'' after the phrase ''in the United States''; and
■ iii. Removing the period and adding a semicolon in its place;
■ i. Adding paragraphs (b)(5)(i)(E), (F), and (G);

■ j. Removing paragraph (b)(5)(iii);
■ k. Redesignating paragraph (b)(5)(ii) as paragraph (b)(5)(iii) and revising the newly redesiganted paragraph;
■ l. Adding new paragraph (b)(5)(ii);
■ m. In paragraphs (b)(6)(i)(A) and (B), adding the word ''dollar'' after the phrase ''average daily'';
■ n. Removing paragraph (b)(6)(iii);
■ o. In paragraph (b)(9)(i):
■ i. Removing the words ''Separately file'' and adding ''File'' in their place; and
■ ii. Removing the phrase ''for transactions in NMS stocks, as defined in paragraph (g) of this section, and transactions in securities other than NMS stocks''; and
■ p. In paragraph (b)(9)(ii):
■ i. Removing the words ''Separately file'' and adding ''File'' in their palce; and
■ ii. Removing the phrase ''for transactions in NMS stocks and transactions in securities other than NMS stocks''.

The revisions and additions read as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * *

(1) *Broker-dealer registration.* The alternative trading system shall register as a broker-dealer under section 15 of the Act (15 U.S.C. 78o) or section 15C(a)(1)(A) of the Act (15 U.S.C. 78o–5(a)(1)(A)). Notwithstanding the preceding sentence, provided that it complies with the applicable conditions in § 240.3a1–1(a)(2) of ths chapater, an alternative trading system that is not registered as a broker-dealer and is either:

(i) A Legacy Government Securities ATS that was formerly not required to comply with §§ 242.300 through 242.304 (Regulation ATS) pursuant to the exemption under § 240.3a1–1(a)(3) of this chapter prior to [effective date of the final rule]; or

(ii) A Newly Designated ATS, may provisionally operate pursuant to the exemption under § 240.3a1–1(a)(2) of this chapter, until the earlier of:

(A) The date the alternative trading system registers as a broker-dealer under section 15 of the Act or section 15C(a)(1)(A) of the Act and becomes a member of a national securities association; or

(B) [date 210 calendar days after the effective date of the final rule].

(2) * * *

(i) The alternative trading system (other than a Covered ATS) shall file an initial operation report on Form ATS, § 249.637 of this chapter, in accordance with the instructions therein, at least 20 days prior to commencing operation as an alternative trading system. Notwithstanding the preceding sentence, a Newly Designated ATS (other than a Covered Newly Designated ATS) shall file an initial operation report on Form ATS, in accordance with the instructions therein, no later than [date 30 calendar days after the effective date of the final rule].

* * * * *

(vii) An ATS must file a Form ATS or Form ATS–R in accordance with the instructions therein. The reports provided for in paragraphs (b)(2) and (9) of this section shall be filed on Form ATS or Form ATS–R, as applicable, and include all information as prescribed in Form ATS or Form ATS–R, as applicable, and the instructions thereto. Any such document shall be executed at, or prior to, the time Form ATS or Form ATS–R is filed and shall be retained by the ATS in accordance with § 242.303 and § 232.302 of this chapter, and the instructions in Form ATS or Form ATS–R, as applicable. Duplicates of the reports provided for in paragraphs (b)(2)(i) through (v) of this section must be filed with surveillance personnel designated as such by any self-regulatory organization that is the designated examining authority for the alternative trading system pursuant to § 240.17d–1 of this chapter simultaneously with filing with the Commission. Duplicates of the reports required by paragraph (b)(9) of this section shall be provided to surveillance personnel of such self-regulatory authority upon request. All reports filed pursuant to this paragraph (b)(2) and paragraph (b)(9) of this section (except for types of securities traded provided on Form ATS and Form ATS–R) will be accorded confidential treatment subject to applicable law.

(viii) A Legacy Government Securities ATS operating pursuant to an initial operation report on Form ATS on file with the Commission as of [effective date of the final rule] shall be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section until that ATS files an initial Form ATS–N with the Commission pursuant to § 242.304(a)(1)(iv)(A). Thereafter, the Legacy Government Securities ATS shall file reports pursuant to § 242.304 and shall not be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section. A Legacy Government Securities ATS that was formerly not required to comply with Regulation ATS pursuant to the exemption under § 240.3a1–1(a)(3) of this chapter prior to [effective date of the final rule], or a Covered Newly Designated ATS, shall file reports pursuant to § 242.304 and shall not be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section. As of [effective date of the final rule], an entity seeking to operate as a Government Securities ATS shall not be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section and shall file reports pursuant to § 242.304. An NMS Stock ATS or entity seeking to operate as an NMS Stock ATS shall not be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section and shall file reports pursuant to § 242.304. An ATS that is not a Covered ATS shall be subject to paragraph (b)(2) of this section. Each Covered ATS that is operated by a broker-dealer that is the registered broker-dealer for more than one ATS must comply with Regulation ATS, including the filing requirements of § 242.304.

* * * * *

(5) *Fair access.* (i) An alternative trading system shall comply with the requirements in paragraph (b)(5)(iii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

* * * * *

(E) With respect to U.S. Treasury Securities, 3 percent or more of the average weekly dollar volume traded in the United States as provided by the self-regulatory organization to which such transactions are reported; or

(F) With respect to Agency Securities, 5 percent or more of the average daily dollar volume traded in the United States as provided by the self-regulatory organization to which such transactions are reported.

(G) Provided, however, that a Newly Designated ATS or Legacy Government Securities ATS shall not be required to comply with the requirements in paragraph (b)(5)(iii) of this section until one month after initially satisfying any of the paragraphs (b)(5)(i)(A) through (F) of this section.

(ii) For purposes of calculating the volume thresholds of paragraph (b)(5)(i) of this section, the average transaction volume for a security or security category of alternative trading systems that are operated by a common broker-dealer, or alternative trading systems operated by affiliated broker-dealers, will be aggregated.

(iii) An alternative trading system shall:

(A) Establish and apply reasonable written standards for granting, limiting, and denying access to the services of the

alternative trading system that, at a minimum:

(*1*) Provide the date that each standard is adopted, effective, and modified;

(*2*) Set forth any objective and quantitative criteria upon which each standard is based;

(*3*) Identify any differences in access to the services of the alternative trading system by an applicant and current participants;

(*4*) Justify why each standard, including any differences in access to the services of the alternative trading system, is fair and not unreasonably discriminatory; and

(*5*) Provide the information required by paragraphs (b)(5)(iii)(A)(*1*) through (*4*) of this section about any standards for granting, limiting, or denying access to the alternative trading system services that are performed by a person other than the broker-dealer operator.

(B) Make and keep records of:

(*1*) All grants of access including, for all participants, the reasons for granting such access under the standards provided in paragraph (b)(5)(iii)(A) of this section; and

(*2*) All denials or limitations of access and reasons, for each applicant and participant, for denying or limiting access to the services of the alternative trading system under the standards provided in paragraph (b)(5)(iii)(A) of this section; and

(C) Report the information required on Form ATS–R (§ 249.638 of this chapter) regarding grants, denials, and limitations of access.

* * * * *

§ 242.302 Recordkeeping requirements for alternative trading systems.

■ 8. Amend § 242.302 by:
■ a. In the introductory text to paragraph (c), removing ''order'' and adding in its place ''trading interest'';
■ b. In paragraphs (c)(1), (3), (5), and (8) through (15), removing ''order'' wherever it appears and adding in its place ''trading interest''; and
■ c. In paragraph (c)(5), removing ''a'' before the phrase ''buy or sell''.

§ 242.303 Record preservation requirements for alternative trading systems.

■ 9. Amend § 242.303 by:
■ a. In paragraph (a)(1)(iii), adding '', including each version,'' after the phrase ''at least one copy'' and adding ''written'' before the word ''standards'';
■ b. In paragraph (a)(1)(iv), adding '', including each version,'' after the phrase ''At least one copy''; and
■ c. In paragraph (a)(1)(v), adding '', including each version,'' after the phrase ''At least one copy''.

■ 10. Amend § 242.304 by:
■ a. Revising the section heading;
■ b. In the introductory text to paragraph (a), removing ''an NMS Stock ATS'' and adding in its place ''a Covered ATS'';
■ c. In paragraphs (a)(1)(i) through (iii):
■ i. Removing ''an NMS Stock ATS'' wherever it appears and adding in its place ''a Covered ATS''; and
■ ii. Removing ''NMS Stock ATS'' wherever it appears and adding in its place ''Covered ATS'';
■ d. In paragraph (a)(1)(i), adding a sentence at the end of the paragraph;
■ e. In paragraph (a)(1)(ii)(A)(*1*), removing the phrase ''the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review'' and adding in its place ''the Commission determines that a longer period is appropriate'';
■ f. In paragraph (a)(1)(ii)(B), removing the phrase ''paragraphs (a)(2)(i)(B) and (C)'' and adding in its place ''paragraphs (a)(2)(i)(B), (C), and (E)'';
■ g. In paragraph (a)(1)(iv):
■ i. Revising the paragraph heading; and
■ ii. Removing ''Legacy NMS Stock ATS'' wherever it appears and adding in its place ''Legacy Government Securities ATS or Covered Newly Designated ATS'';
■ h. Revising paragraph (a)(1)(iv)(A) introductory text;
■ i. In the introductory text to paragraph (a)(1)(iv)(B), removing ''120'' and adding in its place ''180'';
■ j. In paragraph (a)(1)(iv)(B)(*1*), removing ''the initial Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review'' and ''initial 120-calendar day'' and adding in their places ''the Commission determines that a longer period is appropriate'' and ''initial 180-calendar day'', respectively;
■ k. In the introductory text to paragraph (a)(2)(i), removing ''An NMS Stock ATS'' and adding ''A Covered ATS'' in its place;
■ l. In paragraph (a)(2)(i)(A), removing ''except as provided by paragraph (a)(2)(i)(D) of this section,'' and ''NMS Stock ATS'' and adding in their places ''or the length of any extended review period pursuant to paragraph (a)(2)(ii)(A) of this section,'' and ''Covered ATS'', respectively;
■ m. In paragraph (a)(2)(i)(B), removing ''or (D)'' and adding ''(D), or (E)'' in its place;
■ n. In paragraph (a)(2)(i)(C), removing ''or'' at the end of the paragraph;
■ o. In paragraph (a)(2)(i)(D):
■ i. Removing ''Items 24 and 25'' and ''Order Display and Fair Access Amendment'' and adding in their places ''Items 23 and 24'' and ''Contingent Amendment'', respectively; and
■ ii. Removing the period at the end of the paragraph and adding ''; or'' in its place;
■ p. Adding paragraph (a)(2)(i)(E);
■ q. Revising paragraph (a)(2)(ii);
■ r. In paragraphs (a)(3) and (4), (b), and (c):
■ i. Removing ''An NMS Stock ATS'' and ''an NMS Stock ATS'' and adding in their places ''A Covered ATS'' and ''a Covered ATS'', respectively; and
■ ii. Removing ''NMS Stock ATS'' wherever it appears and adding in its place ''Covered ATS'';
■ s. In paragraph (b)(2)(iii)(A):
■ i. Removing the colon at the end of the paragrpah heading and adding a period in its place; and
■ ii. Adding '', or any extended review period,'' after ''the expiration of the review period''; and
■ t. In paragraph (b)(2)(iii)(B):
■ i. Revising the heading; and
■ ii. In the first sentence, removing ''Updating, Correcting, and Order Display and Fair Access Amendments'' and adding ''Updating, Correcting, Fee, and Contingent Amendments'' in it place.

The revisions and addition read as follows:

§ 242.304 Covered ATSs.

(a) * * *

(1) * * *

(i) * * * Notwithstanding the preceding sentence, a Legacy Government Securities ATS that was formerly not required to comply with §§ 242.300 through 242.304 (Regulation ATS) pursuant to the exemption under § 240.3a1–1(a)(3) of this chapter prior to [effective date of the final rule] or Covered Newly Designated ATS, may continue to operate pursuant to the exemption under § 240.3a1–1(a)(2) of this chapter until its initial Form ATS–N becomes effective.

* * * * *

(iv) *Transition for Legacy Government Securities ATSs and Covered Newly Designated ATSs*—(A) *Initial Form ATS–N filing requirements.* A Legacy Government Securities ATS or a Covered Newly Designated ATS shall file with the Commission an initial Form ATS–N, in accordance with the conditions of this section, no later than [date 90 calendar days after the effective date of the final rule]. An initial Form ATS–N filed by a Legacy Government Securities ATS operating pursuant to an initial operation report on Form ATS on file with the Commission as of [effective date of the final rule] shall supersede and replace for purposes of the exemption the previously filed Form ATS of the Legacy Government Securities ATS. A Legacy Government

Securities ATS or Covered Newly Designated ATS may operate, on a provisional basis, pursuant to the filed initial Form ATS–N, and any amendments thereto, during the review of the initial Form ATS–N by the Commission. An initial Form ATS–N filed by a Legacy Government Securities ATS or Covered Newly Designated ATS, as amended, will become effective, unless declared ineffective, upon the earlier of:

* * * * *

(2) * * *

(i) * * *

(E) No later than the date that the information required to be disclosed in Part III, Item 18 on Form ATS–N has become inaccurate or incomplete (''Fee Amendment'').

(ii) *Commission review period; ineffectiveness determination.* (A) The Commission will, by order, declare ineffective any Form ATS–N amendment filed pursuant to paragraphs (a)(2)(i)(A) through (E) of this section, no later than 30 calendar days from filing with the Commission, or, if applicable, the end of the extended review period, if the Commission finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission may extend the amendment review period for:

(*1*) An additional 30 calendar days, if the Commission determines that a longer period is appropriate; or

(*2*) Any extended review period to which a duly authorized representative of the Covered ATS agrees in writing.

(B) A Form ATS–N amendment declared ineffective shall prohibit the Covered ATS from operating pursuant to the ineffective Form ATS–N amendment. A Form ATS–N amendment declared ineffective does not prevent the Covered ATS from subsequently filing a new Form ATS–N amendment.

(C) During review by the Commission of a Material Amendment, the Covered ATS shall amend the Material Amendment pursuant to the requirements of paragraphs (a)(2)(i)(B) through (C) of this section. To make material changes to a filed Material Amendment during the Commission review period, an ATS shall withdraw its filed Material Amendment and must file the new Material Amendment pursuant to (a)(2)(i)(A) of this section.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(B) *Updating, Correcting, Fee, and Contingent Amendments.* * * *

* * * * *

■ 11. Amend § 242.1000 by:

■ a. Adding, in alphabetical order, a definition for ''Agency Securities'';

■ b. In the definition of ''SCI alternative trading system or SCI ATS'':

■ i. Removing the word ''or'' at the end of paragraph (1)(ii);

■ ii. Redesignating paragraph (3) as paragraph (5);

■ iii. Adding a new paragraph (3) and paragraph (4); and

■ iv. In newly redesignated paragraph (5), removing ''paragraphs (1) or (2)'' and adding in its place ''paragraph (1), (2), (3), or (4)''; and

■ c. Adding, in alphabetical order, a definition for ''U.S. Treasury Securities''.

The additions read as follows:

§ 242.1000 Definitions.

* * * * *

Agency Security has the meaning set forth in § 242.300(p).

* * * * *

SCI alternative trading system or *SCI ATS* * * *

(3) Had with respect to U.S. Treasury Securities, five percent (5%) or more of the average weekly dollar volume traded in the United States as provided by the self-regulatory organization to which such transactions are reported; or

(4) Had with respect to Agency Securities, five percent (5%) or more of the average daily dollar volume traded in the United States as provided by the self-regulatory organization to which such transactions are reported.

* * * * *

U.S. Treasury Security has the meaning set forth in § 242.300(o).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 12. The general authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309 (2012), Sec. 107 Pub. L. 112–106, 126 Stat. 313 (2012), Sec. 72001 Pub. L. 114–94, 129 Stat. 1312 (2015), and secs. 2 and 3 Pub. L. 116–222, 134 Stat. 1063 (2020), unless otherwise noted.

* * * * *

■ 13. Amend Form ATS (referenced in § 249.637) by:

■ a. In the General Instructions, Item A.2, after ''commencing operation'' adding ''and a Newly Designated ATS (other than a Covered Newly Designated ATS, as defined in Rule 300(s) of the Exchange Act (17 CFR 242.300(s))) must file an initial operation report on Form ATS no later than [date 30 calendar days after the date of effective date of the final rule].''.

■ b. In the General Instructions, revising Items A.3 through A.6.

■ c. In the General Instructions, revising the fifth and seventh paragraphs of Item A.7.

■ d. In the General Instructions, adding new paragraph A.8.

■ e. In the Explanation of Terms, in the definition of ''Subscriber'', removing the word ''order'' and adding ''trading interest'' in its place.

■ f. In the Explanation of Terms, adding the definition of ''Trading Interest'' and ''Newly Designated ATS'' in alphabetical order.

■ g. At the top of page 1 of the form, removing ''INITIAL OPERATION REPORT'', ''AMENDMENT TO INITIAL OPERATION REPORT'', ''CESSATION OF OPERATIONS REPORT'' and accompanying check boxes and adding text under a new heading ''Type of Filing (select one)''.

■ h. At the top and side of page 1 to the Form removing:

■ i. ''Form ATS Page 1 Execution Page'';

■ ii. ''Date filed (MM/DD/YY)''; and

■ ii. ''[OFFICIAL USE ONLY]''.

■ i. Revising Items 2 through 5.

■ j. Removing Items 6 through 11.

■ k. Removing the text on page 1 of the form beginning ''EXECUTION'', the signature block below, the instruction that states ''This page must always be completed in full with original, manual signature and notarization. Affix notary stamp or seal where applicable.'' and ''DO NOT WRITE BELOW THIS LINE—FOR OFFICIAL USE ONLY''.

■ l. On page 2 of the form, removing the following text:

Alternative trading system name: _____
Filing date: _____
CRD Number: _____
SEC File Number: 8– _____

■ m. At the top and side of page 2 to the Form removing:

■ i. ''Form ATS Page 2 Execution Page'';

■ ii. ''Date filed (MM/DD/YY)''; and

■ iii. ''[OFFICIAL USE ONLY]''.

The revisions and additions read as follows:

Note: The text of Form ATS does not and this amendment will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

FORM ATS

* * * * *

A. **GENERAL INSTRUCTIONS**

* * * * *

3. **CONTACT EMPLOYEE** - The individual listed as the contact employee must be authorized to receive all contact information, communications and mailings and be responsible for disseminating that information within the alternative trading system's organization.

4. **EDGAR FILING** - Any report required to be submitted pursuant to Rule 301 of Regulation ATS shall be prepared, formatted, and submitted in accordance with Regulation S-T and the EDGAR Filer Manual.

5. **EDGAR ACCEPTANCE** - A filing that is defective may be rejected and not be accepted by the EDGAR system. Any filing so rejected shall be deemed not to have been filed. *See generally* Regulation S-T (17 CFR part 232).

6. **RECORDKEEPING** - A copy of this Form ATS must be retained by the ATS in accordance with the EDGAR Filer Manual and Rule 303 of Regulation ATS and must be made available for inspection upon a regulatory request.

7. **PAPERWORK REDUCTION ACT DISCLOSURE**

- * * *
- * * *
- * * *
- * * *

- It is estimated that an alternative trading system will spend approximately 20.5 hours completing the initial operation report on Form ATS, approximately 5 hours preparing each amendment to Form ATS, and approximately 2 hours preparing a cessation of operations report on Form ATS.

- * * *

- All reports provided to the Commission on Form ATS (except for types of securities traded provided on Form ATS and Form ATS-R) will be afforded confidential treatment and will be available only to the examination of Commission staff, state securities authorities, and the self-regulatory organizations. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522 ("FOIA") and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with, an examination or inspection of the books and records of any person or any other investigation.

8. For filings made pursuant to Rule 301(b)(2)(ii) through (iv) (i.e., Amendments to the Initial Operation Report), attach to the filing an Exhibit C marked to indicate additions to or deletions from Items 1 through 6, as applicable. Do not include in Exhibit C Items that are not changing.

B. EXPLANATION OF TERMS

* * * * *

NEWLY DESIGNATED ATS – Shall mean an alternative trading system operating as of [effective date of the final rule] that meets the criteria under 17 CFR 240.3b-16(a) as of [effective date of the final rule] but did not meet the criteria under 17 CFR 240.3b-16(a) in effect prior to [effective date of the final rule]. 17 CFR 242.300(r).

* * * * *

TRADING INTEREST – Shall mean order, as defined in 17 CFR 242.300(e), or any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price. 17 CFR 242.300(q).

* * * * *

WARNING: Failure to keep this form current and to file accurate supplementary information on a timely basis, or the failure to keep accurate books and records or otherwise to comply with the provisions of law applying to the conduct of alternative trading systems would violate the federal securities laws and may result in disciplinary, administrative or criminal action.

INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS

Type of Filing (select one):

☐ Initial operation report	Rule 301(b)(2)(i)
☐ Material amendment	Rule 301(b)(2)(ii)
☐ Periodic amendment	Rule 301(b)(2)(iii)
☐ Correcting amendment	Rule 301(b)(2)(iv)
☐ Cessation of operations report	Rule 301(b)(2)(v)

- Date the ATS will cease to operate: mm/dd/yyyy

1. Provide the following identifying information:
   A. Indicate the following:
      i. Is the organization, association, Person, group of Persons, or system filing the Form ATS a broker-dealer registered with the Commission?

         Yes☐ No☐

      ii. Is the registered broker-dealer authorized by a national securities association to operate an ATS?

         Yes☐ No☐

B. Full name of registered broker-dealer of the ATS ("Broker-Dealer Operator") as stated on Form BD:_____

C. Full name(s) of the ATS under which business is conducted, if different:_____

D. Provide the SEC file number, CRD number, Legal Entity Identifier (if any), and Market Participant Identifier ("MPID") of the Broker-Dealer Operator:

i. SEC File No.:_____

ii. CRD No.:_____

iii. Legal Entity Identifier:_____

E. Provide the full name of the national securities association of the Broker-Dealer Operator, the effective date of the Broker-Dealer Operator's membership with the national securities association, and MPID of the ATS:

i. National Securities Association: _____

ii. Effective Date of Membership: _____

iii. MPID of the ATS: _____

F. Provide, if any, the website URL of the ATS:_____

G. Provide the primary, and if any, secondary, physical street address(es) of the ATS matching system: _____

2.

a. Is the ATS a Newly Designated ATS?

Yes☐ No☐

b. If this is an initial operation report for an ATS other than a Newly Designated ATS, the date the alternative trading system expects to commence operation:

_____

3. In a single document, provide the following:

a. A description of classes of subscribers (for example, broker -dealer, institution, or retail). Also describe any differences in access to the services offered by the alternative trading system to different groups or classes of subscribers.

b. A list of the types of securities the alternative trading system trades (for example, debt, equity, listed), or if this is an initial operation report, the types of securities it expects to trade. Note whether any types of securities are not registered under Section 12(a) of the Exchange Act of 1934 ("Exchange Act").

c. A list of the securities the alternative trading system trades, or if this is an initial operation report, the securities it expects to trade. Note whether any securities are not registered under Section 12(a) of the Exchange Act.

d. The name, address, and telephone number of counsel for the alternative trading system.

e. A list providing the full legal name of those direct owners reported on Schedule A of Form BD.

f. The name of any entity, other than the alternative trading system, that will be involved in operation of the alternative trading system, including the execution, trading, clearing, and settling of transactions on behalf of the alternative trading system. Provide a description of the role and responsibilities of each entity.

g. A description of the manner of operation of the alternative trading system.

h. A description of the procedures governing entry of trading interest into the alternative trading system.

i. A description of the means of access to the alternative trading system.

j. A description of the procedures governing execution, reporting, clearance, and settlement of transactions effected through the alternative trading system.

k. Procedures for ensuring subscriber compliance with system guidelines.

l. A brief description of the alternative trading system's procedures for reviewing system capacity, security, and contingency planning procedures.

m. If any other entity, other than the alternative trading system, will hold or safeguard subscriber funds or securities on a regular basis, provide the name of such entity and a brief description of the controls that will be implemented to ensure the safety of such funds and securities.

4. Attach as Exhibit A, a copy of the alternative trading system's subscriber manual and any other materials provided to subscribers.

5. Attach as Exhibit B, a copy of the constitution, articles of incorporation or association, with all amendments, and of the existing by-laws or corresponding rules or instruments, whatever the name, of the alternative trading system.

☐ Select if, in lieu of filing, the ATS certifies that the information requested under this Exhibit is available at the website above and is maintained on a continuous basis and is accurate as of the date of this filing.

CONTACT INFORMATION, SIGNATURE BLOCK, AND CONSENT TO SERVICE

Provide the following information of the Person at {ATS} prepared to respond to questions for this submission:

First Name: Last Name:

Title:

Email: Telephone:

Primary Street Address of the ATS:

Mailing Address of the ATS (if different):

The {ATS} consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organization in connection with the alternative trading system's activities may be given by registered or certified mail to the contact employee at the primary street address or mailing address (if different) of the ATS, or via email, at the addresses provided on this Form ATS. The undersigned deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and {ATS} represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date {auto fill} {ATS}

By: _____ Title_____

BILLING CODE 8011–01–C

* * * * *

■ 14. Amend Form ATS–R (referenced in § 249.638) by:
■ a. In the General Instructions, revising Items A.3 through A.6.
■ b. In the General Instructions, revising the fifth and seventh paragraphs of Item A.7.
■ c. In the Explanation of Terms, removing the definitions of ''Nasdaq National Market Securities'' and ''Nasdaq SmallCap Market Securities''.
■ d. In the Explanation of Terms, adding the definitions of ''Agency Securities,'' ''Foreign Sovereign Debt Securities,'' ''U.S. Treasury Securities,'' and ''Trading Interest''.
■ e. In the Explanation of Terms, in the definition of ''Subscriber,'' removing the word ''order'' and adding in its place the word ''trading interest''.
■ f. On page 1 of the form, immediately before Section 1, adding text under a new heading ''Type of Filing''.
■ g. At the top and side of page 1 to the Form removing:
■ i. ''Form ATS Page 1 Execution Page'';
■ ii. ''Date filed (MM/DD/YY)''; and
■ iii. ''[OFFICIAL USE ONLY]''.
■ h. Revising Item 1.
■ i. Removing the text on page 1 of the form beginning ''EXECUTION'', the signature block below, the instruction that states ''This page must always be completed in full with original, manual signature and notarization. Affix notary stamp or seal where applicable.'' and ''DO NOT WRITE BELOW THIS LINE—FOR OFFICIAL USE ONLY''.
■ j. On pages 2 and 3 of the form, removing the following text:

DO NOT WRITE BELOW THIS LINE—FOR OFFICIAL USE ONLY

Alternative trading system name: _____
Filing date: _____
CRD Number: _____
SEC File Number: 8– _____

■ k. At the top and side of page 2 to the Form removing:
■ i. ''Form ATS Page 2 Execution Page'';
■ ii. ''Date filed (MM/DD/YY)''; and
■ iii. ''[OFFICIAL USE ONLY]''.
■ l. At the top and side of page 3 to the Form removing:
■ i. ''Form ATS Page 3 Execution Page'';
■ ii. ''Date filed (MM/DD/YY)''; and
■ iii. ''[OFFICIAL USE ONLY]''.
■ m. Revising Item 4.
■ n. Adding Item 5.C.
■ o. Revising Item 6.
■ p. Adding Item 8.
■ q. Adding a signature block at the end of the form.

The additions and revisions read as follows:

Note: The text of Form ATS–R does not and this amendment will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

FORM ATS-R

* * * * *

A. GENERAL INSTRUCTIONS

* * * * *

3. **CONTACT EMPLOYEE** - The individual listed as the contact employee must be authorized to receive all contact information, communications and mailings and be responsible for disseminating that information within the alternative trading system's organization.

4. **EDGAR FILING** - Any report required to be submitted pursuant to Rule 301 of Regulation ATS shall be prepared, formatted, and submitted in accordance with Regulation S-T and the EDGAR Filer Manual.

5. **EDGAR ACCEPTANCE** - A filing that is defective may be rejected and not be accepted by the EDGAR system. Any filing so rejected shall be deemed not to have been filed. See generally Regulation S-T (17 CFR part 232).

6. **RECORDKEEPING** - A copy of this Form ATS-R must be retained by the ATS in accordance with the EDGAR Filer Manual and Rule 303 of Regulation ATS and must be made available for inspection upon a regulatory request.

7. PAPERWORK REDUCTION ACT DISCLOSURE

- * * *
- * * *
- * * *
- * * *
- It is estimated that an alternative trading system will spend approximately 4.75 hours completing Form ATS-R.
- * * *
- All reports provided to the Commission on Form ATS-R (except for types of securities traded provided on Form ATS and Form ATS-R) will be afforded confidential treatment and will be available only to the examination of Commission staff, state securities authorities and the self-regulatory organizations. Subject to the provisions of the Freedom of Information Act, 5

U.S.C. 522 ("FOIA") and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

* * * * *

B. EXPLANATION OF TERMS

AGENCY SECURITIES – Shall mean a debt security issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8).

* * * * *

FOREIGN SOVEREIGN DEBT SECURITIES - Shall mean any security other than an equity security, as defined in §240.3a11-1, issued or guaranteed by a foreign government, as defined in §240.3b-4.

* * * * *

SUBSCRIBER - Shall mean any person that has entered into a contractual agreement with an alternative trading system to access such alternative trading system for the purpose of effecting transactions in securities or to submit, disseminate, or display trading interest on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or national securities association.

TRADING INTEREST - Shall mean an order, as defined in 17 CFR 242.300(e), or any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price. 17 CFR 242.300(q).

* * * * *

U.S. TREASURY SECURITIES – Shall mean a security issued by the U.S. Department of the Treasury.

* * * * *

Alternative Trading System Name:_____

Period covered by this report:_____ to _____

Type of Filing (select one):

☐ Quarterly report Rule 301(b)(9)(i)

☐ Report for an ATS that has ceased to operate Rule 301(b)(9)(ii)

- Date the ATS ceased to operate: mm/dd/yyyy

---

1. Provide the following identifying information:
   A. Full name of registered broker-dealer of the ATS ("Broker-Dealer Operator") as stated on Form BD:_____
   B. Full name(s) of the ATS under which business is conducted, if different:_____
   C. Provide the SEC file number, CRD number, and Legal Entity Identifier (if any) of the Broker-Dealer Operator:
      i. SEC File No.:_____
      ii. CRD No.:_____
      iii. Legal Entity Identifier:_____
   D. Provide the full name of the national securities association of the Broker-Dealer Operator, the effective date of the Broker-Dealer Operator's membership with the national securities association, and Market Participant Identifier ("MPID") of the ATS:
      i. National Securities Association: _____
      ii. Effective Date of Membership: _____
      iii. MPID of the ATS: _____
   E. Provide, if any, the website URL of the ATS:_____
   F. Provide the primary, and if any, secondary, physical street address(es) of the ATS matching system: _____

2. Attach as Exhibit A, a list of all subscribers that were participants of the alternative trading system at any time during the period covered by this report.

3. Attach as Exhibit B, a list of all securities that were traded on the alternative trading system at any time during the period covered by this report.

4. Provide the total unit and dollar volume of transactions (other than those for after-hours trading) in the following securities. For securities reported in 4H-4N, report total settlement value in U.S. Dollars. Enter "None," "N/A" or "0" where appropriate.

Category of Securities	Total Unit Volume of Transactions	Total Dollar Volume of Transactions
A. Listed Equity Securities		
B. Equity securities issued pursuant to Rule 144A of the Securities Act of 1933		
C. Penny Stock, other than any securities included in Items 4A-4D above		
D. Other equity securities not included in Items 4A-4C above		
E. Rights and warrants		
F. Listed options		
G. Unlisted options		
H. Government securities		
i. U.S. Treasury Securities		
ii. Agency Securities		
I. Municipal securities		
J. Corporate debt securities		
i. U.S. corporate debt securities		
ii. Non-U.S. corporate debt securities		
K. Mortgage related securities		
L. Foreign sovereign debt securities		
M. Debt securities other than any securities included in Items 4H-4L above and 4N-4O below		

N. Repurchase agreements

Type of collateral	Overnight triparty		Term triparty		Overnight bilateral		Term bilateral	
	Total Unit Volume of Transactions	Total Dollar Volume of Transactions	Total Unit Volume of Transactions	Total Dollar Volume of Transactions	Total Unit Volume of Transactions	Total Dollar Volume of Transactions	Total Unit Volume of Transactions	Total Dollar Volume of Transactions
NMS stocks								
U.S. Treasury Securities								
Federal Agency Securities								
Agency Mortgage-Backed Securities								
Municipal Securities								
U.S. Corporate Debt Securities								
Non-U.S. Corporate Debt Securities								
Asset-backed securities								
Foreign sovereign debt securities								
Other securities								

i. If other securities, please describe: _____

O. Reverse repurchase agreements

Type of collateral	Overnight triparty		Term triparty		Overnight bilateral		Term bilateral	
	Total Unit Volume of Transactions	Total Dollar Volume of Transactions	Total Unit Volume of Transactions	Total Dollar Volume of Transactions	Total Unit Volume of Transactions	Total Dollar Volume of Transactions	Total Unit Volume of Transactions	Total Dollar Volume of Transactions
NMS stocks								
U.S. Treasury Securities								
Federal Agency Securities								

Agency Mortgage-Backed Securities								
Municipal Securities								
U.S. Corporate Debt Securities								
Non-U.S. Corporate Debt Securities								
Asset-backed securities								
Foreign sovereign debt securities								
Other securities								

i. If other securities, please describe: _____

5. * * *

C. List the types of listed options reported in Item 4F above: _____

6. Provide the total unit and dollar volume of transactions for after-hours trading in the following securities. Enter "None," "N/A" or "0" where appropriate.

Category of Securities	Total Unit Volume of Transactions	Total Dollar Volume of Transactions
A. Listed Equity Securities		
B. Listed options		

* * * * *

8. Was the ATS subject to the fair access obligations under Rule 301(b)(5) during any portion of the period covered by the report?

☐ Yes ☐ No

CONTACT INFORMATION, SIGNATURE BLOCK, AND CONSENT TO SERVICE

Provide the following information of the Person at {ATS} prepared to respond to questions for this submission:

First Name: Last Name:

Title:

Email: Telephone:

Primary Street Address of the ATS:

Mailing Address of the ATS (if different):

The {ATS} consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organization in connection with the alternative trading system's activities may be given by registered or certified mail to the contact employee at the primary street address or mailing address (if different) of the ATS, or via email, at the addresses provided on this Form ATS-R. The undersigned deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and {ATS} represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date {auto fill} {ATS}

By: _____ Title_____

* * * * *

■ 15. Revise Form ATS–N (referenced in § 249.640).

Note: Form ATS–N is attached as Appendix A to this document. Form ATS–N will not appear in the Code of Federal Regulations.

Dated: January 26, 2022.

Vanessa A. Countryman,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

APPENDIX A—MARKED FORM ATS–N

Deleted text is [bracketed]. New text is italicized.

THE SECURITIES AND EXCHANGE COMMISSION HAS NOT PASSED UPON THE MERITS OR ACCURACY OF THE DISCLOSURES IN THIS FILING.

United States Securities and Exchange Commission

Washington, DC

FORM ATS-N

Intentional Misstatements or Omissions of Facts May Constitute Criminal Violations

See 18 U.S.C.1001 and 15 U.S.C. 78ff(a)

File No:

{Covered[NMS Stock] ATS} is making this filing pursuant to the
Rule 304 under the Securities Exchange Act of 1934

Type of Covered ATS

☐ NMS Stock ATS

☐ Government Securities ATS

☐ [Does the NMS Stock ATS currently operate pursuant to a Form ATS?] Is the ATS a Legacy Government Securities ATS or Newly Designated ATS?

Yes☐ No☐

Type of Filing (select one)

☐ Initial Form ATS-N	Rule 304(a)(1)(i)
☐ Material Amendment	Rule 304(a)(2)(i)(A)
☐ Updating Amendment	Rule 304(a)(2)(i)(B)
☐ Correcting Amendment	Rule 304(a)(2)(i)(C)
☐ [Order Display and Fair Access]Contingent Amendment	Rule 304(a)(2)(i)(D)
☐ Fee Amendment	Rule 304(a)(2)(i)(E)

☐ Statement about the Form ATS-N Amendment pursuant to Instruction A.7([g]h) of this form:

☐ Provide the EDGAR accession number for the Form ATS-N filing to be amended:

☐ Notice of Cessation Rule 304(a)(3)

☐ Date the [NMS Stock]Covered ATS will cease to operate: mm/dd/yyyy

☐ Withdrawal of Form ATS-N filing

Provide the EDGAR accession number for the Form ATS-N filing to be withdrawn:

Part I: Identifying Information

1. Indicate the following:

   a. Is the organization, association, Person, group of Persons, or system filing the Form ATS-N a broker-dealer registered with the Commission?

      Yes☐ No☐

   b. Is the registered broker-dealer authorized by a national securities association to operate an ATS?

      Yes☐ No☐

2. Full name of registered broker-dealer, government securities broker, or government securities dealer of the [NMS Stock] ATS ("Broker-Dealer Operator") as stated on Form BD:

3. Full name(s) of [NMS Stock] ATS under which business is conducted, if different:

4. Provide the SEC file number, [and] CRD number, the Legal Entity Identifier (if any), and Market Participant Identifier ("MPID") of the Broker-Dealer Operator:

   a. SEC File No.:
   b. CRD No.:
   c. Legal Entity Identifier:
   d. MPID of the Broker-Dealer Operator:

5. Provide the full name of the national securities association of the Broker-Dealer Operator, the effective date of the Broker-Dealer Operator's membership with the national securities association, and [Market Participant Identifier ("]MPID["")] of the [NMS Stock] ATS:

   a. National Securities Association:
   b. Effective Date of Membership:
   c. MPID of the [NMS Stock] ATS:

6. Provide, if any, the website URL of the [NMS Stock] ATS:

7. Provide the primary[,] and [if any,] secondary[,] physical street address(es) of the [NMS Stock] ATS matching system:

   a. Primary address:

   b. Does the ATS have a secondary matching system?

      Yes☐ No☐

      If yes, provide the secondary address:

8. Types of Securities Traded

a. For an NMS Stock ATS, does the ATS make available for trading all NMS stocks? If the ATS suspends trading in securities under certain circumstances, please indicate so under Part III, Item 20.

☐ Yes
☐ No

If no, identify the securities or types of securities that the ATS does not make available for trading:

b. For a Government Securities ATS, please indicate the types of government securities the ATS makes available for trading:

☐ U.S. Treasury Securities

☐ Bills:	☐ On-the-run	☐ Off-the-run	☐ When-issued
☐ Notes:	☐ On-the-run	☐ Off-the-run	☐ When-issued
☐ Bonds:	☐ On-the-run	☐ Off-the-run	☐ When-issued
☐ TIPS:	☐ On-the-run	☐ Off-the-run	☐ When-issued
☐ STRIPS:	☐ On-the-run	☐ Off-the-run	☐ When-issued
☐ Floating rate notes:	☐ On-the-run	☐ Off-the-run	☐ When-issued

☐ Agency Securities
- ☐ Agency Mortgage-Backed Securities
- ☐ Federal Agency Securities

☐ Repurchase or Reverse Repurchase Agreements on Government Securities ("repos")

☐ Triparty:	☐ Repurchase Agreement
	☐ Reverse Repurchase Agreement
	☐ Centrally Cleared
	☐ Non-Centrally Cleared
☐ Bilateral:	☐ Repurchase Agreement
	☐ Reverse Repurchase Agreement
	☐ Centrally Cleared
	☐ Non-Centrally Cleared

☐ Other:
If other, identify the types of government securities that the ATS makes available for trading:

[8]9. Attach as Exhibit 1, the most recently filed or amended Schedule A of Form BD for the Broker-Dealer Operator disclosing information related to direct owners and executive officers.

☐ Select if, in lieu of filing, {[NMS Stock] ATS} certifies that the information requested under this Exhibit is available at the website above and is accurate as of the date of this filing, and that the ATS will maintain its website in accordance with the rules for amending Form ATS-N pursuant to Rule 304(a)(2)(i) to reflect any changes to Schedule A of Form BD for the Broker-Dealer Operator.

[9]10. Attach as Exhibit 2, the most recently filed or amended Schedule B of Form BD for the Broker-Dealer Operator disclosing information related to indirect owners.

☐ Select if, in lieu of filing, {[NMS Stock] ATS} certifies that the information requested under this Exhibit is available at the website above and is accurate as of the date of this filing, and that the ATS will maintain its website in accordance with the rules for amending Form ATS-N pursuant to Rule 304(a)(2)(i) to reflect any changes to Schedule B of Form BD for the Broker-Dealer Operator.

[10]11. For filings made pursuant to Rule 304(a)(2)(i)(A) through ([D]E) *(i.e.*, Form ATS-N Amendments), attach as Exhibit 3 a document marked to indicate changes to "yes" or "no" answers or additions to or deletions from any Item in Part I, Part II, and Part III, as applicable, including Exhibits 1, 2, and 5. Indicate both the Part and Item number for all Items that are changing. Do not include in Exhibit 3 Items that are not changing.

Part II: Activities of the Broker-Dealer Operator and its Affiliates

Item 1: Broker-Dealer Operator Trading Activities [on]in the ATS

a. Are business units of the Broker-Dealer Operator permitted to enter or direct the entry of [orders and] trading interest [(*e.g.,* quotes, conditional orders, or indications of interest)] into the [NMS Stock] ATS?

Yes☐ No☐

If yes, name and describe each type of business unit of the Broker-Dealer Operator that enters or directs the entry of [orders and]trading interest into the ATS (*e.g.*, [NMS Stock]ATS, type of trading desks, market maker, sales or client desk) [and, for]. For each business unit, provide the applicable MPID and list the capacity of its [orders and] trading interest (*e.g.,* principal, agency, riskless principal). Explain any circumstance when the Broker-Dealer Operator would be a counterparty to an ATS trade.

b. If yes to Item 1(a), are the services that the [NMS Stock] ATS offers and provides to the business units required to be identified in Item 1(a) the same for all Subscribers and Persons whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator?

Yes☐ No☐

If no, explain any differences in response to the applicable Item number in Part III of this form, as required, and list the applicable Item number here. If there are differences that are not applicable to Part III, explain those differences here.

c. Are there any formal or informal arrangements with any of the business units required to be identified in Item 1(a) to provide [orders or] trading interest to the [NMS Stock] ATS (*e.g.*, undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity)?

Yes☐ No☐

If yes, identify the business unit and respond to the request in Part III, Item 12 of this form.

[d. Can orders and trading interest in the NMS Stock ATS be routed to a Trading Center operated or controlled by the Broker-Dealer Operator?

Yes☐ No☐

If yes, respond to request in Part III, Item 16 of this form.]

Item 2: Affiliates Trading Activities [on]in the ATS

a. Are Affiliates of the Broker-Dealer Operator permitted to enter or direct the entry of [orders and] trading interest into the [NMS Stock] ATS?

Yes☐ No☐

If yes, name and describe each type of Affiliate that enters or directs the entry of [orders and] trading interest into the ATS (*e.g.*, broker-dealer, [NMS Stock]ATS, investment company, hedge fund, market maker, principal trading firm)[and, for]. For each Affiliate, provide the applicable MPID and list the capacity of its [orders and] trading interest (*e.g.*, principal, agency, riskless principal). Explain any circumstances when an Affiliate of the Broker-Dealer Operator would be a counterparty to an ATS trade.

b. If yes[,] to Item 2(a), are the services that the [NMS Stock]ATS offers and provides to the Affiliates required to be identified in Item 2(a) the same for all Subscribers and Persons whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator?

Yes☐ No☐

If no, explain any differences in response to the applicable Item number in Part III of this form, as required, and list the applicable Item number here. If there are differences that are not applicable to Part III, explain those differences.

c. Are there any formal or informal arrangements with an Affiliate required to be identified in Item 2(a) to provide [orders or] trading interest to the [NMS Stock] ATS (*e.g.*, undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity)?

Yes☐ No☐

If yes, identify the Affiliate and respond to the request in Part III, Item 12 of this form.

[d. Can orders and trading interest in the NMS Stock ATS be routed to a Trading Center operated or controlled by an Affiliate of the Broker-Dealer Operator?

Yes☐ No☐

If yes, respond to the request in Part III, Item 16 of this form.]

Item 3: [Order] Interaction of Trading Interest with Broker-Dealer Operator; Affiliates

a. Can any Subscriber opt out from interacting with [orders and] trading interest of the Broker-Dealer Operator in the [NMS Stock] ATS?

Yes☐ No☐

If yes, explain the opt-out process.

b. Can any Subscriber opt out from interacting with the [orders and] trading interest of an Affiliate of the Broker-Dealer Operator in the [NMS Stock] ATS?

Yes☐ No☐

If yes, explain the opt-out process.

c. If yes to Item 3(a) or 3(b), are the [terms and conditions] requirements of the opt-out processes required to be identified in Item 3(a), 3(b), or both, the same for all Subscribers?

Yes☐ No☐

If no, identify and explain any differences.

Item 4: Arrangements with Trading [Centers] Venues

a. Are there any formal or informal arrangements (*e.g.*, mutual, reciprocal, or preferential access arrangements) between the Broker-Dealer Operator and a [Trading Center] trading venue to access the [NMS Stock] ATS services (*e.g.*, arrangements to effect transactions or to submit, disseminate, or display [orders and] trading interest in the ATS)?

Yes☐ No☐

If yes, identify the [Trading Center] trading venue and the ATS services and provide a summary of the terms and conditions of the arrangement.

b. [If yes to Item 4(a),] A[a]re there any formal or informal arrangements between an Affiliate of the Broker-Dealer Operator and a [Trading Center] trading venue to access the [NMS Stock] ATS services?

Yes☐ No☐

If yes, identify the [Trading Center] trading venue and ATS services and provide a summary of the terms and conditions of the arrangement.

Item 5: Other Products and Services

a. Does the Broker-Dealer Operator offer [Subscribers] any products or services for the purpose of effecting transactions or submitting, disseminating, or displaying [orders] [and] trading interest in the [NMS Stock] ATS (*e.g.*, algorithmic trading products that send orders to the ATS, order management or order execution systems, data feeds regarding orders and trading interest in, or executions occurring on, the ATS, order hedging or aggregation functionality, post-trade processing)?

Yes☐ No☐

If yes, identify the products or services offered, provide a summary of the [terms and conditions] requirements for use, and list here the applicable Item number in Part III of this form where the use of the product or service is explained. If there is no applicable Item in Part III, explain the use of the product or service with the ATS here.

b. If yes to Item 5(a), are the [terms and conditions] requirements for use of the services or products required to be identified in Item 5(a) the same for all Subscribers, Persons

whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator, and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Does any Affiliate of the Broker-Dealer Operator offer [Subscribers, the Broker-Dealer Operator, or both,] any products or services for the purpose of effecting transactions or submitting, disseminating, or displaying [orders or] trading interest in the [NMS Stock] ATS?

Yes☐ No☐

If yes, identify the products or services offered, provide a summary of the [terms and conditions] requirements for use, and list here the applicable Item number in Part III of this form where the use of the product or service is explained. If there is no applicable item in Part III, explain the use of the product or service with the ATS here.

d. If yes to Item 5(c), are the [terms and conditions] requirements for use of the services or products required to be identified in Item 5(c) the same for all Subscribers, Persons whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator, and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 6: Activities of Service Providers

[a. Does any employee of the Broker-Dealer Operator or its Affiliate that services both the operations of the NMS Stock ATS and any other business unit or any Affiliate of the Broker-Dealer Operator ("shared employee") have access to confidential trading information on the NMS Stock ATS?

Yes☐ No☐

If yes, identify the business unit, Affiliate, or both that the shared employee services, and provide a summary of the role and responsibilities of the shared employee at the ATS and the business unit, Affiliate, or both that the shared employee services.]

[b]a. Does any entity, other than the Broker-Dealer Operator, support the services or functionalities of the [NMS Stock] ATS ("service provider") that are required to be explained in Part III of this form?

Yes☐ No☐

If yes, both identify the service provider and provide a summary of the role and responsibilities of the service provider in response to the applicable Item number in Part III of this form, as required. List the applicable Item number here. If there are services or functionalities that are not applicable to Part III, identify the service provider, the services and functionalities, and also provide a summary of the role and responsibilities of the service provider here.

[c]b. If yes to Item 6([b]a), does the service provider, or any of its Affiliates, use the [NMS Stock] ATS services?

Yes☐ No☐

If yes, identify the service provider, or the Affiliate as applicable, and the ATS services that the service provider or its Affiliates use.

[d]c. If yes to Item 6([c]b), are the services that the [NMS Stock] ATS offers and provides to the entity required to be identified in Item 6([c]b) the same for all Subscribers and Persons whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 7: Protection of Confidential Trading Information

a. Describe the written safeguards and written procedures to protect the confidential trading information of Subscribers to the [NMS Stock] ATS, including:

i. a summary of the roles and responsibilities of any Persons that have access to confidential trading information, the confidential trading information that is accessible by them, and the basis for the access. If any employee of the Broker-Dealer Operator or employee of its Affiliate that services both the operations of the ATS and any other business unit or any Affiliate of the Broker-Dealer Operator ("shared employee") has access to confidential trading information in the ATS, identify the business unit, Affiliate or both that the shared employee services, and provide a summary of the role and responsibilities of the shared employee at the ATS and the business unit, Affiliate, or both, that the shared employee services;

ii. written standards controlling employees of the ATS that trade for employees' accounts; and

iii. written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed.

b. Can a Subscriber consent to the disclosure of its confidential trading information to any Person (not including those employees of the [NMS Stock] ATS who are operating the system or responsible for its compliance with applicable rules)?

Yes☐ No☐

If yes, explain how and under what conditions.

c. If yes to Item 7(b), can a Subscriber withdraw consent to the disclosure of its confidential trading information to any Person (not including those employees of the [NMS Stock] ATS who are operating the system or responsible for its compliance with applicable rules)?

Yes☐ No☐

If yes, explain how and under what conditions.

[d. Provide a summary of the roles and responsibilities of any Persons that have access to confidential trading information, the confidential trading information that is accessible by them, and the basis for the access.]

Part III: Manner of Operations

For each narrative response in Part III, identify and explain any differences among and between any Subscribers, Persons whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator, the Broker-Dealer Operator, and any affiliates of the Broker-Dealer Operator.

Item 1: Types of ATS Subscribers

Select the type(s) of Subscribers that can use the [NMS Stock] ATS services:

☐ Investment Companies ☐ Retail Investors ☐ Issuers ☐ Brokers

[☐ NMS Stock ATSs] ☐ Asset Managers ☐ Principal Trading Firms

☐ Hedge Funds ☐ Market Makers ☐ Banks ☐ Dealers

☐ Insurance Companies ☐ Pension Funds ☐ Corporations

☐ Other

If other, identify the type(s) of [s]Subscriber.

Item 2: Eligibility for ATS Services

a. Does the [NMS Stock] ATS require Subscribers to be registered broker-dealers?

Yes☐ No☐

b. Are there any [other] conditions that the [NMS Stock] ATS requires a Person to satisfy before accessing the ATS services?

Yes☐ No☐

If yes, list and provide a summary of the conditions.

[c. If yes to Item 2(b), are the conditions required to be identified in Item 2(b) the same for all Persons?

Yes☐ No☐

If no, identify and describe any differences.]

[d]c. Does the [NMS Stock] ATS require Subscribers to enter a written agreement to use the ATS services?

Yes☐ No☐

Item 3: Exclusion from ATS Services

[a.] Can the [NMS Stock] ATS exclude, in whole or in part, any Subscriber from the ATS services?

Yes☐ No☐

If yes, list and provide a summary of the conditions for excluding, in whole or in part, a Subscriber from the ATS services.

[b. If yes to Item 3(a), are the conditions required to be identified in Item 3(a) the same for all Subscribers?

Yes☐ No☐

If no, identify and explain any differences.]

Item 4: Hours of Operations and Trading Outside of Regular Trading Hours

a. Provide the days and hours of operations of the [NMS Stock] ATS, including the times when [orders or] trading interest can be entered [on] in the ATS[, and any hours of operation outside of regular trading hours].

b. Are the ATS services available outside of its regular trading hours (e.g., after-hours trading)?

Yes☐ No☐

c. If yes to Item 4(b), with respect to services available outside of the ATS's regular trading hours, are there any differences between the services during the ATS's regular trading hours and outside of the ATS's regular trading hours?

Yes☐ No☐

If yes, identify and explain the differences.

[b. Are the hours of operations the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item 5: Means of Entry

a. Does the [NMS Stock] ATS permit [orders and] trading interest to be entered directly into the ATS (*e.g.*, via Financial Information eXchange ("FIX") protocol, Binary)?

Yes☐ No☐

If yes, explain the protocol that can be used to directly enter [orders and] trading interest into the ATS.

[b. If yes to Item 5(a), are the protocols required to be identified in Item 5(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

[c]b. Are there any [other] means of [for] entering [orders and] trading interest into the [NMS Stock] ATS not otherwise disclosed in Part III, Item 5(a) (*e.g.*, smart order router, algorithm, order management system, sales desk, direct market access, web-enabled system, or aggregation functionality)?

Yes☐ No☐

If yes, identify and explain the [other] means for entering [orders and] trading interest, including [indicate] whether the means are provided through the Broker-Dealer Operator, either by itself or through a third-party contracting with the Broker-Dealer Operator, or through an Affiliate of the Broker-Dealer Operator, and list and provide a summary of the [terms and conditions]requirements for entering [orders or] trading interest into the ATS through these means.

[d. If yes to Item 5(c), are the terms and conditions required to be identified in Item 5(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item 6: Connectivity and Co-location

a. Does the [NMS Stock] ATS offer co-location and related services (*e.g.,* cabinets and equipment, cross-connects)?

Yes☐ No☐

If yes, provide a summary of the [terms and conditions] requirements for use for co-location and related services, including the speed and connection (*e.g.,* fiber, copper) options offered.

[b. If yes to Item (6)(a), are the terms and conditions required to be identified in Item 6(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

[c]b. Does the [NMS Stock] ATS offer any other means besides co-location and related services required to be explained in this Item 6(a) to increase the speed of communication with the ATS?

Yes☐ No☐

If yes, explain the means to increase the speed of communication with the ATS and provide a summary of the [terms and conditions] requirements for its use.

[d. If yes to Item 6(c), are the terms and conditions required to be identified in Item 6(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

[e]c. Does the[NMS Stock] ATS offer any means to reduce the speed of communication with the ATS (*e.g.*, speed bumps)?

Yes☐ No☐

If yes, explain the methods to reduce the speed of communication with the ATS and provide a summary of the [terms and conditions] requirements for its use.

[f. If yes to Item 6(e), are the terms and conditions required to be identified in Item 6(e) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Yes☐ No☐]

Item 7: Order Types [and Attributes] and Sizes; Trading Facilities

Does the ATS provide trading facilities or set rules for bringing together orders of buyers and sellers (*e.g.*, crossing system, auction market, limit order matching book, click-to-trade functionality)?

Yes☐ No☐

If yes, explain the trading facilities and rules for bringing together the orders of buyers and sellers in the ATS, including:

a. [Identify and explain] a description of each order type offered by the [NMS Stock] ATS[. In your explanation, include the following], including:

- [i. priority, including] the order type's priority upon order entry and any subsequent change to priority (if applicable); whether and when the order type can receive a new time stamp; the order type's priority [vis-à-vis]in relation to other orders on the book due to changes in the NBBO or other reference price; and any instance in which the order type could lose execution priority to a later arriving order at the same price;

- [ii.]conditions, including any price conditions (*e.g.*, how price conditions affect the rank and price at which [it]the order type can be executed; conditions on the display or non-display of an order; or conditions on executability and routability);

- [iii.]order types designed not to remove liquidity (*e.g.*, post-only orders, store orders), including what occurs when such order is marketable against trading interest on the [NMS Stock] ATS when received;

- [iv.]order types that adjust their price as changes to the order book occur (*e.g.*, price sliding orders or pegged orders) or have a discretionary range, including an order's rank and price upon order entry and whether such prices or rank may change based on the NBBO or other market conditions when using such order type; when the order type is executable and at what price the execution would occur; whether the price at which the order type can be executed ever changes; and if the order type can operate in different ways, the default operation of the order type;

- [v.] whether an order type is eligible for routing to other [Trading Centers] trading venues;

- [vi.]the time-in-force instructions that can be used or not used with each order type;

- [vii.]the circumstances under which order types may be combined with another order type, modified, replaced, canceled, rejected, or removed from the [NMS Stock] ATS; and

- [viii.]the availability of order types across all forms of connectivity to the [NMS Stock] ATS and differences, if any, in the availability of an order type across those forms of connectivity.

b. any order size requirements (*e.g.*, minimum or maximum size, odd-lot, mixed-lot, trading increments) and related handling procedures (*e.g.*, handling of residual trading interest);

c. rules governing order interaction, priority, pricing methodologies, allocation, matching, and execution of orders;

d. how orders may interact with non-firm trading interest or separate trading functionalities within the ATS or offered by the Broker-Dealer Operator;

e. procedures governing trading in the ATS, such as functionality or protocols that permit the selection of displayed orders to trade against, price improvement functionality, price protection mechanisms, short sales, functionality to adjust or hedge orders, locked-crossed markets, trading controls (*e.g.*, fat finger checks, whether the ATS can employ a global kill switch), the handling of execution errors and trade breaks, and the time-stamping of messages and executions, and any conditions or processes for terminating a counterparty match.

[b. Are the terms and conditions for each order type and attribute the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

[Item 8: Order Sizes

a. Does the NMS Stock ATS require (*e.g.*, minimum or maximum sizes for orders or trading interest)?

Yes☐ No☐

If yes, specify any minimum or maximum order or trading interest size requirements and any related handling procedures.

b. If yes to Item 8(a), are the requirements and procedures required to be identified in Item 8(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Does the NMS Stock ATS accept or execute odd-lot orders?

Yes☐ No☐

If yes, specify any odd-lot order requirements and related handling procedures (*e.g.*, odd lot treated the same as round lot).

d. If yes to Item 8(c), are the requirements and procedures required to be identified in Item 8(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

e. Does the NMS Stock ATS accept or execute mixed-lot orders?

Yes☐ No☐

If yes, specify any mixed lot order requirements and related handling procedures (*e.g.*, mixed lot treated the same as round lot).

f. If yes, to Item 8(e), are the requirements and procedures required to be identified in 8(e) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item [9]8: Use of Non-Firm Trading Interest; Communication Protocols and Negotiation Functionality [Conditional Orders and Indications of Interest]

[a.] Does the [NMS Stock]ATS make available communication protocols for buyers and sellers to communicate non-firm trading interest or negotiate a trade [send or receive any messages indicating trading interest] (*e.g.,* request-for-quote (RFQ) protocols, bids-wanted or offers-wanted protocols, indications of interest mechanisms, conditional order functionalities[, IOIs, actionable IOIs, or conditional orders])?

Yes☐ No☐

If yes, identify and explain [the use of the messages, including information contained in messages (*e.g.*, price or size minimums), how the message is transmitted (*e.g.*, order management system, smart order router, FIX), when the message is transmitted (*e.g.*, automatically by the ATS, or upon the sender's request), the type of Persons that receive the message (*e.g.*, Subscribers, Trading Centers), responses to conditional orders or IOIs (*e.g.*, submission to firm-up conditional orders), and the conditions under which the message might result in an execution in the ATS (*e.g.*, response time parameters, interaction, and matching)] the protocols and functionalities, including:

a. the use of messages, including:

- types of messages that the ATS permits to be sent and received and the type of Persons that can send or receive messages (*e.g.*, the ATS, types of Subscribers, specific Subscribers, customers of Subscribers, trading venues);
- information contained in messages (*e.g.*, symbol, price, direction, or size minimums) and whether the terms in the messages can vary based on potential recipients (*e.g.*, different Subscribers may receive different prices for the same security);
- how and when messages are transmitted (*e.g.*, order management system, router, or FIX);

- whether messages are attributed to their sender or anonymous, and whether a participant may elect to disclose its identity to other Subscribers, and if so, how, when, and what is disclosed;
- processes to respond to messages (*e.g.*, submission to firm-up conditional orders, response parameters for an RFQ, response to a request to negotiate, last look procedures);
- time parameters applicable to messages (*e.g.*, the time-in-force instructions that can be used with a message, or wire time or response time applied to a conditional order or RFQ);
- information regarding the contra-party trading interest made known on the system (if trading interest is made known on the system, describe it in Part III, Item 15), including whether a Subscriber may elect whether to display only part of its trading interest (*e.g.*, hidden size);
- the circumstances under which messages may be modified, replaced, canceled, rejected, or removed from the ATS;
- any restrictions or conditions under which the message might result in the match of two counterparties, require a response, or result in an execution in the ATS (*e.g.*, interaction, matching, selection, automatic execution) and any price conditions (*e.g.*, how price conditions affect the rank and price at which the message can result in an execution);
- limits or requirements for multiple messages sent at the same time (*e.g.*, whether the ATS prohibits a Subscriber from entering multiple buy or sell orders in the same security);
- whether a message containing trading interest is eligible to be sent to destinations outside the ATS (if a message can be sent to a destination outside the ATS, describe it in Part III, Item 16);
- the availability of message types across all forms of connectivity to the ATS and differences, if any, in the availability of an order type across those forms of connectivity.

b. any requirements relating to the size of trading interest (*e.g.*, minimum or maximum size, message controls or throttling, odd-lot, mixed-lot, trading increments) and related handling procedures (*e.g.*, handling of residual trading interest).

c. procedures governing communication protocols, including:

- priority, including the priority applied to a message upon entry and any subsequent change to priority (if applicable, whether and when the message can receive a new time stamp, the message's priority in relation to other messages in the ATS due to a change to any reference price, and any instance in which a message could lose execution priority to a later arriving message at the same price); whether the ATS permits or provides for Subscribers to vary pricing based on the identity of other Subscribers (*e.g.*, preferred pricing feeds or tiered pricing) and whether Subscribers can select counter-parties to interact with based on their identity;
- rules for interaction, pricing methodologies, allocation, matching, and execution;
- functionality or protocols for the auto-execution of non-firm trading interest, and how the ATS or a Subscriber can designate trading interest as automatically executable;
- how non-firm trading interest may interact with orders or separate trading functionalities in the ATS or functionality offered by the Broker-Dealer Operator;

- procedures governing trading in the ATS, such as functionality or protocols that permit a Subscriber to select displayed non-firm trading interest to trade against, price improvement functionality, price protection mechanisms, short sales, functionality to adjust or hedge trading interest, locked-crossed markets, the handling of execution errors, platform and trade controls (*e.g.*, fat finger checks, whether the ATS can employ a global kill switch), the time-stamping of trading interest messages and executions, any conditions or processes for terminating a counterparty match;
- what information is made available to Subscribers from the ATS about interaction history, counterparty matching, or executions (*e.g.*, pre- and post-trade data, best execution analysis, transaction cost analysis), when such information is made available, the source(s) of such information, and the process for Subscribers to access this information.

[b. If yes to Item 9(a), are the terms and conditions governing conditional orders and indications of interest the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item 9: Monitoring and Surveillance

a. Does the ATS supervise the trading activity that occurs on or through the ATS (*e.g.*, supervisory systems and procedures to detect, deter, or limit potentially disruptive, manipulative, or non-bona fide quoting and trading activities that occur on or through its system and to ensure that they are reasonably designed to achieve compliance with applicable SRO rules and the federal securities laws)?

Yes☐ No☐

If yes, provide a summary of the supervision activities, the sources of data the ATS uses to supervise trading activity (*e.g.*, internal or external sources), and the activities that the ATS intends to detect, deter, or limit.

b. Does the ATS monitor for certain trading behaviors or activities that may be detrimental to the ATS marketplace or trading (*e.g.*, anti-gaming technology)?

Yes☐ No☐

If yes, provide a summary the monitoring activities and the trading behaviors and activities that the ATS intends to detect, deter, or limit.

Item 10: Opening and Reopening

a. Explain the processes and procedures related to how the [NMS Stock] ATS opens or re-opens for trading, including when and how [orders and] trading interest [are] is priced, prioritized, matched, and executed; when and how trading interest may be sent, received, and viewed at opening; how unexecuted trading interest is handled at the time the ATS begins its regular trading hours or following a stoppage of trading in a security during its regular trading hours; whether there are any protocols at the open for buyers and sellers to send messages and negotiate a trade; [,] and identify any order types allowed prior to the start of its regular trading hours or following a stoppage of trading in a security during its regular trading hours.

[b. Are the processes and procedures governing opening and re-opening the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Explain how unexecuted orders and trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours.

d. Are the processes or procedures governing unexecuted orders and trading at the time the NMS Stock ATS begins regular trading at the start of regular trading hours, or following a stoppage of trading in a security during regular trading hours, the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

[e]b. Are there any differences between pre-opening executions, executions following a stoppage of trading in a security during the ATS's regular trading hours, and/or executions during its regular trading hours?

Yes☐ No☐

If yes, identify and explain the differences.

Item 11: [Trading Services, Facilities and Rules] Interaction with Related Markets

[a. Provide a summary of the structure of the NMS Stock ATS marketplace (e.g., crossing system, auction market, limit order matching book) and explain the means and facilities for bringing together the orders of multiple buyers and sellers on the NMS Stock ATS.

b. Are the means and facilities required to be identified in Item 11(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Explain the established, non-discretionary rules and procedures of the NMS Stock ATS, including order interaction rules for the priority, pricing methodologies, allocation, matching, and execution of orders and trading interest, and other procedures governing trading, such as price improvement functionality, price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, and the time-stamping of orders and executions.

d. Are the established, non-discretionary rules and procedures required to be identified in Item 11(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Does the Broker-Dealer Operator or any of its Affiliates offer functionality, procedures, or protocols to facilitate trading or communication on, or source pricing for, the ATS

using markets for financial instruments related to the securities that the ATS trades (*e.g.*, futures, options, currencies, swap, fixed income markets), including offering order types to facilitate transactions on both markets, or procedures to allow Subscribers to perform multi-leg transactions involving the identified market(s)?

Yes☐ No☐

If yes, (i) identify the functionality, procedures, protocols, and source of pricing and the related market; (ii) state whether the functionality, procedures, protocols, and source of pricing is provided or operated by the Broker-Dealer Operator or an affiliate of the Broker-Dealer Operator and whether the related market is provided or operated by the Broker-Dealer Operator or its affiliate; and (iii) explain the use of the functionality, procedures, protocols, and source of pricing with regard to the related market and the ATS, including how and when the functionality, procedures, protocols, and source of pricing can be used, by whom, and with what markets.

Item 12: Liquidity Providers

Are there any formal or informal arrangements with any [Subscriber]Person or the Broker-Dealer Operator to display, enter, or trade against [provide orders or] trading interest in [to] the [NMS Stock] ATS (*e.g.*, undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity)?

Yes☐ No☐

If yes, identify the liquidity provider and describe the arrangement, including the terms and conditions.

Item 13: Segmentation; Notice

a. Is[Are] [orders and] trading interest in the [NMS Stock] ATS segmented into categories, classifications, tiers, or levels (*e.g.*, segmented by type of participant, [order] trading interest size, duration, source, or nature of trading activity)?

Yes☐ No☐

If yes, explain the segmentation procedures, including (i) [a description for] how and what [orders and] trading interest is [are] segmented, including where the identification of segmented trading interest is applied (*e.g.*, when ATS trading interest is received by the Broker-Dealer Operator or entered into the ATS); (ii) identify and describe any categories, classification, tiers, or levels and the types of [orders and] trading interest that are included in each; (iii) provide a summary of the parameters for each segmented category and length of time each segmented category is in effect, including when such category is determined, reviewed, and can be changed; (iv) any procedures for overriding a determination of segmented category; and (v) how segmentation can affect [order]trading interest interaction.

b. Can the ATS, in the absence of Subscriber direction, prevent a Subscriber or its potential counter-parties from viewing or interacting with certain trading interest (*e.g.*, permissioning, filtering, or blocking)?

Yes☐ No☐

If yes, explain such processes, including (i) what a Subscriber or counterparty is prevented from viewing or interacting with and where this determination is made (*i.e.*, when trading interest is received at the Broker-Dealer Operator or the ATS); (ii) how and when the ATS prevents a Subscriber or its potential counter-party from viewing or

interacting with certain trading interest; (iii) identify and describe any categories, classification, tiers, or levels and the types of trading interest that the ATS uses to determine how Subscribers can view or interact with other trading interest; (iv) a summary of the parameters for such processes and length of time any such parameter is in effect; (v) any procedures for overriding a determination of any category, classification, tier, or level that the ATS uses to designate how Subscriber trading interest can interact; (vi) how such processes can affect trading interest interaction; (vii) how a Subscriber can view filtered messages and any permissioning process and criteria for a Subscriber to send, receive, or interact with a message.

[If yes to Item 13(a), is the segmentation of orders and trading interest the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

c. Does the [NMS Stock] ATS identify [orders or]trading interest entered by a customer of a broker-dealer on the [NMS Stock] ATS as [a] customer [order] trading interest?

Yes☐ No☐

d. If yes to Item 13(a) or 13(b), does the [NMS Stock]ATS disclose to any Person the designated segmented or otherwise designated category, classification, tier, or level of [orders and]trading interest?

Yes☐ No☐

If yes, provide a summary of the content of the disclosure, when and how the disclosure is communicated, who receives it, and whether and how such designation can be contested.

[e. If yes to Item 13(d), are the disclosures required to be identified in 13(d) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item 14: Counter-Party Selection

a. Can [orders or] trading interest be designated to interact or not interact with certain [orders or] trading interest in the [NMS Stock] ATS (*e.g.*, designated to interact with or execute against a specific Subscriber's [orders or] trading interest or prevent the trading interest of a Subscriber[']s order] from interacting with or executing against the trading interest of that Subscriber [itself])?

Yes☐ No☐

If yes, explain the counter-party selection procedures, including how counter-parties can be selected, and whether the designations affect the trading rules (*e.g.*, order interaction or priority) or communication protocols of [interaction and priority of trading interest in] the ATS.

b. Can a Subscriber designate trading interest that the Subscriber or potential counter-parties can view (*e.g.*, filtering, blocking, permissioning)?

Yes☐ No☐

If yes, explain such processes, including (i) how and when a Subscriber can designate which trading interest it or a potential counter-party can view; (ii) any categories, classifications, or levels and the types of trading interest that Subscribers are able to designate; (iii) a summary of the parameters for such processes and length of time any such parameter is in effect; and (iv) how such processes can affect how trading interest interacts in the ATS.

[b. If yes to Item 14(a), are the procedures for counter-party selection required to be identified in Item 14(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item 15: Display and Visibility of Trading Interest

a. Does the ATS display trading interest to Subscribers or the public (*e.g.*, ATS disseminates orders through market data feeds or a website or sends invitations or requests to Subscribers about potential counterparties)?

Yes☐ No☐

If yes, explain what information the ATS displays (*e.g.*, security, price, size, direction, the identity of the sender, rating information based on the sender's past performance in the ATS), how and when such information is displayed, to whom such information is displayed (*e.g.*, Subscribers, public, types of market participant), and how long the displayed information is available. Indicate whether a Subscriber can opt-out of the display of its trading interest, and if so the process for that Subscribers to do so.

b. Can a Subscriber use the ATS to display or make known trading interest to any Person (*e.g.*, stream quotes to the Subscribers or the public or send a request for quote, indication of interest, conditional order, or invitation to negotiate to a Subscriber or the Broker-Dealer Operator)?

Yes☐ No☐

If yes, explain what information the Subscriber can display through the ATS (*e.g.*, security, price, size, direction, the identity of the sender), procedures for Subscribers to display such information, how and when such information is displayed, to whom such information is displayed (*e.g.*, Subscribers, public, types of market participant), and how long the displayed information is available.

c. Is any trading interest bound for the ATS made known to any Person (not including employees of the ATS who are operating the system) (*e.g.*, trading interest directed to the ATS by customers of the Broker-Dealer Operator that passes through a SOR or functionality of the Broker-Dealer Operator before entering the ATS), or is any ATS trading interest made known to any Person that is not otherwise disclosed in Part III, 15(a) or (b) (*e.g.*, displays orders to the Broker-Dealer Operator's SOR or trading desk), or both?

Yes☐ No☐

If yes, explain what information is displayed (*e.g.*, security, price, size, direction, the identity of the sender), how and when such information is displayed, to whom such information is displayed (*e.g.*, algorithm, SOR, trading desk, third party), and how long the displayed information is available.

d[a]. Does the ATS operate as an Electronic Communication Network as defined in Rule 600(a)([23]31) of Regulation NMS?

Yes☐ No☐

[b. Are Subscriber orders and trading interest bound for or resting in the NMS Stock ATS displayed or made known to any Person (not including those employees of the NMS Stock ATS who are operating the system)?

Yes☐ No☐

If yes, explain the display procedures, including how and when Subscriber orders and trading interest are displayed, how long orders and trading interest are displayed, what information about orders and trading interest is displayed, and the functionality of the Broker-Dealer Operator and types of market participants that receive the displayed information.

c. If yes to Item 15(b), are the display procedures required to be identified in 15(b) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item 16: Routing

a. Can [orders and] trading interest in the [NMS Stock] ATS be routed or sent to a destination outside the [NMS Stock] ATS?

Yes☐ No☐

b. If yes to Item 16(a), must affirmative instructions from a Subscriber be obtained before its [orders or] trading interest can be routed or sent from the [NMS Stock] ATS?

Yes☐ No☐

If yes, describe the affirmative instruction and explain how the affirmative instruction is obtained. If no, explain when [orders] trading interest in the [NMS Stock] ATS can be routed or sent from the ATS (*e.g.*, at the discretion of the Broker-Dealer Operator).

c. Can trading interest in the ATS be routed or sent to a destination operated or controlled by the Broker-Dealer Operator or an Affiliate of the Broker-Dealer Operator?

Yes☐ No☐

If yes, identify the destination and when and how trading interest is routed or sent from the ATS to the destination.

Item 17: Closing

[a.] Are there any differences between how [orders and] trading interest [are]is treated on the [NMS Stock]ATS during its closing session(s) [the close] and how [orders and] trading interest [are] is treated during its regular trading hours?

Yes☐ No☐

If yes, identify and explain the differences as compared to the information provided in the relevant Part III Items of this form.

[b. Is the treatment of orders and trading interest during the close the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

[Item 18: Trading Outside of Regular Trading Hours

a. Does the NMS Stock ATS conduct trading outside of its regular trading hours?

Yes☐ No☐

b. If yes to Item 18(a), are there any differences between trading outside of regular trading hours and trading during regular trading hours in the NMS Stock ATS?

Yes☐ No☐

If yes, identify and explain the differences.

c. If yes to Item 18(a), is the treatment of orders and trading interest outside of regular trading hours the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item [19]18: Fees

a. Identify and describe any fees or charges for use of the [NMS Stock] ATS services, including the type of fees (*e.g.*, subscription, connectivity, market data), the structure of the fees (*e.g.*, fixed, volume-based, transaction-based), variables that impact the fees (*e.g.*, types of securities traded, block orders, form of connectivity to the ATS), differentiation among types of Subscribers (*e.g.*, broker-dealers, institutional investors, retail), whether the fee is incorporated into the price displayed for a security (*e.g.*, markups, markdowns), and range of fees (*e.g.*, high and low).

b. Identify and describe any fees or charges for use of the [NMS Stock] ATS services that are bundled with the Subscriber's use of non-ATS services or products offered by the Broker-Dealer Operator or its Affiliates, including a summary of the bundled services and products, the structure of the fee, variables that impact the fee, differentiation among types of Subscribers, and range of fees.

c. Identify and describe any rebate or discount of fees or charges required to be identified in Items [19]18(a) and [19]18(b), including the type of rebate or discount, structure of the rebate or discount, variables that impact the rebate or discount, differentiation among types of Subscribers, and range of rebate or discount.

Item [20]19: Suspension of Trading

[a.] Explain any procedures for suspending or stopping trading on the [NMS Stock] ATS, including the suspension of trading in individual NMS stocks, U.S. Treasury Securities, or in an Agency Security.

[b. Are the procedures for suspending or stopping trading the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item [21]20: Trade Reporting

[a.] Explain any procedures and material arrangements for reporting transactions on the [NMS Stock] ATS, including where an ATS reports transactions and under what circumstances.

[b. Are the procedures and material arrangements for reporting transactions on the NMS Stock ATS the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item [22]21: Post-Trade Processing, Clearance and Settlement

[a.] Describe any procedures and material arrangements undertaken as a result of the contractual agreements between the Broker-Dealer Operator and the ATS participants to [facilitate]manage the post-trade processing (such as routing, enrichment, allocations, matching, confirmation, affirmation, notification), clearance, and/or settlement of transactions on the [NMS Stock] ATS (*e.g.*, whether the ATS, Broker-Dealer Operator, or Affiliate of either: becomes a counterparty[,]; [whether it] submits trades to a registered clearing agency[,]; [or whether it] requires Subscribers to have arrangements with a clearing firm; or terminates trades). Please include a description of any user requirements for such procedures and material arrangements, including the type and extent of connectivity (*e.g.*, FIX), and whether connectivity is to an OMS, EMS, EOMS, clearinghouse/custodian, or other system.

[b. Are the procedures and material arrangements undertaken to facilitate the clearance and settlement of transactions on the NMS Stock ATS the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item [23]22: Market Data

[a.] Identify the sources of market data used by the [NMS Stock] ATS (*e.g.*, proprietary feed from a national securities exchange, feed from the securities information processor ("SIP"), or feeds from trading venues), and how the ATS uses market data from these

sources to provide the services that it offers, including how the ATS uses market data to determine the NBBO and protected quotes or BBO, and display, price, prioritize, execute, and remove [orders and] trading interest [on]in the ATS.

[b. Are the sources of market data and how the NMS Stock ATS uses market data for the services that it offers the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.]

Item [24]23: Order Display and Execution Access

a. If an NMS Stock ATS, [H]has the [NMS Stock] ATS displayed Subscriber orders to any Person (other than NMS Stock ATS employees) and had an average daily share volume of 5% or more in that NMS stock as reported by an effective transaction reporting plan or disseminated through an automated quotation system during four of the preceding six calendar months?

Yes☐ No☐

b. If yes to Item [24]23(a), is the NMS Stock ATS required to comply with Rule 301(b)(3)(ii) of Regulation ATS?

Yes☐ No☐

If yes,

i. Provide the ticker symbol for each such NMS stock displayed during each of the last 6 calendar months;
ii. Explain how the ATS displays such orders on a national securities exchange or through a national securities association; and
iii. Explain how the ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that national securities exchange or through a national securities association pursuant to Rule 301(b)(iii) of Regulation ATS.

Item [25]24: Fair Access

a. If an NMS Stock ATS, h[H]as the [NMS Stock]ATS executed 5% or more of the average daily trading volume in an NMS stock, whether by itself or aggregated pursuant to Rule 301(b)(5)(ii), as reported by an effective transaction reporting plan or disseminated through an automated quotation system during four of the preceding six calendar months?

Yes☐ No☐

b. If a Government Securities ATS, has the ATS executed 3% or more of the average weekly trading volume in U.S. Treasury Securities, whether by itself or aggregated pursuant to Rule 301(b)(5)(ii), as reported to and disseminated by a self-regulatory organization during four of the preceding six calendar months?

Yes☐ No☐

c. If a Government Securities ATS, has the ATS executed 5% or more of the average daily trading volume in Agency Securities, whether by itself or aggregated pursuant to Rule 301(b)(5)(ii), as reported to and disseminated by a self-regulatory organization during four of the preceding six calendar months?

Yes☐ No☐

d.[b.]If yes to Item [25]24 (a), (b), or (c), is the [NMS Stock] ATS required to comply with Rule 301(b)(5)(iii) of Regulation ATS?

Yes☐ No☐

If yes,

i. If an NMS Stock ATS, [P]provide the ticker symbol for each such NMS stock during each of the last 6 calendar months; and

ii. Describe the reasonable written standards for granting, limiting, and denying access to the services of[trading on] the ATS pursuant to Rule 301(b)(5)(iii)(A) of Regulation ATS.

Item [26]25: Aggregate Platform Data

Does the [NMS Stock] ATS publish or otherwise provide to one or more Subscribers aggregate platform-wide [order flow and execution] statistics of the ATS that are not otherwise required disclosures under Rule 605 of Regulation NMS?

Yes☐ No☐

If yes,

i. Attach, as Exhibit 4, the most recent disclosure of aggregate platform-wide [order flow and execution] statistics of the ATS that are not otherwise required disclosures under Rule 605 of Regulation NMS and that the ATS provided to one or more Subscribers as of the end of each calendar quarter.

☐ Select if, in lieu of filing, {[NMS Stock] ATS} certifies that the information requested under Exhibit 4 is available at the website provided in Part I, Item 6 of this form and is accurate as of the date of this filing, and that the ATS will maintain its website in accordance with the rules for amending Form ATS-N pursuant to Rule 304(a)(2)(i) to reflect any changes to such information.

ii. Attach, as Exhibit 5, a list and explanation of the categories or metrics for the aggregate platform-wide [order flow and execution] statistics provided as Exhibit 4 and explain the criteria or methodology used to calculate aggregate platform-wide [order flow and execution] statistics.

☐ Select if, in lieu of filing, {[NMS Stock] ATS} certifies that the information requested under Exhibit 5 is available at the website provided in Part I, Item 6 of this form and is accurate as of the date of this filing, and that the ATS will maintain its website in accordance with the rules for amending Form ATS-N pursuant to Rule 304(a)(2)(i) to reflect any changes to such information.

Part IV: Contact Information, Signature Block, and Consent to Service

Provide the following information of the Person at {[NMS Stock] ATS} prepared to respond to questions for this submission:

First Name: Last Name:

Title:

E-Mail: Telephone:

Primary Street Address of the [NMS Stock] ATS:

Mailing Address of the [NMS Stock] ATS (if different):

The {[NMS Stock]ATS} consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organization in connection with the alternative trading system's activities may be given by registered or certified mail to the contact employee at the primary street address or mailing address (if different) of the [NMS Stock]ATS, or via email, at the addresses provided on this Form ATS-N. The undersigned[, being first duly sworn,] deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and {[NMS Stock]ATS} represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date {auto fill} {[NMS Stock] ATS}

By: _____ Title_____

FORM ATS-N INSTRUCTIONS

A. FILING FORM ATS-N:

1. Form ATS-N is a public reporting form that is designed to provide market participants and the Commission with information about the operations of [the NMS Stock] a Covered ATS and the ATS-related activities of its Broker-Dealer Operator and its Affiliates. Among other things, [an NMS Stock] a Covered ATS must file Form ATS-N to be exempt from the definition of "exchange" pursuant to Exchange Act Rule 3a1-1(a)(2).

2. A separate Form ATS-N is required for each [NMS Stock] Covered ATS operated by the same Broker-Dealer Operator.

3. [An NMS Stock] A Covered ATS must provide all the information required by Form ATS-N, including responses to each Item, as applicable, and the Exhibits, and disclose information that is accurate, current, and complete.

4. [An NMS Stock] A Covered ATS must respond to each request in detail unless otherwise provided (*i.e.*, where the request indicates that the ATS is required to disclose "summary" information).

5. Any report required to be submitted pursuant to Rule 304 of Regulation ATS shall be prepared, formatted, and submitted in accordance with Regulation S-T and the EDGAR Filer Manual. Filers have the option of submitting the information to EDGAR using the most recent version of the XML schema for Rule 304 as specified by the EDGAR Filer Manual, or submitting the information using the web-fillable form for Rule 304 in EDGAR.

6. Initial Form ATS-N: Prior to commencing operations, [an NMS Stock]a Covered ATS shall file an initial Form ATS-N and the initial Form ATS-N must become effective. If [an NMS Stock]a Government Securities ATS is currently operating pursuant to a Form ATS, it must indicate such on the Form ATS-N. [If the NMS Stock ATS is operating pursuant to a previously filed initial operation report on Form ATS as of January 7, 2019, such NMS Stock ATS shall file with the Commission a Form ATS-N no earlier than January 7, 2019, and no later than February 8, 2019.] A Legacy Government Securities ATS or Newly Designated ATS shall file with the Commission a Form ATS-N no later than [the date 90 calendar days after the effective date of the final rule].

7. Form ATS-N Amendment

   a. [An NMS Stock]A Covered ATS shall amend a Form ATS-N in accordance with the conditions of Rule 304.

   b. A Material Amendment, except as provided by Rule 304(a)(2)(i)(D) for [an Order Display and Fair Access Amendment] a Contingent Amendment or Rule 304(a)(2)(i)(E) for a Fee Amendment, must be filed at least 30 calendar days, or the length of any extended Commission review period, prior to the date of implementation of a material change to the operations of the [NMS Stock]Covered

ATS or to the activities of the Broker-Dealer Operator or its Affiliates that are subject to disclosure on Form ATS-N.

c. An Updating Amendment must be filed no later than 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate or incomplete for any reason and was not previously required to be reported to the Commission as a Form ATS-N Amendment pursuant to Rule 304(a)(2)(i)(A), Rule 304(a)(2)(i)(C), [or] Rule 304(a)(2)(i)(D), or Rule 304(a)(2)(i)(E).

d. A Correcting Amendment must be filed promptly to correct information in any previous disclosure on Form ATS-N, after discovery that any information previously filed on Form ATS-N was materially inaccurate or incomplete when filed.

e. A[n Order Display and Fair Access] Contingent Amendment must be filed no later than seven calendar days after information required to be disclosed in Part III, Items [24]23 and [25]24 on Form ATS-N has become inaccurate or incomplete.

f. A Fee Amendment must be filed no later than the date the information required to be disclosed in Part III, Item 18 on Form ATS-N has become inaccurate or incomplete.

[f.]g. [An NMS Stock ATS]A Covered ATS must select only one "Type of Amendment" for each Form ATS-N Amendment filed with the Commission.

[g]h. For each Amendment, indicate the Part and Item number of the Form ATS-N that is the subject of the change(s), provide a brief summary of the substance of the change(s), and state whether or not the change(s) apply to: (1) all Subscribers and the Broker-Dealer Operator; (2) only the Broker-Dealer Operator; (3) only Subscribers; (4) only certain Subscribers or subsets of Subscribers or customers of Subscribers and the Broker-Dealer Operator; or (5) only certain Subscribers or subsets of Subscribers or customers of Subscribers. If the change(s) apply only to certain Subscribers, describe which Subscribers the change(s) apply to. Do not describe any changes made to Part IV.

[h]i. For each Amendment, provide the EDGAR accession number for the filing that is being amended.

8. Notice of Cessation: [An NMS Stock]A Covered ATS shall notice its cessation of operations on Form ATS-N at least 10 business days prior to the date the [NMS Stock] Covered ATS will cease to operate as [an NMS Stock] a Covered ATS.

9. Withdrawal: If [an NMS Stock] a Covered ATS determines to withdraw a filing, it must check the "Withdrawal of Form ATS-N filing" check box for the type of filing and provide the EDGAR accession number of the Form ATS-N filing that is being withdrawn. [An NMS Stock] A Covered ATS may withdraw an initial Form ATS-N or an Amendment before the end of the applicable Commission review period. [An NMS Stock] A Covered ATS may withdraw a notice of cessation of operations at any time before the date that the [NMS Stock] Covered ATS had indicated it intended to cease operating. A Legacy [NMS Stock ATS] Government Securities ATS or Currently Designated ATS may not withdraw its initial Form ATS-N at any time.

10. A filing that is defective may be rejected and not be accepted by the EDGAR system. Any filing so rejected shall be deemed not to have been filed. See generally Regulation S-T (17 CFR part 232).

B. CONTACT INFORMATION

- The individual listed on the [NMS Stock]ATS's response to Part IV of Form ATS-N as the contact representative must be authorized to receive all incoming communications and be responsible for disseminating that information, as necessary, within the [NMS Stock] ATS. The contact information provided in Part IV of Form ATS-N will not be made public.

C. RECORDKEEPING

- A copy of this Form ATS-N must be retained by the [NMS Stock] Covered ATS in accordance with the EDGAR Filer Manual and Rule 303 of Regulation ATS and must be made available for inspection upon a regulatory request.

D. PAPERWORK REDUCTION ACT DISCLOSURE

- Form ATS-N requires [an NMS Stock] a Covered ATS to provide the Commission with certain information regarding: (1) the operation of the [NMS Stock] ATS and the ATS-related activities of the Broker-Dealer Operator and its Affiliates; (2) material and other changes to the operations and disclosures of the [NMS Stock] ATS; and (3) notice upon ceasing operation of the [NMS Stock] ATS. Form ATS-N is designed to provide the public with information to, among other things, help them make informed decisions about whether to participate on the [NMS Stock] Covered ATS. In addition, the Form ATS-N is designed to provide the Commission with information to permit it to carry out its market oversight and investor protection functions.

- The information provided on Form ATS-N will help the Commission to determine whether [an NMS Stock] a Covered ATS is in compliance with the federal securities laws and the rules or regulations thereunder, including Regulation ATS. [An NMS Stock] A Covered ATS must:

  - File an initial Form ATS-N prior to commencing operations.

  - File a Form ATS-N Amendment: (1) at least 30 calendar days prior to the date of implementation of a material change to the operations of the [NMS Stock]Covered ATS or to the activities of the Broker-Dealer Operator or its Affiliates that are subject to disclosure on Form ATS-N (Material Amendment); (2) no later than 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate or incomplete for any reason and was not previously required to be reported to the Commission as a Form ATS-N amendment pursuant to Rule 304(a)(2)(i)(A), Rule 304(a)(2)(i)(C), [or] Rule 304(a)(2)(i)(D), or Rule 304(a)(2)(i)(E) (Updating Amendment); (3) promptly, to correct information in any previous disclosure on Form ATS-N, after discovery that any information previously filed on Form ATS-N was materially inaccurate or incomplete when filed (Correcting Amendment); [or] (4) no later than seven calendar days after information required to be disclosed in Part III, Items [24]23 and [25]24 on Form ATS-N has become inaccurate or incomplete ([Order Display and Fair Access]Contingent Amendment); or (5) no later than the date the information required to be disclosed in Part III, Item 18 on Form ATS-N has become inaccurate or incomplete (Fee Amendment). During the Commission review period of an initial Form ATS-N filing, [an NMS Stock] a

Legacy Government Securities ATS or Newly Designated ATS [that is operating as of January 7, 2019] shall amend its filed Form ATS-N pursuant to these requirements, and [an NMS Stock] a Covered ATS that [was not operating as of January 7, 2019] is not a Legacy Government Securities ATS or Newly Designated ATS shall amend its filed Form ATS-N pursuant to the requirements for Updating and Correcting Amendments. During the Commission review period of an initial Form ATS-N filing, a[n] [NMS Stock] Covered ATS shall amend a filed Material Amendment pursuant to the requirements for Updating and Correcting Amendments.

- Notice its cessation of operations at least 10 business days before the date the [NMS Stock] Covered ATS ceases to operate as [an NMS Stock] a Covered ATS.

 This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. 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 control number. We estimate that an [NMS Stock]ATS will spend approximately [127.4]136.4 hours completing the Form ATS-N, approximately 9.4 hours preparing each amendment to Form ATS-N, and approximately 2 hours preparing a notice of cessation on Form ATS-N. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

E. EXPLANATION OF TERMS

The following terms are defined for purposes of Form ATS-N.

 AFFILIATE: Shall mean, with respect to a specified Person, any Person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified Person.

- **AGENCY SECURITY:** Shall mean a debt security issued or guaranteed by a U.S. executive agency, as defined in 5 U.S.C. 105, or government-sponsored enterprise, as defined in 2 U.S.C. 622(8).

 ALTERNATIVE TRADING SYSTEM: Shall mean any organization, association, Person, group of Persons, or system: (1) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act; and (2) that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, Person, group of Persons, or system, or (ii) discipline subscribers other than by exclusion from trading. 17 CFR 242.300(a).

 BROKER-DEALER OPERATOR: Shall mean the registered broker-dealer or government securities broker or government securities dealer of the [NMS Stock] ATS pursuant to 17 CFR 242.301(b)(1).

 CONTROL: Shall mean the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through ownership

of securities, by contract, or otherwise. A Person is presumed to control the broker-dealer of an alternative trading system if that Person: (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker-dealer of the alternative trading system. 17 CFR 242.300(f).

- **GOVERNMENT SECURITY**: Shall mean securities defined in section 3(a)(42) of the Exchange Act. 15 U.S.C. 78c(a)(42).

- **GOVERNMENT SECURITIES ATS**: Shall mean an alternative trading system that trades government securities or repurchase and reverse repurchase agreements on government securities. A Government Securities ATS shall not trade securities other than government securities or repurchase and reverse repurchase agreements on government securities.

- **LEGACY GOVERNMENT SECURITIES ATS**: Shall mean a Government Securities ATS operating as of [effective date of the final rule] that was either: (1) formerly not required to comply with Regulation ATS (§ 242.300 through 242.304) pursuant to the exemption under § 240.3a1-1(a)(3) prior to [effective date of the final rule]; or (2) operating pursuant to an initial operation report on Form ATS on file with the Commission as of [effective date of the final rule].

- **NEWLY DESIGNATED ATS** – Shall mean an alternative trading system operating as of [effective date of the final rule] that meets the criteria under 17 CFR 240.3b-16(a) as of [effective date of the final rule] but did not meet the criteria under 17 CFR 240.3b-16(a) in effect prior to [effective date of the final rule]. 17 CFR 242.300(r).

- **NMS SECURITY**: Shall mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. 17 CFR 242.600(b)(46).

- **NMS STOCK**: Shall mean any NMS security other than an option. 17 CFR 242.600(b)(47).

- **NMS STOCK ATS**: Shall mean an alternative trading system, as defined in Rule 300(a) under the Exchange Act, that trades NMS stocks, as defined in Rule 300(g) under the Exchange Act. An NMS Stock ATS shall not trade securities other than NMS stocks. 17 CFR 242.300(k).

- **ORDER**: Shall mean any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order. 17 CFR 242.300(e).

- **PERSON**: [Shall mean a natural person or a company. 15 U.S.C. 80a-2(a)(28).]Shall mean a natural person, company, government, or political subdivision, agency, or instrumentality of a government. 15 U.S.C. 78c(a)(9).

- **SUBSCRIBER**: Shall mean any Person that has entered into a contractual agreement with an alternative trading system to access an alternative trading system for the purpose of effecting transactions in securities, or for submitting, disseminating or displaying [orders]trading interest on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or association. 17 CFR 242.300(b).

- **TRADING INTEREST**: Shall mean an order or any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price. 17 CFR 240.300(q).

- **TRADING [CENTER]VENUE**: Shall mean a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, a future or options market, or any other broker- or dealer-operated platform for executing trading interest [that executes orders] internally by trading as principal or crossing orders as agent. [17 CFR 242.600(b)(78).]

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Part III

Department of Labor

Office of the Secretary

29 CFR Parts 1, 3, and 5
Updating the Davis-Bacon and Related Acts Regulations; Proposed Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Parts 1, 3, and 5

RIN 1235–AA40

Updating the Davis-Bacon and Related Acts Regulations

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (Department) proposes to amend regulations issued under the Davis-Bacon and Related Acts that set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects. As the first comprehensive regulatory review in nearly 40 years, the Department believes that revisions to these regulations are needed to provide greater clarity and enhance their usefulness in the modern economy.

DATES: Interested persons are invited to submit written comments on this notice of proposed rulemaking (NPRM) on or before May 17, 2022.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA40, by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Address written submissions to: Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Commenters submitting file attachments on *https://www.regulations.gov* are advised that uploading text-recognized documents—*i.e.,* documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to *https://www.regulations.gov,* including any personal information provided. The Wage and Hour Division (WHD) posts comments gathered and submitted by a third-party organization as a group under a single document ID number on *https://www.regulations.gov.* All comments must be received by 11:59 p.m. on May 17, 2022, for consideration in this rulemaking; comments received after the comment period closes will not be considered.

The Department strongly recommends that commenters submit their comments electronically via *https://www.regulations.gov* to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Please submit only one copy of your comments by only one method.

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this proposal may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov/agencies/whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

In order to provide greater clarity and enhance their usefulness in the modern economy, the Department proposes to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the Davis-Bacon Act and the Davis-Bacon Related Acts (collectively, the DBRA). The Davis-Bacon Act (DBA or Act), enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. *See* 40 U.S.C. 3142. The DBA applies to workers on contracts entered into by Federal agencies and the District of Columbia that are in excess of $2,000 and for the construction, alteration, or repair of public buildings or public works. Congress subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as ''Related Acts'') under which Federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods.

The Supreme Court has described the DBA as ''a minimum wage law designed for the benefit of construction workers.'' *United States* v. *Binghamton Constr. Co.,* 347 U.S. 171, 178 (1954). The Act's purpose is ''to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.'' *Universities Research Ass'n, Inc.* v. *Coutu,* 450 U.S. 754, 773 (1981) (quoting H. Comm. on Educ. and Lab., Legislative History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962)). By requiring the payment of minimum prevailing wages, Congress sought to ''ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.'' Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176 (1981) (citation and internal quotation marks omitted).[1]

Congress has delegated authority to the Department to issue prevailing wage determinations and prescribe rules and regulations for contractors and subcontractors on DBA-covered construction projects.[2] *See* 40 U.S.C. 3142, 3145. It has also directed the Department, through Reorganization Plan No. 14 of 1950, to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 5 U.S.C. app. 1, effective May 24, 1950, 15 FR 3176, 64 Stat. 1267. These regulations, which have been updated and revised periodically over time, are primarily located in parts 1, 3,

[1] Available at: *https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf.*

[2] The DBA and the Related Acts apply to both prime contracts and subcontracts of any tier thereunder. In this NPRM, as in the regulations themselves, where the terms ''contracts'' or ''contractors'' are used, they are intended to include reference to subcontracts and subcontractors of any tier.

and 5 of title 29 of the Code of Federal Regulations.

The Department last engaged in a comprehensive revision of the regulations governing the DBA and the Related Acts in a 1981–1982 rulemaking.[3] Since that time, Congress has expanded the reach of the Davis-Bacon labor standards significantly, adding numerous new Related Act statutes to which these regulations apply. The Davis-Bacon Act and now 71 active Related Acts[4] collectively apply to an estimated $217 billion in Federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers.[5] The Department expects these numbers to continue to grow as Federal and State governments seek to address the significant infrastructure needs of the country, including, in particular, the energy and transportation infrastructure necessary to mitigate climate change.[6]

In addition to the expansion of the prevailing wage rate requirements of the DBA and the Related Acts, the Federal contracting system itself has undergone significant changes since the 1981–1982 rulemaking. Federal agencies have dramatically increased spending through interagency Federal schedules such as the Multiple Award Schedule (MAS). Contractors have increased their use of single-purpose entities, such as joint ventures and teaming agreements, in construction contracts with Federal, State and local governments. Federal procurement regulations have been overhauled and consolidated in the Federal Acquisition Regulation (FAR), which contains a subsection on the Davis-Bacon Act and related contract clauses. *See* 48 CFR 22.400 *et seq.* Court and agency administrative decisions have developed and clarified myriad aspects of the laws governing Federal procurement.

During the past 40 years, the Department's DBRA program also has continued to evolve. Where the program initially was focused on individual project-specific wage determinations, contracting agencies now incorporate the Department's general wage determinations for the construction type in the locality in which the construction project is to occur. The program also now uniformly uses wage surveys to develop general wage determinations, eliminating an earlier practice of developing wage determinations based solely on other evidence about the general level of unionization in the targeted area. In a 2006 decision, the Department's Administrative Review Board (ARB) identified several survey-related wage determination procedures then in effect as inconsistent with the regulatory language that had resulted from the 1981–1982 rulemaking. *See Mistick Construction,* ARB No. 04–051, 2006 WL 861357, at *5–7 (Mar. 31, 2006).[7] As a consequence of these developments, the use of averages of wage rates from survey responses has increasingly become the methodology used to issue new wage determinations—notwithstanding the Department's long-held interpretation that the DBA allows the use of such averages only as a methodology of last resort.

The Department has also received significant feedback from stakeholders and others since the last comprehensive rulemaking. In a 2011 report, the Government Accountability Office (GAO) reviewed the Department's wage survey and wage determination process and found that the Department was often behind schedule in completing wage surveys, leading to a backlog of wage determinations and the use of out-of-date wage determinations in some areas.[8] The report also identified dissatisfaction among regulated parties regarding the rigidity of the Department's county-based system for identifying prevailing rates,[9] and missing wage rates requiring an overuse of ''conformances'' for wage rates for specific job classifications.[10] A 2019 report from the Department's Office of the Inspector General (OIG) made similar findings regarding out-of-date wage determinations.[11]

Ensuring that construction workers are paid the wages required under the DBRA also requires effective enforcement in addition to an efficient wage determination process. In the last decade, enforcement efforts at the Department have resulted in the recovery of more than $213 million in back wages for over 84,000 workers.[12] But the Department has also encountered significant enforcement challenges. Among the most critical of these is the omission of DBRA contract clauses from contracts that are clearly covered by the DBRA. In one recent case, a contracting agency agreed with the Department that a blanket purchase agreement (BPA) it had entered into with a contractor had mistakenly omitted the Davis-Bacon clauses and wage determination—but the contracting agency's struggle to rectify the situation led to a delay of 8 years before the workers were paid the wages they were owed.

The Department now seeks to address a number of these outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. In this rulemaking, the Department proposes to update and modernize the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. In some of these revisions, the Department has determined that changes it made in the 1981–1982 rulemaking were mistaken or ultimately resulted in outcomes that are increasingly in tension with the DBA statute itself. In others, the Department seeks to expand further on procedures that were introduced in that last major revision, or to propose new procedures that will increase efficiency of administration of the DBRA and enhance protections for covered construction workers. On all the proposed changes, the Department seeks comment and participation from the many stakeholders in the program.

The proposed rule includes several elements targeted at increasing the amount of information available for wage determinations and speeding up the determination process. In a proposal to amend § 1.3 of the regulations, the Department outlines a new methodology to expressly give the WHD Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied. Such a change would help improve the currentness and accuracy of wage determinations, as many states and localities conduct

[3] *See* 46 FR 41444 (NPRM); 47 FR 23644 (final rule); 48 FR 19532 (revised final rule).

[4] The Department maintains a list of the Related Acts at [cite website address].

[5] These estimates are discussed below in section V (Executive Order 12866, Regulatory Planning and Review et al.).

[6] *See* Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, § 206 (Jan. 27, 2021), available at: *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.*

[7] Decisions of the ARB from 1996 to the present are available on the Department's website at *https://www.dol.gov/agencies/arb/decisions.*

[8] *See* Gov't Accountability Office, GAO–11–152, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey (2011) (2011 GAO Report), at 12–19, available at: *https://www.gao.gov/products/gao-11-152.*

[9] *Id.* at 23–24.

[10] *Id.* at 32–33.

[11] *See* Department of Labor, Office of the Inspector General, Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates (2019) (OIG Report), at 10, available at: *https://www.oversight.gov/sites/default/files/oig-reports/04-19-001-Davis%20Bacon.pdf.*

[12] Gov't Accountability Office, GAO–21–13, Fair Labor Standards Act: Tracking Additional Complaint Data Could Improve DOL's Enforcement (2020) (2020 GAO Report), at 39, available at: *https://www.gao.gov/assets/gao-21-13.pdf.*

surveys more frequently than the Department and have relationships with stakeholders that may facilitate the process and foster more widespread participation. This proposal would also increase efficiency and reduce confusion for the regulated community where projects are covered by both DBRA and local or State prevailing wage laws and contractors are already familiar with complying with the local or State prevailing wage requirement.

The Department also proposes changes, in § 1.2, to the definition of ''prevailing wage,'' and, in § 1.7, to the scope of data considered to identify the prevailing wage in a given area. To address the overuse of weighted average rates, the Department proposes to return to the definition of ''prevailing wage'' in § 1.2 that it used from 1935 to 1983.[13] Currently, a single wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise a weighted average is used. The Department proposes to return instead to the ''three-step'' method that was in effect before 1983. Under that method (also known as the 30-percent rule), in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. The Department also proposes to return to a prior policy on another change made during the 1981–1982 rulemaking related to the delineation of wage survey data submitted for ''metropolitan'' or ''rural'' counties in § 1.7(b). Through this change, the Department seeks to more accurately reflect modern labor force realities, to allow more wage rates to be determined at smaller levels of geographical aggregation, and to increase the sufficiency of data at the statewide level.

Proposed revisions to §§ 1.3 and 5.5 are aimed at reducing the need for the use of ''conformances'' where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome on contracting agencies, contractors, and the Department. The proposed revisions would create a new procedure through which the Department may identify (and list on the wage determination) wage and fringe benefit rates for certain classifications for which WHD received insufficient data through its wage survey program. The procedure should reduce the need for conformances for classifications for which conformances are often required.

The Department also proposes to revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index.[14] The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area.

The Department also seeks to strengthen enforcement in several critical ways. The proposed rule seeks to address the challenges caused by the omission of contract clauses. In a manner similar to its rule under Executive Order 11246 (Equal Employment Opportunity), the Department proposes to designate the DBRA contract clauses in § 5.5(a) and (b), and applicable wage determinations, as effective by ''operation of law'' notwithstanding their mistaken omission from a contract. This proposal is an extension of the retroactive modification procedures that were put into effect in § 1.6 by the 1981–1982 rulemaking, and it promises to expedite enforcement efforts to ensure the timely payment of prevailing wages to all workers who are owed such wages under the relevant statutes.

In addition, the Department proposes to include new anti-retaliation provisions in the Davis-Bacon contract clauses in new paragraphs at §§ 5.5(a)(11) (DBRA) and 5.5(b)(5) (Contract Work Hours and Safety Standards Act), and in a new section of part 5 at § 5.18. The new language is intended to ensure that workers who raise concerns about payment practices or assist agencies or the Department in investigations are protected from termination or other adverse employment actions.

Finally, to reinforce the remedies available when violations are discovered, the Department proposes to clarify and strengthen the cross-withholding procedure for recovering back wages. The proposal does so by including new language in the withholding contract clauses at §§ 5.5(a)(2) (DBRA) and 5.5(b)(3) (Contract Work Hours and Safety Standards Act) to clarify that cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. The proposal also seeks to create a mechanism through which contractors will be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in appropriate circumstances—if, for example, those entities are controlled by the same controlling shareholder or are joint venturers or partners on a Federal contract. The proposed revisions include, as well, a harmonization of the DBA and Related Act debarment standards.

II. Background

A. Statutory and Regulatory History

The Davis-Bacon Act, as enacted in 1931 and subsequently amended, requires the payment of minimum prevailing wages determined by the Department of Labor to laborers and mechanics working on Federal contracts in excess of $2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3141 *et seq.* Congress has also included the Davis-Bacon requirements in numerous other laws, known as the Davis-Bacon Related Acts (the Related Acts and, collectively with the Davis-Bacon Act, the DBRA), which provide Federal assistance for construction projects through grants, loans, loan guarantees, insurance, and other methods. Congress intended the Davis-Bacon Act to ''protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.'' *Coutu,* 450 U.S. at 773 (quoting H. Comm. on Educ. and Lab., Legis. History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962)).

The Copeland Act, enacted in 1934, added the requirement that contractors working on Davis-Bacon projects must submit weekly certified payrolls for work performed on the contract. *See* 40 U.S.C. 3145. The Copeland Act also prohibited contractors from inducing any worker to give up any portion of the wages due to them on such projects. *See* 18 U.S.C. 874. In 1962, Congress passed the Contract Work Hours and Safety Standards Act, which, as amended, requires an overtime payment of additional half-time for hours worked over forty in the workweek by laborers and mechanics, including watchmen and guards, on Federal contracts or federally assisted contracts containing Federal prevailing wage standards. *See* U.S.C. 3701 *et seq.*

As initially enacted, the DBA did not take into consideration the provision of fringe benefits to workers. In 1964, Congress expanded the Act to require the Department to include an analysis of fringe benefits as part of the wage determination process. The amendment

[13] The 1981–1982 rulemaking went into effect on April 29, 1983. 48 FR 19532.

[14] Available at: *https://www.bls.gov/news.release/eci.toc.htm.*

requires contractors and subcontractors to provide fringe benefits (such as vacation pay, sick leave, health insurance, and retirement benefits), or the cash equivalent thereof, to their workers at the level prevailing for the labor classification on projects of a similar character in the locality. *See* Act of July 2, 1964, Public Law 88–349, 78 Stat 238.

Congress has delegated broad rulemaking authority under the DBRA to the Department of Labor. The DBA, as amended, contemplates regulatory and administrative action by the Department to determine the prevailing wages that must be paid and to ''prescribe reasonable regulations'' for contractors and subcontractors. 40 U.S.C. 3142(b); 40 U.S.C. 3145. Congress also, through Reorganization Plan No. 14 of 1950, directed the Department to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 5 U.S.C. app. 1.

The Department promulgated its initial regulations implementing the Act in 1935 and has since periodically revised them. *See* U.S. Department of Labor, Regulations No. 503 (Sept. 30, 1935). In 1938, these initial regulations, which set forth the procedures for the Department to follow in determining prevailing wages, were included in part 1 of Title 29 of the new Code of Federal Regulations. *See* 29 CFR 1.1 *et seq.* (1938). The Department later added regulations to implement the payroll submission and anti-kickback provisions of the Copeland Act—first in part 2 and then relocated to part 3 of Title 29. *See* 6 FR 1210 (Mar. 1, 1941); 7 FR 687 (Feb. 4, 1942); 29 CFR part 2 (1942); 29 CFR part 3 (1943). After Reorganization Plan No. 14 of 1950, the Department issued regulations setting forth procedures for the administration and enforcement of the Davis-Bacon and Related Acts in a new part 5. 16 FR 4430 (May 12, 1951); 29 CFR part 5. The Department made significant revisions to the regulations in 1964, and again in the 1981–1982 rulemaking.[15]

While the Department has made periodic revisions to the regulations in recent years, such as to better protect the personal privacy of workers, 73 FR 77511 (Dec. 19, 2008); to remove references to the ''Employment Standards Administration,'' 82 FR 2225 (Jan. 9, 2017); and to adjust Federal civil money penalties, 81 FR 43450 (July 1, 2016), 83 FR 12 (Jan. 2, 2018), 84 FR 218 (Jan. 23, 2019), the Department has not engaged in a comprehensive review and revision since the 1981–1982 rulemaking.

B. Overview of the Davis-Bacon Program

The Wage and Hour Division (WHD), an agency within the U.S. Department of Labor, administers the Davis-Bacon program for the Department. WHD carries out its responsibilities in partnership with the Federal agencies that enter into direct DBA-covered contracts for construction and/or administer Federal assistance that is covered by the Related Acts to State and local governments and other funding recipients. The State and local governmental agencies and authorities also have important responsibilities in administering Related Act program rules, as they manage programs through which covered funding flows or the agencies themselves directly enter into covered contracts for construction.

The DBRA program includes three basic components in which these government entities have responsibilities: (1) Wage surveys and wage determinations; (2) contract formation and administration; and (3) enforcement and remedies.

1. Wage Surveys and Determinations

The DBA delegates to the Secretary of Labor the responsibility to determine the wage rates that are ''prevailing'' for each classification of covered laborers and mechanics on similar projects ''in the civil subdivision of the State in which the work is to be performed.'' 40 U.S.C. 3142(b). WHD carries out this responsibility for the Department through its wage survey program, and derives the prevailing wage rates from survey information that responding contractors and other interested parties voluntarily provide. The program is carried out in accordance with the program regulations in part 1 of Title 29, *see* 29 CFR 1.1 through 1.7, and its procedures are described in guidance documents such as the ''Davis-Bacon Construction Wage Determinations Manual of Operations'' (1986) (Manual of Operations) and ''Prevailing Wage Resource Book'' (2015) (PWRB).[16] Although part 1 of the regulations provides the authority for WHD to create project-specific wage determinations, such project wage determinations, once more common, now are rarely employed. Instead, nearly all wage determinations are general wage determinations issued for general types of construction (building, residential, highway, and heavy) and applicable to a specific geographic area. General wage determinations can be incorporated into the vast majority of contracts and create uniform application of the DBRA for that area.

2. Contract Formation and Administration

The Federal agencies that enter into DBA-covered contracts or administer Related Act programs have the initial responsibility to determine whether a contract is covered by the DBA or one of the Related Acts and identify the contract clauses and the applicable wage determinations that must be included in the contract. *See* 29 CFR 1.6(b). In addition to the Department's regulations, this process is also guided by parallel regulations in part 22 of the Federal Acquisition Regulation (FAR) for those contracts that are subject to the FAR. *See* 48 CFR part 22. Federal agencies also maintain their own regulations and guidance governing agency-specific aspects of the process. *See, e.g.,* 48 CFR subpart 222.4 (Defense); 48 CFR subpart 622.4 (State); U.S. Department of Housing and Urban Development, HUD Handbook 1344.1, Federal Labor Standards Requirements in Housing and Urban Development Programs (2013).[17]

Where contracting agencies or interested parties have questions about such matters as coverage under the DBRA or the applicability of the appropriate wage determination to a specific contract, they are directed to submit those questions to the Administrator of WHD (the Administrator) for resolution. *See* 29 CFR 5.13. The Administrator provides periodic guidance on this process, as well as other aspects of the DBRA program, to contracting agencies and other interested parties, particularly through All Agency Memoranda (AAMs) and ruling letters. In addition,

[15] *See* 29 FR 13462 (Sept. 30, 1964); 46 FR 41444–70 (NPRM parts 1 and 5) (Aug. 14, 1981); 47 FR 23644–79 (final rule parts 1, 3, and 5) (May 28, 1982). The Department also proposed a significant revision of parts 1 and 5 of the regulations in 1979 and issued a final rule in 1981. *See* 44 FR 77026 (NPRM Part 1); 44 FR 77080 (NPRM part 5); 46 FR 4306 (final rule part 1); 46 FR 4380 (final rule part 5). That 1981 final rule, however, was delayed and subsequently replaced by the 1981–1982 rulemaking. The 1982 final rule was delayed by litigation and re-published with amendments in 1983. 48 FR 19532 (Apr. 29, 1983).

[16] The Manual of Operations is a 1986 guidance document that is still used internally for reference within WHD. The Prevailing Wage Resource Book is a 2015 document that is intended to provide practical information to contracting agencies and other interested parties, and is available at *https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.*

[17] Available at: *https://www.hud.gov/sites/dfiles/OCHCO/documents/Work-Schedule-Request.pdf.*

the Department maintains a guidance document, the Field Operations Handbook (FOH), to provide external and internal guidance for the regulated community and for WHD investigators and staff on contract administration and enforcement policies.[18]

During the administration of a DBRA-covered contract, contractors and subcontractors are required to provide certified payrolls to the contracting agency to demonstrate their compliance with the incorporated wage determinations on a weekly basis. *See generally* 29 CFR part 3. Contracting agencies have the duty to ensure compliance by engaging in periodic audits or investigations of contracts, including examinations of payroll data and confidential interviews with workers. *See* 29 CFR 5.6. Prime contractors have the responsibility for the compliance of all the subcontractors on a covered prime contract. 29 CFR 5.5(a)(6). WHD conducts investigations of covered contracts, which include determining if the DBRA contract clauses or appropriate wage determinations were mistakenly omitted from the contract. *See* 29 CFR 1.6(f). If WHD determines that there was such an omission, it will request that the contracting agency either terminate and resolicit the contract or modify it to incorporate the required clauses or wage determinations retroactively. *Id.*

3. Enforcement and Remedies

In addition to WHD, contracting agencies have enforcement authority under the DBRA. When a contracting agency's investigation reveals underpayments of wages of the DBA or one of the Related Acts, the Federal agency generally is required to provide a report of its investigation to WHD, and to seek to recover the underpayments from the contractor responsible. *See* 29 CFR 5.6(a)(1), 5.7. If violations identified by the contracting agency or by WHD through its own investigation are not promptly remedied, contracting agencies are required to suspend payment on the contract until sufficient funds are withheld to compensate the workers for the underpayments. 29 CFR 5.9. The DBRA contract clauses also provide for ''cross-withholding'' if sufficient funds are no longer available on the contract under which the violations took place. Under this procedure, funds may be withheld from any other covered Federal contract held by the same prime contractor in order to remedy the underpayments on the contract at issue. *See* 29 CFR 5.5(a)(2), (b)(3). Contractors that violate the DBRA may also be subject to debarment from future Federal contracts. *See* 29 CFR 5.12.

Where WHD conducts an investigation and finds that violations have occurred, it will notify the affected prime contractor and subcontractors of the findings of the investigation—including any determination that workers are owed wages and whether there is reasonable cause to believe the contractor may be subject to debarment. *See* 29 CFR 5.11(b). Contractors can request a hearing regarding these findings through the Department's Office of Administrative Law Judges (OALJ) and may appeal any ruling by the OALJ to the Department's Administrative Review Board (ARB). *Id.; see also* 29 CFR parts 6 and 7 (OALJ and ARB rules of practice for Davis-Bacon proceedings). Decisions of the ARB are final agency actions that may be reviewable under the Administrative Procedure Act in Federal district court. *See* 5 U.S.C. 702, 704.[19]

III. Discussion of Proposed Rule

A. Legal Authority

The Davis-Bacon Act, as enacted in 1931 and subsequently amended, requires the payment of certain minimum ''prevailing'' wages determined by the Department of Labor to laborers and mechanics working on Federal contracts in excess of $2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3141 *et seq.* The DBA authorizes the Secretary of Labor to develop a definition for the term ''prevailing'' wage and a methodology for setting it based on similar projects in the civil subdivision of the State in which a covered project will occur. *See* 40 U.S.C. 3142(b); *Bldg. & Constr. Trades' Dep't, AFL–CIO* v. *Donovan,* 712 F.2d 611, 616 (D.C. Cir. 1983).

The Secretary of Labor has the responsibility to ''prescribe reasonable regulations'' for contractors and subcontractors on covered projects. 40 U.S.C. 3145. The Secretary, through Reorganization Plan No. 14 of 1950, also has the responsibility to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts ''[i]n order to assure coordination of administration and consistency of enforcement of the labor standards provisions'' of the DBRA. 5 U.S.C. app. 1.

The Secretary has delegated authority to promulgate these regulations to the Administrator of the WHD and to the Deputy Administrator of the WHD if the Administrator position is vacant. *See* Secretary's Order No. 01–2014, 79 FR 77527 (Dec. 24, 2014); Secretary's Order No. 01–2017, 82 FR 6653 (Jan. 19, 2017).

B. Overview of the Proposed Rule

1. 29 CFR Part 1

The procedural rules providing for the payment of minimum wages, including fringe benefits, to laborers and mechanics engaged in construction activity covered by the Davis-Bacon and Related Acts are set forth in 29 CFR part 1. The regulations in this part also set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits.

i. Section 1.1 Purpose and Scope

The Department proposes technical revisions to § 1.1 to update the statutory reference to the Davis-Bacon Act, now recodified at 40 U.S.C. 3141 *et seq.* The Department also proposes to eliminate outdated references to the Deputy Under Secretary of Labor for Employment Standards at the Employment Standards Administration. The Employment Standards Administration was eliminated as part of an agency reorganization in 2009 and its authorities and responsibilities were devolved into its constituent components, including the WHD. *See* Secretary's Order No. 09–2009 (Nov. 6, 2009), 74 FR 58836 (Nov. 13, 2009), 82 FR 2221 (Jan. 9, 2017). The Department further proposes to revise § 1.1 to reflect the removal of Appendix A of part 1, as discussed further below. The Department also proposes to add new paragraph (a)(1) to reference the WHD website (*https://www.dol.gov/agencies/whd/*government-contracts) on which a listing of laws requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act is currently found.

[18] The Field Operations Handbook reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretive policy. Chapter 15 of the FOH covers the DBRA, including CWHSSA, and is available at *https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15.*

[19] In addition to reviewing liability determinations and debarment, the ARB and the courts also have jurisdiction to review general wage determinations. Judicial review, however, is strictly limited to any procedural irregularities, as there is no jurisdiction to review the substantive correctness of a wage determination under the DBA. *See Binghamton Constr. Co.,* 347 U.S. at 177.

ii. Section 1.2 Definitions

(A) Prevailing Wage

The Department proposes to redefine the term ''prevailing wage'' in § 1.2 to return to the original methodology for determining whether a wage rate is prevailing. This original methodology has been referred to as the ''three-step process.''

Since 1935, the Secretary has interpreted the word ''prevailing'' in the Davis-Bacon Act to be consistent with the common understanding of the term as meaning ''predominant'' or ''most frequent.'' From 1935 until the 1981–1982 rulemaking, the Department employed a three-step process to identify the most frequently used wage rate for each classification of workers in a locality. *See* Regulation 503 section 2 (1935); 47 FR 23644.[20] This three-step process identified as prevailing: (1) Any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then (3) the weighted average rate. The second step is referred to as the ''30-percent rule.''

The three-step process relegated the average rate to a final, fallback method of determining the prevailing wage. In 1962 congressional testimony, Solicitor of Labor Charles Donahue explained the reasoning for this sequence in the determination: An average rate ''does not reflect a true rate which is actually being paid by any group of contractors in the community being surveyed.'' Instead, ''it represents an artificial rate which we create ourselves, and which does not reflect that which a predominant amount of workers are paid.'' [21]

In 1982, the Department published a final rule that amended the definition of ''prevailing wage'' by eliminating the second step in the three-step process—the 30-percent rule. *See* 47 FR 23644. The new process required only two steps: First identifying if there was a single wage rate paid to more than 50 percent of workers, and then, if not, relying on a weighted average of all the wage rates paid. *Id.* at 23644–45.

In eliminating the 30-percent rule, however, the Department did not change its underlying interpretation of the word ''prevailing''—that it means ''the most widely paid rate'' must be the ''definition of first choice'' for the prevailing wage. 47 FR 23645. While the 1982 rule continued to allow the Department to use an average rate as a fallback, the Department rejected commenters' suggestions that the weighted average could be used in all cases. *See* 47 FR 23644–45. As the Department explained, this was because the term ''prevailing'' contemplates that wage determinations mirror, to the extent possible, those rates ''actually paid'' to workers. 47 FR 23645.

This interpretation—that the definition of first choice for the term ''prevailing wage'' should be an actual wage rate that is most widely paid—has now been shared across administrations for over 85 years. In the intervening decades, Congress has amended and expanded the reach of the Act's prevailing wage requirements dozens of times without altering the term ''prevailing'' or the grant of broad authority to the Secretary of Labor to define it.[22] In addition, the question was also reviewed by the Office of Legal Counsel (OLC) at the Department of Justice, which independently reached the same conclusions: ''prevailing wage'' means the current and predominant actual rate paid, and an average rate should only be used as a last resort. *See* 5 Op. O.L.C. at 176–77.[23]

In the 1982 final rule, when the Department eliminated the 30-percent rule, it anticipated that this change would increase the use of artificial average rates. 47 FR 23648–49. Nonetheless, the Department believed a change was preferable because the 30-percent threshold could in some cases not account for up to 70 percent of the remaining workers. *See* 46 FR 41444. The Department also stated that it agreed with the concerns expressed by certain commenters that the 30-percent rule was ''inflationary'' and gave ''undue weight to collectively bargained rates.'' 47 FR 23644–45.

Now, however, after reviewing the development of the Davis-Bacon Act program since the 1981–1982 rulemaking, the Department concludes that eliminating the 30-percent rule ultimately resulted in an overuse of average rates. On paper, the weighted average remains the fallback method to be used only when there is no majority rate. In practice, though, it has become a central mechanism to set the prevailing wage rates included in Davis-Bacon wage determinations and covered contracts.

Prior to the 1982 rule change, the use of averages was relatively rare. In a Ford Administration study of Davis-Bacon Act prevailing wage rates in commercial-type construction in 19 cities, none of the rates were based on averages because all of the wage rates were ''negotiated'' rates, *i.e.,* based on CBAs that represented a predominant wage rate in the locality.[24] The Department estimates that prior to the 1982 final rule, as low as 15 percent of classification rates across all wage determinations were based on averages. After the 1982 rule was implemented, the use of averages may have initially increased to approximately 26 percent of all wage determinations.[25]

The Department's current use of weighted averages is now significantly higher than this 26 percent figure. To analyze the current use of weighted averages and the potential impacts of this rulemaking, the Department compiled data for select classifications for 17 recent wage surveys—nearly all of the completed surveys that WHD began in 2015 or later. The data show that the Department's reliance on average rates has increased significantly, and now accounts for 64 percent of the observed classification determinations in this recent time period.[26]

The Department believes that such an overuse of weighted averages is

[20] Implemented Apr. 29, 1983. *See* 48 FR 19532.

[21] *Administration of the Davis Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. and Lab.,* 87th Cong. 811–12 (1962) (testimony of Charles Donahue, Solicitor of Labor).

[22] *See, e.g.,* Act of Mar. 23, 1941, ch. 26, 55 Stat. 53 (1941) (applying the Act to alternative contract types); Contract Work Hours and Safety Standards Act of 1962, Public Law 87–581, 76 Stat. 357 (1962) (requiring payment of overtime on contracts covered by the Act); Act of July 2, 1964, Public Law 88–349, 78 Stat. 238 (1964) (extending the Act to cover fringe benefits); 29 CFR 5.1 (referencing 57 Related Acts into which Congress incorporated Davis-Bacon Act requirements between 1935 and 1978).

[23] *See* note 1, *supra.*

[24] *See* Robert S. Goldfarb & John F. Morrall, ''An Analysis of Certain Aspects of the Administration of the Davis-Bacon Act,'' Council on Wage and Price Stability (May 1976), reprinted in Bureau of Nat'l Affs., *Construction Labor Report,* No. 1079, D–1, D–2 (1976).

[25] *See Oversight Hearing on the Davis-Bacon Act, Before the Subcomm. on Lab. Standards of the H. Comm. on Educ. and Lab.,* 96th Cong. 58 (1979) (statement of Ray Marshall, Secretary of Labor) (discussing study of 1978 determinations showing only 24 percent of classification rates were based on the 30-percent rule); Jerome Staller, ''Communications to the Editor,'' *Policy Analysis,* Vol. 5, No. 3 (Summer 1979), pp. 397–98 (noting that 60 percent of determinations in the internal Department 1976 and 1978 studies were based on the 30-percent rule or the average-rate rule). The authors of the Council on Wage and Price Stability study, however, pointed out that the Department's figures were for rates that had been based on survey data, while 57 percent of rates in the mid-1970's were based solely on CBAs without the use of surveys (a practice that the Department no longer uses to determine new rates). *See* Robert S. Goldfarb & John F. Morrall II., ''The Davis-Bacon Act: An Appraisal of Recent Studies,'' 34 Indus. & Lab. Rel. Rev. 191, 199–200 & n.35 (1981). Thus, the actual percentage of annual classification determinations that were based on average rule before 1982 may have been as low as 15 percent, and the percent based on the average rule after 1982 would have been expected to be around 26 percent.

[26] *See* below section V (Executive Order 12866, Regulatory Planning and Review et al.).

inconsistent with both the text and the purpose of the Act. It is inconsistent with the Department's longstanding interpretation of Congress's use of the word ''prevailing'' in the text of the Act—including the Department's statements in the preamble to the 1982 rule itself that the definition of first choice for the ''prevailing'' wage should be the most widely paid rate that is actually paid to workers in the relevant locality. If nearly two-thirds of rates that are now being published based on recent surveys are based on a weighted average, it is no longer fair to say that it is a fallback method of determining the prevailing wage.

The use of averages as the dominant methodology for issuing wage determinations is also inconsistent with the recognized purpose of the Act ''to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.'' *Coutu,* 450 U.S. at 773 (internal quotation marks and citation omitted). Using an average to determine the minimum wage rate on contracts allows a single low-wage contractor in the area to depress wage rates on Federal contracts below the higher rate that may be generally more prevalent in the community—by factoring into (and lowering) the calculation of the average that is used to set the minimum wage rates on local Federal contracts.[27]

To address the increasing tension between the current methodology and the purpose and definition of ''prevailing,'' the Department proposes to return to the original three-step process. The Department expects that re-introducing the 30-percent rule will reduce the use of average rates roughly by half—from 63 percent to 31 percent. The data from the regulatory impact analysis included with this NPRM below in section V suggests that returning to the three-step process will continue to result in 36 percent of prevailing wage rates based on the majority rule, with the balance of 33 percent based on the 30-percent rule, and 31 percent based on the weighted average.

This estimated distribution illustrates why the Department is no longer persuaded, as it stated in the 1981 NPRM, that the majority rule is more appropriate than the three-step process (including the 30-percent rule) because the 30-percent rule ''ignores the rate paid to up to 70 percent of the workers.'' *See* 46 FR 41444.[28] That characterization ignores that the first step in the three-step process is still to adopt the majority rate if there is one. Under both the three-step process and the current majority rule, any wage rate that is paid to a majority of workers would be identified as prevailing. Under either method, the weighted average will be used whenever there is no wage rate that is paid to more than 30 percent of employees in the survey response.

The difference between the majority and the three-step methodologies is solely in how a wage rate is determined when there is no majority, but there is a significant plurality wage rate paid to between 30 and 50 percent of workers. In that circumstance, the current ''majority'' rule uses averages instead of the rate that is actually paid to that significant plurality of the survey population. This is true, for example, even where the same wage rate is paid to 45 percent of workers and no other rate is paid to as high a percentage of workers. In such circumstances, the Department believes that a wage rate paid to between 30 and 50 percent of workers is clearly more of a ''prevailing'' wage rate than an average.

The Department has also considered the other explanations it provided in 1982 for eliminating the 30-percent rule, including any possible upward pressure on wages or prices and a perceived ''undue weight'' given to collectively bargained rates. These explanations are no longer persuasive for two fundamental reasons. First, the concerns appear to be unrelated to the text of the statute, and, if anything, contrary to its legislative purpose. Second, the Department's estimates of the effects of a return to the 30-percent rule suggest that the concerns are misplaced.

The concerns about inflation at the time of the 1982 rule were based in part on a criticism of the Act itself.[29] A fundamental purpose of the Davis-Bacon Act was to limit low-bid contractors from depressing local wage rates. *See* 5 U.S. O.L.C. at 176.[30] This purpose necessarily contemplates an increase in wage rates over what could otherwise be paid without the enactment of the statute. Moreover, the effect of maintaining such a prevailing rate can just as easily be seen as guarding against deflationary effects of the use of low-wage contractors—instead of resulting in inflation. Staff of the H. Subcomm. on Lab., 88th Cong., Administration of the Davis-Bacon Act, Rep. of the Subcomm. on Lab. of the Comm. on Educ. and Lab. (Comm. Print 1963) (1963 House Committee Report), at 2–3.

The 1982 final rule contained an economic analysis that suggested that the elimination of the 30-percent rule could save $120 million (in 1982 dollars) in construction costs per year through reduced contract costs. However, the Department does not believe that this 40-year old analysis is reliable or accurate.[31] For example, the analysis did not consider labor market forces that could prevent contractors from lowering wage rates in the short run. The analysis also did not attempt to address productivity losses or other costs of setting a lower minimum wage. For these reasons, the Department does not believe that the analysis in the 1982 final rule implies that the current proposed reversion to the 30-percent rule would have a significant impact on

[27] For example, the 2001 wage determination for electricians in Eddy County, New Mexico was an average rate based on responses that included lower-paid workers that had been brought in from Texas by a Texas electrical contractor to work on a single job. As the ARB noted in reviewing a challenge to the wage determination, the result was that ''contract labor from Texas, where wages reportedly are lower, effectively has determined the prevailing wage for electricians in this New Mexico county.'' *New Mexico Nat. Elec. Contractors Ass'n,* ARB No. 03–020, 2004 WL 1261216, at * 8 (May 28, 2004).

[28] The 30-percent rule can only be characterized as ''ignoring'' rates because it is a rule that applies a mathematical ''mode,'' in which the only relevant value is the value of the number that appears most frequently—instead of a mean (average), in which the values of all the numbers are averaged together. Both the 30-percent rule and the majority rule are modal rules in which the values of the non-prevailing wage rates do not factor into the final analysis.

[29] The GAO issued a report in 1979 urging Congress to repeal the Act because of ''inflationary'' concerns. *See* Gov't Accountability Office, HRD–79–18, The Davis Bacon Act Should be Repealed, (1979) (1979 GAO Report). Available at: *https://www.gao.gov/assets/hrd-79-18.pdf.* The report argued that even using only weighted averages for prevailing rates would be inflationary because they could increase the minimum wage paid on contracts and therefore result in wages that were higher than they otherwise would be. The House Subcommittee on Labor Standards reviewed the report during oversight hearings in 1979, but Congress did not amend or repeal the Act, and instead continued to expand its reach. *See, e.g.,* Cranston-Gonzalez National Affordable Housing Act, Public Law 101–625, Sec. 811(j)(6), 104 Stat. 4329 (1990); Energy Independence and Security Act of 2007, Public Law. No, 110–140, Sec. 491(d), 121 Stat. 1651 (2007); American Recovery and Reinvestment Act, Public Law 111–5, Sec. 1606, 123 Stat. 303 (2009); Consolidated Appropriations Act of 2021, Public Law 116–260, Sec. 9006(b), 134 Stat. 1182 (2021).

[30] *See* note 1, *supra.*

[31] The Department has not attempted to assess the relative accuracy of this estimate over the decades, which would be challenging given the dynamic nature of the construction industry and the relatively small impact of even $120 million in savings. The Department at the time acknowledged that its estimate had been heavily criticized by commenters and was only a ''best guess''—in part because it could not foresee how close a correlation there would be between the wage rates that are actually paid on covered contracts and the wage determinations that set the Davis-Bacon minimum wages. 47 FR 23648.

contract costs. Even if the Department were to rely on this analysis as an accurate measure of impact, such savings (adjusted to 2019 dollars) would only amount to approximately two-tenths of a percent of total estimated covered contract costs.

The Department also does not believe that the proposed reversion to the 30-percent rule would have any noticeable impact on overall national inflation numbers.[32] An illustrative analysis in section V.D. shows returning to the 30-percent rule will significantly reduce the reliance on the weighted average method to produce prevailing wage rates. Under the 30-percent rule, some prevailing wage determinations may increase and others decrease, but the magnitude of these changes will, overall, be negligible. Additionally, recent research shows that wage increases, particularly at the lower end of the distribution, do not cause significant economy-wide price increases.[33] The Department thus does not believe that any limited net wage increase for the approximately 1.2 million covered workers (less than 1 percent of the total national workforce) will significantly increase prices or have any appreciable effect on the macro economy.

Further, since the DBA legislates that minimum wages must be paid to workers on construction projects, the effect of such requirement is not a permissible basis for departing from the longstanding interpretation of the plain meaning of the term ''prevailing.'' The ''basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase costs to the [F]ederal [G]overnment.'' *Bldg. & Constr. Trades Dep't, AFL–CIO* v. *Donovan,* 543 F. Supp. 1282, 1290 (D.D.C. 1982). Congress has considered cost concerns, and enacted and expanded the DBA notwithstanding them. *Id.* at 1290–91; 1963 House Committee Report at 2–3; Reorganization Plan No. 14 of 1950, 5 U.S.C. app. 1.[34] Thus, even if concerns about an inflationary effect on government contract costs or speculative effects on the national macro economy were used to justify eliminating the 30-percent rule, the Department does not believe such reasoning now provides either a factual or legal basis to maintain the current majority rule.

The Department is also no longer persuaded that the 30-percent rule gives undue weight to collectively bargained rates. The underlying concern at the time was that identification of a single prevailing wage could give more weight to union rates that more often tend to be the same across companies. If this occurs, however, it is a function of the plain meaning of the statutory term ''prevailing,'' which, as both the Department and OLC have concluded, refers to a predominant single wage rate, or a modal wage rate. The same weight is given to collectively bargained rates whether the Department chooses a 50-percent or 30-percent threshold. The Department accordingly now understands the concerns voiced at the time to be concerns about the potential outcome (of more wage determinations based on union rates) instead of concerns about any actual weight given to union rates by the choice of the modal threshold. To choose a threshold because the outcome would be more beneficial to non-union contractors—as the Department seems to have suggested it was doing in 1982—does not have any basis in the statute. *Donovan,* 543 F. Supp. at 1291, n.16 (noting that the Secretary's concern about weight to collectively bargained rates ''bear[s] no relationship to the purposes of the statute'').

Regardless, the Department's regulatory impact analysis does not suggest that a return to the 30-percent rule would give undue weight to collectively bargained rates. Among a sample of rates considered in an illustrative analysis, one-third of all rates (or about half of rates currently established based on weighted averages) would shift to a different method. Among these rates that would be set based on a new method, the majority would be based on non-collectively bargained rates. Specifically, in the V.D. illustration, Department estimates that the use of single wage rates that are not the product of collective bargaining agreements would increase from 12 percent to 36 percent of all wage rates—an overall increase of 24 percentage points. The use of single wage rates that are based on collective bargaining agreements will increase from 25 percent to 34 percent—an overall increase of 9 percentage points.[35]

The Department has also considered, but decided against, proposing to use the median wage rate as the ''prevailing'' rate. The median, like the average (mean), is a number that can be unrelated to the wage rate paid with the greatest frequency to employees working in the locality. Using either the median or the average as the primary method of determining the prevailing rate is not consistent with the meaning of the term ''prevailing.'' *Accord* 47 FR 23645. The Department is therefore proposing to return to the three-step process and the 30-percent rule, and is not proposing as alternatives the use of either the median or mean as the primary or sole methods for making wage determinations.

(1) Former Subsection § 1.2(a)(2)

In a non-substantive change, the Department proposes to move the language currently at § 1.2(a)(2) that explains the interaction between the definition of prevailing wage and the sources of information in § 1.3. Under the proposed rule, that language (altered to update the cross-reference to the definition of prevailing wage) would now appear in § 1.3.

[32] The 1979 GAO report about the DBA noted that ''minimum wage rates [such as the Davis-Bacon Act prevailing wage requirements] tend to have an inflationary effect on . . . the national economy as a whole.'' 1979 GAO Report, HRD–79–18 at 76, 83–84.

[33] *See, e.g.,* J.P. Morgan, Why Higher Wages Don't Always Lead to Inflation (Feb. 7, 2018), available at: *https://www.jpmorgan.com/commercial-banking/insights/higher-wages-inflation;* Daniel MacDonald & Eric Nilsson, The Effects of Increasing the Minimum Wage on Prices: Analyzing the Incidence of Policy Design and Context, Upjohn Institute working paper; 16–260 (June 2016), available at *https://research.upjohn.org/up_workingpapers/260/;* Nguyen Viet Cuong, Do Minimum Wage Increases Cause Inflation? Evidence from Vietnam, ASEAN Economic Bulletin Vol. 28, No. 3 (2011), pp. 337–59, available at: *https://www.jstor.org/stable/41445397;* Magnus Jonsson & Stefan Palmqvist, Do Higher Wages Cause Inflation?, Sveriges Riksbank Working Paper Series 159 (Apr. 2004), available at: *http://archive.riksbank.se/Upload/WorkingPapers/WP_159.pdf;* Kenneth M. Emery & Chih-Ping Chang, Do Wages Help Predict Inflation?, Federal Reserve Bank of Dallas, Economic Review First Quarter 1996 (1996), available at: *https://www.dallasfed.org/~/media/documents/research/er/1996/er9601a.pdf.*

[34] In his message accompanying Reorganization Plan No. 14, President Truman noted that ''[s]ince the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' 5 U.S.C. app. 1.

[35] *See* below section V (Executive Order 12866, Regulatory Planning and Review et al.). As discussed in the regulatory impact analysis, the Department found that fringe benefits currently do not prevail in slightly over half of the classification-county observations it reviewed—resulting in no required fringe benefit rate for that classification. This would be largely unchanged under the proposed reversion to the 3-step process, with nearly half of classification rates still not requiring the payment of fringe benefits. Only about 13 percent of fringe rates would shift from no fringes or an average rate to a modal prevailing fringe rate. Overall under the estimate, the percentage of fringe benefit rates based on collective bargaining agreements would increase from 25 percent to 34 percent. The percentage of fringe benefit rates not based on collective bargaining rates would increase from 3 percent to 7 percent.

(2) Variable Rates That Are Functionally Equivalent

The Department also proposes to amend the regulations on compiling wage rate information at § 1.3 to allow for variable rates that are functionally equivalent to be counted together for the purpose of determining whether a single wage rate prevails under the proposed definition of ''prevailing wage'' in § 1.2. The Department generally followed this proposed approach until after the 2006 decision of the ARB in *Mistick Construction.* 2006 WL 861357.

Historically, the Department has considered wage rates included in survey data that may not be exactly the same to be functionally equivalent—and therefore counted as the same—as long as there was an underlying logic that explained the difference between them. For example, some workers may perform work under the same labor classification for the same contractor or under the same collective bargaining agreement (CBA) on projects in the same geographical area being surveyed and get paid different wages based on the time of day that they performed work—*e.g.,* a ''night premium.'' In that circumstance, the Department would count the normal and night-premium wage rates to be the ''same wage'' rate for purposes of calculating whether that wage rate prevailed under the majority rule that is discussed in the section above. Similarly, where workers in the same labor classification were paid different ''zone rates'' for work on projects in different zones covered by the same CBA, the Department considered those rates as compensating workers for the burden of traveling or staying away from home and did not reflect fundamentally different underlying wage rates for the work actually completed. Variable zone rates would therefore be considered the ''same wage'' for the purpose of determining the prevailing wage rate.

In another example, the Department took into consideration ''escalator clauses'' in CBAs that may have increased wage rates across the board at some point during the survey period. Wages for workers working under the same CBA could be reported differently on a survey based on the week their employer used in responding to the wage survey rather than an actual difference in prevailing wages. The Department has historically treated such variable rates the same for the purposes of determining the prevailing wages paid to laborers or mechanics in the survey area. The Department has also considered wage rates to be the same where workers made the same combination of basic hourly rates and fringe rates, even if the basic hourly rates (and also the fringe rates) differed slightly.

In these circumstances, where the Department has treated certain variable rates as the same, it has generally chosen one of the variable rates to use as the prevailing rate. In the case of rates that are variable because of an escalator-clause issue, it uses the most current rate under the collective bargaining agreement. Similarly, where the Department identified combinations of hourly and fringe rates as the ''same,'' the Department identified one specific hourly rate and one specific fringe rate that prevailed, following the guidelines in 29 CFR 5.24, 5.25, and 5.30.

In 2006, the ARB strictly interpreted the regulatory language of § 1.2(a) in a way that has limited some of these practices. *See Mistick Constr.,* 2006 WL 861357, at *5–7. The decision affirmed the Administrator's continued use of the escalator-clause rule, but found the use of the same combination of basic hourly and fringe rates did not amount to exactly the ''same'' wage and thus violated the use of the term ''same wage'' in § 1.2(a). The ARB also viewed the flexibility shown to collective bargaining agreements as inconsistent with the ''purpose'' of the 1982 final rule, which the Administrator had explained was in part to avoid giving ''undue weight'' to collectively bargained rates. The ARB held that the Administrator could not consider variable rates under a collective bargaining agreement to be the ''same wage'' under § 1.2(a) as written—and therefore, if there was no strictly ''same wage'' that would prevail under the majority rule, the Administrator would have to use the fallback weighted average on the wage determination.

The ARB's conclusion in *Mistick*—particularly its determination that even wage data reflecting the same aggregate compensation but slight variations in the basic hourly rate and fringe benefit rates did not reflect the ''same wage'' as that term was used under the current regulations—could be construed as a determination that wage rates need to be identical ''to the penny'' in order to be regarded as the ''same wage,'' and that nearly any variation in wage rates, no matter how small and regardless of the reason for the variation, might need to be regarded as reflecting different, unique wage rates.

The ARB's decision in *Mistick* limited the Administrator's methodology for determining a prevailing rate, thus contributing to the increased use of weighted average rates. As noted above, however, both the Department and OLC have agreed that averages should generally only be used as a last resort. As the OLC opinion noted, the use of an average is difficult to justify ''particularly in cases where it coincides with *none* of the actual wage rates being paid.'' 5 Op. O.L.C. at 177 (emphasis in original).[36] In discussing those cases, OLC quoted from the 1963 House Report summarizing extensive congressional oversight hearings of the Act. The report had concluded that ''[u]se of an average rate would be artificial in that it would not reflect the actual wages being paid in a local community,'' and ''such a method would be disruptive of local wage standards if it were utilized with any great frequency.'' *Id.*[37] To the extent that an inflexible, ''to the penny'' approach to determining if wage data reflects the ''same wage'' promotes the use of average rates even when wage rate variations are exceedingly slight and are based on practices reflecting that the rates, while not identical, are functionally equivalent, such an approach would be inconsistent with these authorities and the statutory purpose they reflect.

For these reasons, and particularly because a mechanical, ''to the penny'' approach ultimately undermines rather than promotes the determination of actual prevailing wage rates, the Department believes that it is consistent with the language and purpose of the statute to treat slight variations in wages as the same rate in appropriate circumstances.

As reflected in *Mistick,* the existing regulation does not clearly authorize the use of functionally equivalent wages to determine the local prevailing wage. *See* 2006 WL 861357, at *5–7. Accordingly, the Department proposes to amend § 1.3 to include a new paragraph at § 1.3(e) that would permit the Administrator to count wage rates together—for the purpose of determining the prevailing wage—if the rates are functionally equivalent and the variation can be explained by a CBA or the written policy of a contractor.

Such flexibility would not be unlimited. Some variations within the same CBA clearly amount to different rates. For example, when a CBA authorizes the use of ''market recovery rates'' that are lower than the standard rate in order to win a bid, under certain circumstances those rates may not be appropriate to combine together with the CBA's standard rate as ''functionally equivalent'' because frequent use of such a rate could suggest (though does

[36] *See* note 1, *supra.*

[37] *See* 1963 House Committee Report, *supra,* at 7–8.

not necessarily compel) a conclusion that the CBA's regular rate may not be prevailing in the area.

The Department welcomes comments on all aspects of this proposal regarding proposed changes to the definition of ''prevailing wage'' in § 1.2 and to the regulation governing the obtaining and compiling of wage rate information in § 1.3.

(B) Area

The core definition of ''area'' in § 1.2 largely reproduces the specification in the Davis-Bacon Act statute, prior to its 2002 re-codification, that the prevailing wage should be based on projects of a similar character in the ''city, town, village, or other civil subdivision of the State in which the work is to be performed.'' *See* 40 U.S.C. 276a(a) (2002).

The rule's geography-based definition of area applies to federally assisted projects covered by the Davis-Bacon Related Acts as well as projects covered by the DBA itself. Some of the Related Acts have used different terminology to identify the appropriate ''area'' for a wage determination, including the terms ''locality'' and ''immediate locality.'' [38] However, the Department has long concluded that these terms are best interpreted and applied consistent with the methodology for determining the area under the original DBA. *See Virginia Segment C–7, METRO,* WAB 71–4, 1971 WL 17609, at *3–4 (Dec. 7, 1971).[39]

The Department proposes to revise the definition of area to address projects that span multiple counties and to address highway projects specifically. Under WHD's current methodology, if a project spans more than one county, the contracting officer is instructed to attach wage determinations for each county to the project and contractors may be required to pay differing wage rates to the same employees when their work crosses county lines. This policy was reinforced in 1971 when the Wage Appeals Board (WAB) found that, under the terms of the then-applicable regulations, there was no basis to provide a single prevailing wage rate for a project occurring in Virginia, the District of Columbia, and Maryland. *See Virginia Segment C–7, METRO,* 1971 WL 17609.

Critics of this policy have pointed out that workers are very often hired and paid a single wage rate for a project, and—unless there are different city or county minimum wage laws—workers' pay rates often do not change as they move between tasks in different counties. The 2011 report by the GAO, for example, quoted a statement from a contractor association representative that requiring different wage rates for the same workers on the same multi-county project is ''illogical.'' *See* 2011 GAO Report at 24.[40]

While requiring different prevailing wage rates for work by the same worker on the same project may be consistent with the current regulations, the DBA and Related Act statutes themselves do not address multi-jurisdictional projects. Issuing and applying a single project wage determination for such projects is not inconsistent with the text of the DBA. Nor is it inconsistent with the purpose of the DBA, which is to protect against the depression of local wage rates caused by competition from low-bid contractors from outside of the locality.

Accordingly, the Department proposes adding language in the definition of ''area'' in § 1.2 that would expressly authorize WHD to issue project wage determinations with a single rate for each classification, using data from all of the relevant counties in which a project will occur. The Department solicits comments on whether this procedure should be mandatory for multi-jurisdictional projects or available at the request of the contracting agency or an interested party, if WHD determines that such a project wage determination would be appropriate.

The Department's other proposed change to the definition of ''area'' in § 1.2 is to allow the use of State highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects. Although there is significant variation between states, most states maintain civil subdivisions responsible for certain aspects of transportation planning, financing, and maintenance.[41] These districts tend to be organized within State departments of transportation or otherwise through State and County governments.

Using State highway districts as a geographic unit for wage determinations would be consistent with the Davis-Bacon Act's specification that wage determinations should be tied to a ''civil subdivision of a State.'' State highway districts were considered to be ''subdivisions of a State'' at the time the term was used in the original Davis-Bacon Act. *See Wight* v. *Police Jury of Par. of Avoyelles, La.,* 264 F. 705, 709 (5th Cir. 1919) (describing the creation of highway districts as ''governmental subdivisions of the [S]tate'').

In identifying the appropriate geographic area of a wage determination, the Federal-Aid Highway Act of 1956 (FAHA), one of the Related Acts, uses the term ''immediate locality'' instead of ''civil subdivision.'' 23 U.S.C. 113. However, the FAHA requires the application of prevailing wage rates in the immediate locality to be ''in accordance with'' the DBA, *id.,* and, as noted above, WHD has long applied these alternative definitions of area in the Related Acts in a manner consistent with the ''civil subdivision'' language in the original Act.

The Department also notes that Congress, in enacting the FAHA, envisioned that the Federal aid would be provided in a manner that sought to complement and cooperate with State departments of transportation. *See Frank Bros.* v. *Wisconsin Dep't of Transp.,* 409 F.3d 880, 887–89 (7th Cir. 2005). As State highway or transportation districts often plan, develop, and oversee federally financed highway projects, the provision of a single wage determination for each district would simplify the procedure for incorporating Federal financing into these projects.

As such, the Department proposes to authorize WHD to adopt State highway districts as the geographic area for determining prevailing wages on highway projects, where appropriate.

(C) Type of Construction (or Construction Type)

The Department proposes to define ''type of construction'' or ''construction type'' to mean the general category of construction as established by the Administrator for the publication of general wage determinations. The proposed language also provides examples of types of construction,

[38] *See, e.g.,* National Housing Act, 12 U.S.C. 1715c(a) (locality); Housing and Community Development Act of 1974, 42 U.S.C. 1440(g), 5310(a) (locality); Federal Water Pollution Control Act, 33 U.S.C. 1372 (immediate locality); Federal-Aid Highway Acts, 23 U.S.C. 113(a) (immediate locality).

[39] The Wage Appeals Board (WAB) was the Department's administrative appellate entity from 1964 until 1996, when it was eliminated and the Administrative Review Board was created and provided jurisdiction over appeals from decisions of the Administrator and the Department's Administrative Law Judges (ALJs) under a number of statutes, including the Davis-Bacon and Related Acts. 61 FR 19978 (May 3, 1996). WAB decisions from 1964 to 1996 are available on the Department's website at *https://www.dol.gov/agencies/oalj/public/dba_sca/references/caselists/wablist.*

[40] *See* note 8, *supra.*

[41] *See generally* Am. Assoc. of State Highway and Transp. Offs., Transportation Governance and Financing: A 50-State Review of State Legislatures and Departments of Transportation (2016), available at: *https://www.financingtransportation.org/pdf/50_state_review_nov16.pdf.*

including building, residential, heavy, and highway, consistent with the four construction types the Department currently uses in general wage determinations, but does not exclude the possibility of other types. The terms ''type of construction'' or ''construction type'' are already used elsewhere in part 1 to refer to these general categories of construction, as well as in wage determinations themselves. As used in this part, the terms ''type of construction'' and ''construction type'' are synonymous and interchangeable. The Department believes that including this definition would provide additional clarity for these references, particularly for members of the regulated community who might be less familiar with the term.

(D) Other Definitions

The Department proposes additional conforming edits to 29 CFR 1.2 in light of proposed changes to 29 CFR 5.2. As part of these conforming edits, the Department proposes to revise the definition of ''agency'' (and add a sub-definition of ''Federal agency'') to mirror the definition proposed and discussed below in § 5.2. The Department also proposes to add to § 1.2 new defined terms also proposed in parts 3 and 5, including ''employed'', ''type of construction (or construction type),'' and ''United States or the District of Columbia.'' For further discussion on these proposed terms, see the corresponding discussion in § 3.2 and 5.2 below.

(E) Paragraph Designations

The Department is also proposing to amend §§ 1.2, 3.2, and 5.2 to remove paragraph designations of defined terms and instead to list defined terms in alphabetical order. The Department proposes to make conforming edits throughout parts 1, 3, and 5 in any provisions that currently reference lettered paragraph definitions.

iii. Section 1.3 Obtaining and Compiling Wage Rate Information

(A) 29 CFR 1.3(b)

The Department proposes to switch the order of § 1.3(b)(4) and (5) for clarity. This nonsubstantive change would simply group together the subparagraphs in § 1.3(b) that apply to wage determinations generally, and follow those subparagraphs with one that applies only to Federal-aid highway projects under 23 U.S.C. 113.

(B) 29 CFR 1.3(d)

As part of its effort to modernize the regulations governing the determination of Davis-Bacon prevailing wage rates, the Department is considering whether to revise § 1.3(d), regarding when survey data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements (hereinafter ''Federal project data'') may be used in determining prevailing wages for building and residential construction wage determinations. The Department is not proposing any specific revisions to § 1.3(d) in this NPRM, but rather is seeking comment on whether this regulatory provision—particularly its limitation on the use of Federal project data in determining wage rates for building and residential construction projects—should be revised.

For approximately 50 years (beginning shortly after the DBA was enacted in 1931 and continuing until the 1981–1982 rulemaking), the Department used Federal project data in determining prevailing wage rates for all categories of construction, including building and residential construction. The final rule promulgated in May 1982 codified this practice with respect to heavy and highway construction, providing in new § 1.3(d) that ''[d]ata from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.'' [42] The Department explained that ''it would not be practical to determine prevailing wages for 'heavy' and 'highway' construction projects if Davis-Bacon covered projects are excluded in making wage surveys because such a large portion of those types of construction receive Federal financing.'' [43]

With respect to building and residential construction, however, the 1982 final rule concluded that such construction often occurred without Federal financial assistance subject to Davis-Bacon prevailing wage requirements, and that to invariably include Federal project data in calculating prevailing wage rates applicable to building and residential construction projects therefore would ''skew[ ] the results upward,'' contrary to congressional intent.[44] The final rule therefore provided in § 1.3(d) that ''in compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.'' 29 CFR 1.3(d). In subsequent litigation, the D.C. Circuit upheld § 1.3(d)'s limitation on the use of Federal project data as consistent with the DBA's purpose and legislative history—if not necessarily its plain text—and therefore a valid exercise of the Administrator's broad discretion to administer the Act.[45]

As a result of § 1.3(d)'s limitation on the use of Federal project data in calculating prevailing wage rates applicable to building and residential construction, WHD first attempts to calculate a prevailing wage based on non-Federal project survey data at the county level—*i.e.,* survey data that includes data from private projects or projects funded by State and local governments without assistance under the DBRA, but excludes data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements. *See* 29 CFR 1.3(d), 1.7(a); Manual of Operations at 38; *Coal. for Chesapeake Hous. Dev.,* ARB No. 12–010, 2013 WL 5872049, at *4 (Sept. 25, 2013) (*Chesapeake Housing*). If there is insufficient non-Federal project survey data for a particular classification in that county, then WHD considers survey data from Federal projects in the county if such data is available.

Under the current regulations, WHD expands the geographic scope of data that it considers when it is making a county wage determination when data is insufficient at the county level. This procedure is described below in the discussion of the ''scope of consideration'' regulation at § 1.7. For wage determinations for federally funded building and residential construction projects, WHD currently integrates Federal project data into this procedure at each level of geographic aggregation in the same manner it is integrated at the county level: If the combined Federal and non-Federal survey data received from a particular county is insufficient to establish a prevailing wage rate for a classification in a county, then WHD attempts to calculate a prevailing wage rate for that county based on non-Federal wage data from a group of surrounding counties. *See* 29 CFR 1.7(a), (b). If non-Federal project survey data from the surrounding-county group is insufficient, then WHD includes Federal project data from all the counties in that county group. If both non-Federal project and Federal project data for a surrounding-county group is still insufficient to determine a prevailing wage rate, then, for classifications that have been designated as ''key''

[42] *See* Final Rule, Procedures for Predetermination of Wage Rates, 47 FR 23644 (May 28, 1982).

[43] *Id.*

[44] *See Donovan,* 712 F.2d at 620.

[45] *Id.* at 621–22.

classifications, WHD may expand to a ''super group'' of counties or even to the statewide level. *See Chesapeake Housing,* 2013 WL 5872049, at *6; PWRB, Davis-Bacon Surveys, at 6.[46] At each stage of data expansion for building and residential wage determinations, WHD first attempts to determine prevailing wages based on non-Federal project data; however, if there is insufficient non-Federal data, WHD will consider Federal project data.

As reflected in the plain language of § 1.3(d) as well as WHD's implementation of that regulatory provision, the current formulation of § 1.3(d) does not prohibit all uses of Federal project data in establishing prevailing wage rates for building and residential construction projects subject to Davis-Bacon requirements; rather it limits the use of such data to circumstances where ''there is insufficient wage data to determine the prevailing wages in the absence of such data.'' 29 CFR 1.3(d). WHD often uses Federal project data in calculating prevailing wage rates applicable to residential construction due to insufficient non-Federal project survey data submissions. By contrast, because WHD's surveys of building construction typically have a higher participation rate than residential surveys, WHD uses Federal project data less frequently in calculating prevailing wage rates applicable to building construction projects covered by the DBRA. For example, the 2011 GAO Report analyzed 4 DBA surveys and found that over two-thirds of the residential rates for 16 key job classifications (such as carpenter and common laborer) included Federal project data because there was insufficient non-Federal project data, while only about one-quarter of the building wage rates for key classifications included Federal project data. 2011 GAO Report, at 26.[47]

Notwithstanding the use of Federal project data in calculating prevailing wage rates for building and residential construction, the Department recognizes that some interested parties may believe that § 1.3(d) imposes an absolute barrier to the use of Federal project data in determining prevailing wage rates. As a result, survey participants may not submit Federal project data in connection with WHD's surveys of building and residential construction—thereby reducing the amount of data that WHD receives in response to its building and residential surveys. The Department strongly encourages robust participation in Davis-Bacon prevailing wage surveys, including building and residential surveys, and it therefore urges interested parties to submit Federal project data in connection with building and residential surveys with the understanding that such data will be used in calculating prevailing wage rates if insufficient non-Federal project data is received. In the absence of such Federal project data, for example, a prevailing wage rate may be calculated at the surrounding-county group or even statewide level when it would have been calculated based on a smaller geographic area if more Federal project data had been submitted.

Although increased submission of such Federal project data thus could be expected to contribute to more robust wage determinations even without any change to § 1.3(d), the Department recognizes that revisions to § 1.3(d) may nonetheless be warranted. Specifically, the Department is interested in comments regarding whether to revise § 1.3(d) in a way that would permit WHD to use Federal project data more frequently when it calculates building and residential prevailing wages. For example, particularly given the challenges that WHD has faced in achieving high levels of participation in residential wage surveys—and given the number of residential projects that are subject to Davis-Bacon labor standards under Related Acts administered by the U.S. Department of Housing and Urban Development—it may be appropriate to expand the amount of Federal project data that is available to use in setting prevailing wage rates for residential construction.

There may also be other specific circumstances that particularly warrant greater use of Federal project data. More generally, if the current limitation on the use of Federal project data were removed from § 1.3(d), WHD could in all circumstances establish Davis-Bacon prevailing wage rates for building and residential construction based on all usable wage data in the relevant county or other geographic area, without regard to whether particular wage data was ''Federal'' and whether there was ''insufficient'' non-Federal project data. Alternatively, § 1.3(d) could be revised in order to provide a definition of ''insufficient wage data,'' thereby providing increased clarity regarding when Federal project data may and may not be used in establishing prevailing wage rates for building or residential construction. The Department specifically invites comments on these and any other issues regarding the use of Federal project data in developing building and residential wage determinations.

(C) 29 CFR 1.3(f)—Frequently Conformed Rates

The Department is also proposing changes relating to the publication of rates for labor classifications for which conformance requests are regularly submitted when such classifications are missing from wage determinations. The Department's proposed changes to this subsection are discussed below in part III.B.1.xii (''Frequently conformed rates''), together with proposed changes to § 5.5(a)(1).

(D) 29 CFR 1.3(g)–(j)—Adoption of State/Local Prevailing Wage Determinations

The Department proposes to add new paragraphs (g), (h), (i), and (j) to § 1.3 to permit the Administrator, under specified circumstances, to determine Davis-Bacon wage rates by adopting prevailing wage rates set by State and local governments.

About half of the States, as well as many localities, have their own prevailing wage laws (sometimes called ''little'' Davis-Bacon laws).[48] Additionally, a few states have processes for determining prevailing wages in public construction even in the absence of such State laws.[49] Accordingly, the Administrator has long taken prevailing wage rates set by States and localities into account when making wage determinations. Under the current regulations, one type of information that the Administrator may ''consider[ ]'' in determining wage rates is ''[w]age rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.'' 29 CFR 1.3(b)(3). Additionally, for wage determinations on federally-funded highway construction projects, the Administrator is required by statute and regulation to ''consult[ ]'' with ''the highway department of the State'' in which the work is to be performed, and to ''give due regard to the information thus obtained.'' 23 U.S.C. 113(b); 29 CFR 1.3(b)(4).

In reliance on these provisions, WHD has sometimes adopted and published certain states' highway wage determinations in lieu of conducting wage surveys in certain areas. According to a 2019 report by the Department's Office of the Inspector General (OIG), WHD used highway wage

[46] *See* note 16, *supra.*

[47] *See* note 8, *supra.*

[48] A list of such states, and the thresholds for coverage, can be found here: Dollar Threshold Amount for Contract Coverage, U.S. Dep't of Lab., Wage and Hour Div., *https://www.dol.gov/agencies/whd/state/prevailing-wages* (last updated Jan. 2021).

[49] These states include Iowa, North Dakota, and South Dakota.

determinations from 15 states between fiscal years 2013 and 2017. *See* 2019 OIG Report at 10.[50]

The OIG report expressed concern about the high number of out-of-date Davis-Bacon wage rates, particularly non-union rates, noting, for example, that some published wage rates were as many as 40 years old. *Id.* at 5. The OIG report further noted that at the time, 26 states and the District of Columbia had their own prevailing wage laws, and recommended that WHD ''should determine whether it would be statutorily permissible and programmatically appropriate to adopt [S]tate or local wage rates other than those for highway construction.'' *Id.* at 10–11. WHD indicated to OIG that in the absence of a regulatory revision, it viewed adoption of State rates for non-highway construction as in tension with the definition of prevailing wage in § 1.2(a) and the ARB's *Mistick* decision. *Id.* at 10.

The Department shares OIG's concern regarding outdated wage rates. Outdated and/or inaccurate wage determinations are inconsistent with the intent of the Davis-Bacon labor standards, which aim to ensure that laborers and mechanics on covered projects are paid locally prevailing wages and fringe benefits. Wage rates that are significantly out-of-date do not reflect this intent and could even have the effect of depressing wages if covered contractors pay no more than an artificially-low prevailing wage rate that has not been adjusted over time to continue to reflect the wages paid to workers in a geographic area. Accordingly, the Department agrees with OIG that, where appropriate, adoption of more current wage determinations made by states and localities would be consistent with the DBA's purpose. States often conduct wage surveys far more frequently than WHD.[51] Furthermore, if a State or locality is already engaged in efforts to determine prevailing wages—and if the State's methods are reliable, rigorous, and transparent—similar activities conducted by WHD on a less regular basis can be duplicative and an inefficient use of survey respondents' efforts and WHD's scarce resources. Relatedly, states and localities that regularly update their own wage determinations may have ongoing relationships with stakeholders in the relevant geographic areas that facilitate that process. In contrast, WHD may lack similarly strong relationships with those stakeholders given the relative infrequency with which it surveys any given area. Thus, many states and localities may be in a position to ensure greater participation in wage surveys, which can improve wage survey accuracy.

The Department believes that a regulatory revision would best ensure that WHD can incorporate State and local wage determinations where doing so would further the purposes of the Davis-Bacon labor standards. As noted above, the current regulations permit WHD to ''consider'' State or local prevailing wage rates among a variety of sources of information used to make wage determinations, and require WHD to give ''due regard'' to information obtained from State highway departments for highway wage determinations. *See* 29 CFR 1.3(b)(3)–(4). However, they also provide that any information WHD considers when making wage determinations must ''be evaluated in the light of [the prevailing wage definition set forth in] § 1.2(a).'' 29 CFR 1.3(c). While some States and localities' definitions of prevailing wage mirror the Department's regulatory definition, many others' do not.[52] Because the current regulations at §§ 1.2(a) and 1.3(c), as well as the ARB's decision in *Mistick,* suggest that any information (such as State or local wage rates) that WHD obtains and ''consider[s]'' under § 1.3(b) must be filtered through the definition of ''prevailing wage'' in § 1.2, the Department is proposing a regulatory change to clarify that WHD may adopt State or local prevailing wage determinations under certain circumstances even where the State or locality's definition of prevailing wage differs from the Department's.

Additionally, the Department's regulations apply numerous requirements and constraints to WHD's own wage determinations, such as those concerning geographic scope, *see* § 1.7, and the type of project data that may be used, *see* § 1.3(d). Like the definition of prevailing wage, analogous requirements under State and local prevailing wage laws vary. Although, as noted above, the Department's regulations permit WHD to ''consider'' State and local determinations and to give ''due regard'' to State rates for highway construction, the current regulations do not specifically address whether WHD may adopt State or local rates derived using methods and requirements that differ from those used by WHD.

Accordingly, and in light of the advantages of adopting State and local rates discussed above, the Department is proposing to add a new paragraph, § 1.3(g), which would explicitly permit WHD to adopt prevailing wage rates set by State or local officials, even where the methods used to derive such rates, including the definition of the prevailing wage, may differ in some respects from the methods the Administrator uses under the DBA and the regulations in 29 CFR part 1. The proposal would permit WHD to adopt such wage rates provided that the Administrator, after reviewing the rate and the processes used to derive the rate, concludes that they meet certain listed criteria. The criteria, which are explained further below, are intended to allow WHD to adopt State and local prevailing wage rates where appropriate while also ensuring that adoption of such rates is consistent with the statutory requirements of the Davis-Bacon Act and does not create arbitrary distinctions between jurisdictions where WHD makes wage determinations by using its own surveys and jurisdictions where WHD makes wage determinations by adopting adopt State or local rates.

Importantly, the proposed rule requires the Administrator to make an affirmative determination that the enumerated criteria have been met in order to adopt a State or local wage rate, and to do so only after careful review of both the rate and the process used to derive the rate. This makes clear that if the proposed rule is finalized, the Department may not simply accept State or local data with little or no review. Such actions would be inconsistent with the Secretary's statutory responsibility to ''determine[ ]'' the wages that are prevailing. 40 U.S.C. 3142(b). Adoption of State or local rates after appropriate review, however, is consistent with the authority Congress granted to the Department in the Davis-Bacon Act. The DBA ''does not prescribe a method for determining prevailing wages.'' *Chesapeake Housing,* 2013 WL 5872049, at *4.

[50] *See* note 11, *supra.*

[51] Some states, such as Minnesota, conduct surveys annually. *See* Prevailing Wage: Annual Statewide Survey, Minn. Dep't of Labor & Indus., *https://www.dli.mn.gov/business/employment-practices/prevailing-wage-annual-statewide-survey* (last visited Nov. 17, 2021). Others use a different frequency; for example, Nevada conducts a survey every 2 years. *See* Nevada's 2021–2023 Prevailing Wage Survey Released, Nev. Dep't of Bus. & Indus., *https://business.nv.gov/News_Media/Press_Releases/2021/Labor_Commissioner/Nevada%E2%80%99s_2021-2023_Prevailing_Wage_Survey_Released/* (last visited Nov. 17, 2021).

[52] For example, Washington uses a definition similar to the Department's current majority rule. See Wash. Rev. Code § 39.12.010(1) (2021). Wyoming, in contrast, uses a method that mirrors the three-step process in this proposed rule. Wyo. Stat. Ann. §§ 27–4–401–413 (2021). Other states use CBA rates as a starting point. N.M. Stat. Ann. §§ 13–4–10–17 (2021); N.M. Code R. § 11.1.2.12 (2021); N.Y. Lab. Law §§ 220–224 (McKinney 2021).

Rather, the statute ''delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.'' *Donovan,* 712 F.2d at 616. The D.C. Circuit has explained that the DBA's legislative history reflects that Congress ''envisioned that the Secretary could establish the method to be used'' to determine DBA prevailing wage rates. *Id.* (citing 74 Cong. Rec. 6,516 (1931) (remarks of Rep. Kopp) (''A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.'')).

Reliance on prevailing wage rates calculated by State or local authorities for similar purposes is a permissible exercise of this broad statutory discretion. In areas where states or localities are already gathering reliable information about prevailing wages in construction, it may be inefficient for the Department to use its limited resources to perform the same tasks. As a result, the Department is proposing to use State and local wage determinations under specified circumstances where, based on a review and analysis of the processes used in those wage determinations, the Administrator determines that such use would be appropriate and consistent with the DBA. Such resource-driven decisions by Federal agencies are permissible. *See, e.g., Hisp. Affs. Project* v. *Acosta,* 901 F.3d 378, 392 (D.C. Cir. 2018) (upholding Department's decision not to collect its own data but instead to rely on a ''necessarily . . . imprecise'' estimate given that data collection under the circumstances would have been ''very difficult and resource-intensive''); *Dist. Hosp. Partners, L.P.* v. *Burwell,* 786 F.3d 46, 61–62 (D.C. Cir. 2015) (agency's use of ''imperfect[ ]'' data set was permissible under the Administrative Procedure Act).

The Department is proposing to permit the adoption of State and local rates for all types of construction. The FHWA's independent statutory obligation for the Department to consider and give ''due regard'' to information obtained from State highway agencies for highway wage determinations does not prohibit WHD from adopting State or local determinations, either for highway construction or for other types of construction, where appropriate. Rather, this language imposes a minimum requirement for the Secretary to consult with states and consider their wage determinations for highway construction. *See Virginia, ex rel., Comm'r, Virginia Dep't of Highways and Transp.* v. *Marshall,* 599 F.2d 588, 594 (4th Cir. 1979) (''Section 113(b) requires that the Secretary 'consult' and give 'due regard' to the information thus obtained.''). In sum, the FHWA's requirement sets a floor for reliance on State data for highway construction, not a ceiling, and does not foreclose reliance on State or local data for other types of construction.

The criteria the Department proposes for the adoption of State or local rates, which are included in proposed new paragraph § 1.3(h), are as follows:

First, the State or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties. This requirement ensures that WHD will not adopt a prevailing wage rate where the process to set the rate artificially favors certain entities, such as union or non-union contractors. Rather, the State or local process must reflect a good-faith effort to derive a wage that prevails for similar workers on similar projects within the relevant geographic area within the meaning of the Davis-Bacon Act statutory provisions. The use of the language ''survey or other process'' in the proposed regulatory text is intended to permit the Administrator to incorporate wage determinations from States or localities that do not necessarily engage in surveys but instead use a different process for gathering information and setting prevailing wage rates, provided that this process meets the required criteria.[53]

Second, the State or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, each of which can be calculated separately. Thus, under the proposed rule, WHD must be able to confirm during its review process that both figures are prevailing for the relevant classification(s), and must be able to list each figure separately on its wage determinations. This reflects the statutory requirement that a prevailing wage rate under the Davis-Bacon Act must include fringe benefits, 40 U.S.C. 3141(2)(B); 29 CFR 5.20, and that ''the Secretary is obligated to make a separate finding of the rate of contribution or cost of fringe benefits.'' 29 CFR 5.25(a). This requirement also would ensure that WHD could determine the basic or regular rate of pay in order to determine compliance with the Contract Work Hours and Safety Standards Act (CWHSSA) and the Fair Labor Standards Act (FLSA).

Third, the State or local government must classify laborers and mechanics in a manner that is recognized within the field of construction. The Department recognizes that differences in industry practices mean that the precise types of work done and tools used by workers in particular classifications may not be uniform across states and localities. For example, in some areas, a significant portion of work involving the installation of heating, ventilation, and air-conditioning (HVAC) duct work may be done by an HVAC Technician, whereas in other areas such work may be more typically performed by a Sheet Metal Worker. Indeed, unlike in the case of the Service Contract Act (SCA), WHD does not maintain a directory of occupations for the Davis-Bacon Act. However, under this proposed rule, in order for WHD to adopt a State or locality's wage rate, the State or locality's classification system must be in a manner recognized within the field of construction. This standard is intended to ensure that the classification system does not result in lower wages than are appropriate by, for example, assigning duties associated with skilled classifications to a classification for a general laborer.

Finally, the State or local government's criteria for setting prevailing wage rates must be substantially similar to those the Administrator uses in making wage determinations under 29 CFR part 1. The proposed regulation provides a non-exclusive list of factors to guide this determination, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for determining the appropriate geographic area(s). Thus, the more similar a State or local government's methods are to those used by WHD, the greater likelihood that their corresponding wage rate(s) will be accepted. While the proposed regulation lists the above factors as guidelines, it ultimately directs that the Administrator's determination in this regard will be based on the totality of the circumstances. The reservation of such discretion in the Administrator intends to preserve the Administrator's ability to make an overall determination regarding whether adoption of a State or local wage rate is consistent with both

[53] For example, a few states determine prevailing wage rates through stakeholder negotiations that typically involve labor and employer groups. The proposed rule does not foreclose acceptance of rates set using such a process providing that the process is generally open to full participation by all interested parties and that the other required criteria are met.

the language and purpose of the DBA, and thereby is consistent with the statutory directive for the Secretary (in this case, via delegation to the Administrator), to determine the prevailing wage. *See* 40 U.S.C. 3142(b).

Proposed § 1.3(g) permits the Administrator to adopt State or local wage rates with or without modification. This is intended to encompass situations where the Administrator reviews a State or local wage determination and determines that although the State or local wage determination might not satisfy the above criteria as initially submitted, it would satisfy those criteria with certain modifications. For example, the Administrator may obtain from the State or local government the State or locality's wage determinations and the wage data underlying those determinations, and, provided the data was collected in accordance with the criteria set forth earlier (such as that the survey was fully open to all participants) may determine, after review and analysis, that it would be appropriate to use the underlying data to adjust or modify certain classifications or construction types, or to adjust the wage rate for certain classifications. Consistent with the Secretary's authority to make wage determinations, the regulation permits the Administrator to modify a State or local wage rate as appropriate while still generally relying on it as the primary source for a wage determination. For instance, before using State or local government wage data to calculate prevailing wage rates under the DBA, the Administrator could regroup counties, apply the definition of ''prevailing wage'' set forth in § 1.2, disregard data for workers who do not qualify as laborers or mechanics under the DBA, and/or segregate data based on the type of construction involved. It is anticipated that the Administrator would cooperate with the State or locality to make the appropriate modifications to any wage rates.

The Department also proposes to add a new paragraph § 1.3(i), which would explain that in order for WHD to adopt a State or local government prevailing wage rate, the Administrator must obtain the wage rates and any relevant supporting documentation and data from the State or local entity, and provides instructions for submission.

Finally, the Department proposes to add a new paragraph § 1.3(j), which would explain that nothing in the additional proposed sections described above precludes the Administrator from considering State or local prevailing wage rates in a more holistic fashion, consistent with § 1.3(b)(3), or from giving due regard to information obtained from State highway departments, consistent with § 1.3(b)(4), as part of the Administrator's process of making prevailing wage determinations under 29 CFR part 1. For example, under this proposed rule, as under the current regulations, if a State or locality were to provide the Department with the underlying data that it uses to determine wage rates, even if the Administrator determines not to adopt the wage rates themselves, the Administrator may consider or use the data as part of the process to determine the prevailing wage within the meaning of 29 CFR 1.2, provided that the data is timely received and otherwise appropriate. The purpose of the proposed additional language is to clarify that the Administrator may, under certain circumstances, adopt State or local wage rates, and use them in wage determinations, even if the process and rules for State or local wage determinations differs from the Administrator's. These proposed revisions therefore address the concerns WHD voiced to OIG that the current regulations, and in particular the definition of prevailing wage as interpreted by the ARB in *Mistick,* could preclude, or at least be in tension with, such an approach.

iv. Section 1.4 Report of Agency Construction Programs

Section 1.4 currently provides that, to the extent practicable, agencies that use wage determinations under the DBRA shall submit an annual report to the Department outlining proposed construction programs for the coming year. The reports described in § 1.4 assist WHD in its multi-year planning efforts by providing information that may guide WHD's decisions regarding when to survey wages for particular types of construction in a particular locality. These reports are an effective way for the Department to know where Federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use.

Notwithstanding the importance of these reports to the program, contracting agencies have not regularly provided them to the Department. As a result, after careful consideration, the Department proposes to remove the language in the regulation that currently allows agencies to submit reports only ''to the extent practicable.'' Instead, as proposed, § 1.4 would require Federal agencies to submit the construction reports.

The Department also now proposes to adopt certain elements of two prior AAMs addressing these reports. In 1985, WHD updated its guidance regarding the agency construction reports, including by directing that Federal agencies submit the annual report by April 10 each year and providing a recommended format for such agencies to submit the report. *See* AAM 144 (Dec. 27, 1985). In 2017, WHD requested that Federal agencies include in the reports proposed construction programs for an additional 2 fiscal years beyond the upcoming year. *See* AAM 224 (Jan. 17, 2017). The proposed changes to § 1.4 would codify these guidelines as part of the regulations.

The Department also proposes new language requiring Federal agencies to include notification of any expected options to extend the terms of current construction contracts. The Department is proposing this change because—like a new contract—the exercise of an option requires the incorporation of the most current wage determination. *See* AAM 157 (Dec. 9, 1992); *see also* 48 CFR 22.404–12(a). Receiving information concerning expected options to extend the terms of current construction contracts therefore will help the Department assess where updated wage determinations are needed for Federal and federally assisted construction, which will in turn contribute to the effectiveness of the overall Davis-Bacon wage survey program. The Department also proposes that Federal agencies include the estimated cost of construction in their reports, as this information also will help the Department prioritize areas where updated wage determinations will have the broadest effects.

In addition, the Department proposes to require that Federal agencies include in the annual report a notification of any significant changes to previously reported construction programs. In turn, the Department proposes eliminating the current directive that agencies notify the Administrator mid-year of any significant changes in their proposed construction programs. Such notification would instead be provided in Federal agencies' annual reports.

Finally, the Department proposes deleting the reference to the Interagency Reports Management Program as the requirements of that program were terminated by the General Services Administration (GSA) in 2005. *See* 70 FR 3132 (Jan. 19, 2005).

The Department does not believe that these proposed changes will result in significant burdens on contracting agencies, as the proposed provisions request only information already on

hand. Furthermore, any burden resulting from the new proposal should be offset by the proposed elimination of the current directive that agencies notify the Administrator of any significant changes in a separate mid-year report. However, the Department also seeks comment on any alternative methods through which the Department may obtain the information and eliminate the need to require the agency reports.

v. Section 1.5 Publication of General Wage Determinations and Procedure for Requesting Project Wage Determinations

The Department proposes a number of revisions to § 1.5 to clarify the applicability of general wage determinations and project wage determinations. Except as noted below, these revisions are consistent with longstanding Department practice and subregulatory guidance.

First, the Department proposes to re-title § 1.5, currently titled ''Procedure for requesting wage determinations,'' as ''Publication of general wage determinations and procedure for requesting project wage determinations.'' The proposed revision better reflects the content of the section as well as the distinction between general wage determinations, which the Department publishes for broad use, and project wage determinations, which are requested by contracting agencies on a project-specific basis.

Additionally, the Department proposes to add language to § 1.5(a) to explain that a general wage determination contains, among other information, a list of wage rates determined to be prevailing for various classifications of laborers and mechanics for specified type(s) of construction in a given area. Likewise, the Department proposes to add language to § 1.5(b) to explain circumstances under which an agency may request a project wage determination, namely, where (1) the project involves work in more than one county and will employ workers who may work in more than one county; (2) there is no general wage determination in effect for the relevant area and type of construction for an upcoming project; or (3) all or virtually all of the work on a contract will be performed by one or more classifications that are not listed in the general wage determination that would otherwise apply, and contract award or bid opening has not yet taken place. The first of these three circumstances conforms to the proposed revision to the definition of ''area'' in § 1.2 discussed above that would permit the issuance of project wage determinations for multi-county projects where appropriate. The latter two circumstances reflect the Department's existing practice. *See* PWRB, Davis-Bacon Wage Determinations, at 4–5.

The Department also proposes to add language to § 1.5(b) clarifying that requests for project wage determinations may be sent by means other than the mail, such as email or online submission, as directed by the Administrator. Additionally, consistent with the Department's current practice, the Department proposes to add language to § 1.5(b) requiring that when requesting a project wage determination for a project that involves multiple types of construction, the requesting agency must attach information indicating the expected cost breakdown by type of construction. *See* PWRB, Davis-Bacon Wage Determinations, at 5. The Department also proposes to clarify that in addition to submitting the information specified in the regulation, a party requesting a project wage determination must submit all other information requested in the Standard Form (SF) 308.

Finally, the Department proposes to clarify the term ''agency'' in § 1.5. In proposed § 1.5(b)(2) (renumbered, currently § 1.5(b)(1)), which describes the process for requesting a project wage determination, the Department proposes to delete the word ''Federal'' that precedes ''agency.'' This proposed deletion, and the resulting incorporation of the definition of ''agency'' from § 1.2, clarifies that, as already implied elsewhere in § 1.5, non-Federal agencies may request project wage determinations. *See, e.g.,* § 1.5(b)(3) (proposed § 1.5(b)(4)) (explaining that a State highway department under the Federal-Aid Highway Acts may be a requesting agency).

vi. Section 1.6 Use and Effectiveness of Wage Determinations

(A) Organizational, Technical and Clarifying Revisions

The Department proposes to reorganize, rephrase, and/or re-number several regulatory provisions and text in § 1.6. These proposed revisions include adding headings to paragraphs and subparagraphs for clarity; changing the order of some of the paragraphs and subparagraphs so that discussions of general wage determinations precede discussions of project wage determinations, reflecting the fact that general wage determinations are (and have been for many years) the norm, whereas project wage determinations are the exception; adding the word ''project'' before ''wage determinations'' in locations where the text refers to project wage determinations but could otherwise be read as referring to both general and project wage determinations; using the term ''revised'' wage determination to refer both to cases where a wage determination is modified, such as due to updated CBA rates, and cases where a wage determination is re-issued entirely (referred to in the current regulatory text as a ''supersedeas'' wage determination), such as after a new wage survey; consolidating certain subsections that discuss revisions to wage determinations to eliminate redundancy and improve clarity; revising the regulation so that it references the publication of a general wage determination (consistent with the Department's current practice of publishing wage determinations online), rather than publication of notice of the wage determination (which the Department previously did in the **Federal Register**); and using the term ''issued'' to refer, collectively, to the publication of a general wage determination or WHD's provision of a project wage determination.

The Department also proposes minor revisions to clarify that there is only one appropriate use for wage determinations that are no longer current—which are referred to in current regulatory text as ''archived'' wage determinations, and the Department now proposes to describe as ''inactive'' to conform to the terminology currently used on the System for Award Management (*SAM.gov*). That permissible circumstance is when the contracting agency initially failed to incorporate the correct wage determination into the contract and subsequently must incorporate the correct wage determination after contract award or the start of construction (a procedure that is discussed in § 1.6(f)). In that circumstance, even if the wage determination that should have been incorporated at the time of the contract award has since become inactive, it is still the correct wage determination to incorporate into the contract.

The Department also proposes that agencies should notify the Administrator prior to engaging in incorporation of an inactive wage determination, and that agencies may not incorporate the inactive wage determination if the Administrator instructs otherwise. While the current regulation requires the Department to ''approv[e]'' the use of an inactive wage determination, the proposed change permits the contracting agency to use an inactive wage determination under these limited circumstances as long as it has notified the Administrator and has

not been instructed otherwise. The proposed change is intended to ensure that contracting agencies incorporate omitted wage determinations promptly rather than waiting for approval.

The Department also proposes revisions to § 1.6(b) to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The proposed language states that when a construction contract includes work in more than one area (as the term is defined in § 1.2), and no multi-county project wage determination has been obtained (as contemplated by the proposed revisions to § 1.2), the applicable wage determination for each area must be incorporated into the contract so that all workers on the project are paid the wages that prevail in their respective areas, consistent with the DBA. The Department also proposes language stating that when a construction contract includes work in more than one type of construction (as the Department has proposed to define the term in § 1.2), the contracting agency must incorporate the applicable wage determination for each type of construction where the total work in that category of construction is substantial. This accords with the Department's longstanding guidance published in AAM 130 (Mar. 17, 1978) and AAM 131 (July 14, 1978).[54] The Department intends to continue interpreting the meaning of ''substantial'' in subregulatory guidance.[55] The Department requests comments on the above proposals, including potential ways to improve the standards for when and how to incorporate multiple wage determinations into a contract.

The Department also proposes to add language to § 1.6(b) clarifying and reinforcing the responsibilities of contracting agencies, contractors, and subcontractors with regard to wage determinations. Specifically, the Department proposes to clarify in § 1.6(b)(1) that contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project. In § 1.6(b)(2), the Department proposes to clarify that contractors and subcontractors have an affirmative obligation to ensure that wages are paid to laborers and mechanics in compliance with the DBRA labor standards.

The Department also proposes to revise language in § 1.6(b) that currently states that the Administrator ''shall give foremost consideration to area practice'' in resolving questions about ''wage rate schedules.'' In the Department's experience, this language has created unnecessary confusion because stakeholders have at times interpreted it as precluding the Administrator from considering other factors when resolving questions about wage determinations. Specifically, the Department has long recognized that when ''it is clear from the nature of the project itself in a construction sense that it is to be categorized'' as either building, residential, heavy, or highway construction, ''it is not necessary to resort to an area practice'' to determine the proper category of construction. AAM 130, at 2; *see also* AAM 131, at 1 (''area practice regarding wages paid will be taken into consideration together with other factors,'' when ''the nature of the project in a construction sense is not clear.''); *Chastleton Apartments,* WAB No. 84–09, 1984 WL 161751, at *4 (Dec. 11, 1984) (because the ''character of the structure in a construction sense dictates its characterization for Davis-Bacon wage purposes,'' where there was a substantial amount of rehabilitation work being done on a project similar to a commercial building in a construction sense, it was ''not necessary to determine whether there [was] an industry practice to recognize'' the work as residential construction). The regulatory reference to giving ''foremost consideration to area practice'' in determining which wage determination to apply to a project arguably is in tension with the Department's longstanding position, and has resulted in stakeholders contending on occasion that WHD or a contracting agency must in every instance conduct an exhaustive review of local area practice as to how work is classified, even if the nature of the project in a construction sense is clear. The revised language would resolve this perceived inconsistency and would streamline determinations regarding construction types by making clear that while the Administrator should continue considering area practice, the Administrator may consider other relevant factors, particularly the nature of the project in a construction sense. This proposed regulatory revision also would better align the Department's regulations with the FAR, which does not call for ''foremost consideration'' to be given to area practice in all circumstances, but rather provides, consistent with AAMs 130 and 131, that ''[w]hen the nature of a project is not clear, it is necessary to look at additional factors, with primary consideration given to locally established area practices.'' 48 CFR 22.404–2(c)(5).

In § 1.6(e), the Department proposes to clarify that if, prior to contract award (or, as appropriate, prior to the start of construction), the Administrator provides written notice that the bidding documents or solicitation included the wrong wage determination or schedule, or that an included wage determination was withdrawn by the Department as a result of an Administrative Review Board decision, the wage determination may not be used for the contract, without regard to whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred. Current regulatory text states that under such circumstances, notice of such errors is ''effective immediately'' but does not explain the consequences of such effect. The proposed language is consistent with the Department's current practice and guidance. *See* Manual of Operations at 35.

In § 1.6(g), the Department proposes to clarify that under the Related Acts, if Federal funding or assistance is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated retroactive to the date of the contract award or the beginning of construction; the Department proposes to delete language indicating that a wage determination must be ''requested,'' as such language appears to contemplate a project wage determination, which in most situations will not be necessary as a general wage determination will apply. The Department also proposes to revise § 1.6(g) to clarify that it is the head of the applicable Federal agency who must request any waiver of the requirement that a wage determination

[54] AAM 130 states that where a project ''includes construction items that in themselves would be otherwise classified, a multiple classification may be justified if such construction items are a substantial part of the project . . . [but] a separate classification would not apply if such construction items are merely incidental to the total project to which they are closely related in function,'' and construction is incidental to the overall project. AAM 130, p. 2, n.1. AAM 131 similarly states that multiple schedules are issued if ''the construction items are substantial in relation to project cost[s].'' However, it, it further explains that ''[o]nly one schedule is issued if construction items are 'incidental' in function to the overall character of a project . . . and if there is not a substantial amount of construction in the second category.'' AAM 131, p. 2.

[55] Most recently, on December 14, 2020, the Administrator issued AAM 236, which states that ''[w]hen a project has construction items in a different category of construction, contracting agencies should generally apply multiple wage determinations when the cost of the construction exceeds either $2.5 million or 20 percent of the total project costs,'' but that WHD will consider ''exceptional situations'' on a case-by-case basis. AAM 236, pp. 1–2.

provided under such circumstances be retroactive to the date of the contract award or the beginning of construction. The current version of § 1.6(g) uses the term ''agency'' and is therefore ambiguous as to whether it refers to the Federal agency providing the funding or assistance or the State or local agency receiving it. The proposed clarification that this term refers to Federal agencies reflects both the Department's current practice and its belief that it is most appropriate for the relevant Federal agency, rather than a State or local agency, to bear these responsibilities, including assessing, as part of the waiver request, whether non-retroactivity would be necessary and proper in the public interest based on all relevant considerations.

(B) Requirement To Incorporate Most Recent Wage Determinations Into Certain Ongoing Contracts

The Department's longstanding position has been to require that contracts and bid solicitations contain the most recently issued revision to a wage determination to be applied to construction work to the extent that such a requirement does not cause undue disruption to the contracting process. *See* 47 FR 23644, 23646 (May 28, 1982); *United States Army,* ARB No. 96–133, 1997 WL 399373, at *6 (July 17, 1997) (''The only legitimate reason for not including the most recently issued wage determination in a contract is based upon disruption of the procurement process.''). Under the current regulations, a wage determination is generally applicable for the duration of a contract once incorporated. *See* 29 CFR 1.6(c)(2)(ii) and (c)(3)(vi). For clarity, the Department proposes to add language to § 1.6(a) to state this affirmative principle.

The Department also proposes to add a new section, § 1.6(c)(2)(iii), to clarify two circumstances where this general principle does not apply. First, the Department proposes to explain that the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order—or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract. This proposed change is consistent with the Department's guidance, case law, and historical practice, under which such modifications are considered new contracts. *See United States Army,* 1997 WL 399373, at *6 (noting that DOL has consistently ''required that new DBA wage determinations be incorporated . . . when contracts are modified beyond the obligations of the original contract''); *Iowa Dep't of Transp.,* WAB No. 94–11, 1994 WL 764106, at *5 (Oct. 7, 1994) (''A contract that has been 'substantially' modified must be treated as a 'new' contract in which the most recently issued wage determination is applied.''); AAM 157 (Dec. 9, 1992) (explaining that exercising an option ''requires a contractor to perform work for a period of time for which it would not have been obligated . . . under the terms of the original contract,'' and as such, ''once the option . . . is exercised, the additional period of performance becomes a new contract''). Under these circumstances, the most recent version of any wage determination(s) must be incorporated as of the date of the change or, where applicable, the date the agency exercises its option to extend the contract's term. These circumstances do not include situations where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

Additionally, modern contracting methods frequently involve a contractor agreeing to perform construction as the need arises over an extended time period, with the quantity and timing of the construction not known when the contract is awarded.[56] Examples of such contracts would include, but are not limited to: A multi-year indefinite-delivery-indefinite-quantity (IDIQ) contract to perform repairs to a Federal facility when needed; a long-term contract to operate and maintain part or all of a facility, including repairs and renovations as needed; [57] or a schedule contract or blanket purchase agreement whereby a contractor enters into an agreement with a Federal agency to provide certain products or services (either of which may involve work subject to Davis-Bacon coverage, such as installation) or construction at agreed-upon prices to various agencies or other government entities, who can order from the schedule at any time during the contract. The extent of the required construction, the time, and even the place where the work will be performed may be unclear at the time such contracts are awarded.

Particularly when such contracts are lengthy, using an outdated wage determination from the time of the underlying contract award is contrary to the text and purpose of the DBA because it does not sufficiently ensure that workers are paid prevailing wages. Additionally, in the Department's experience, agencies are sometimes inconsistent as to how they incorporate wage determination revisions into these types of contracts. Some agencies do so every time additional Davis-Bacon work is obligated, others do so annually, others only incorporate applicable wage determinations at the time the original, underlying contract is awarded, and sometimes no wage determination is incorporated at all. This inconsistency can prevent the payment of prevailing wages to workers and can disrupt the contracting process.

Accordingly, the Department proposes to require, for these types of contracts, that contracting agencies incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award or, where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the Department for the alternative date. This proposal is consistent with the rules governing wage determinations under the SCA, which require that the contracting agency obtain a wage determination prior to the ''[a]nnual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress.'' *See* 29 CFR 4.4(a)(1)(v). Additionally, consistent with the discussion above, if an option is exercised for one of these types of contracts, the most recent version of any wage determination(s) would need to be incorporated as of the date the agency exercises its option to extend the contract's term (subject to the exceptions set forth in proposed § 1.6(c)(2)(ii)), even if that date did not coincide with the anniversary date of the contract. When any construction work under such a contract is obligated, the most up-to-date wage determination(s) incorporated into the underlying contract must be included in each task order, purchase order, or any other method used to direct performance. Once an applicable wage determination revision is included in such an order, that revision would generally be applicable until the

[56] Depending on the circumstances, these types of contracts may be principally for services and therefore subject to the SCA, but contain substantial segregable work that is covered by the DBA. *See* 29 CFR 4.116(c)(2).

[57] The Department of Defense, for example, enters into such arrangements pursuant to the Military Housing Privatization Initiative, 10 U.S.C. 2871, *et seq.*

construction items originally called for by that order are completed, even if the completion of that work extends beyond the twelve-month period following the most recent anniversary date of the underlying contract. By proposing this revision, the Department seeks to ensure that workers are being paid prevailing wages within the meaning of the Act, provide certainty and predictability to agencies and contractors as to when, and how frequently, wage rates in these types of contracts can be expected to change, and bring consistency to agencies' application of the DBA. The Department has also included language noting that contracting and ordering agencies remain responsible for ensuring that the applicable updated wage determination(s) is included in task orders, purchase orders, or other similar contract instruments that are issued under the master contract.

(C) 29 CFR 1.6(c)(1)—Periodic Adjustments

The Department proposes to add a provision to 29 CFR 1.6(c)(1) to expressly provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates. Such rates (both base hourly wages and fringe benefits) would be updated between surveys so that they do not become out-of-date and fall behind wage rates in the area.

(1) Background

Based on the data that it receives through its prevailing wage survey program, WHD generally publishes two types of prevailing wage rates on the Davis-Bacon wage determinations that it issues: (1) Modal rates (under the current majority rule, wage rates that are paid to a majority of workers in a particular classification), and (2) weighted average rates, which are published whenever the wage data received by WHD reflects that no single wage rate was paid to a majority of workers in the classification. *See* 29 CFR 1.2(a)(1).

Under the current majority rule, modal majority wage rates typically reflect collectively bargained wage rates. When a CBA rate prevails on a general wage determination, WHD updates that prevailing wage rate based on periodic wage and fringe benefit increases in the CBA. Manual of Operations at 74–75; *see also Mistick Construction,* 2006 WL 861357, at *7 n.4.[58] However, when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails, such wage rates (currently designated as ''SU'' rates) on general wage determinations are not updated between surveys, and therefore can become out-of-date. This proposal would expand WHD's practice of updating collectively bargained rates between surveys to include updating non-collectively bargained rates.

While the goal of WHD is to conduct surveys in each area every 3 years, because of the resource intensive nature of the wage survey process and the vast number of survey areas, many years can pass between surveys conducted in any particular area. The 2011 GAO Report found that, as of 2010, while 36 percent of ''nonunion-prevailing rates'' [59] were 3 years old or less, almost 46 percent of these rates were 10 or more years old. 2011 GAO Report at 18.[60] As a result of lengthy intervals between Davis-Bacon surveys, the real value of the effectively-frozen rates erodes as compensation in the construction industry and the cost of living rise. The resulting decline in the real value of prevailing wage rates may adversely affect construction workers the DBA was intended to protect. *See Coutu,* 450 U.S. at 771 (''The Court's previous opinions have recognized that '[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers.' '' (citations omitted)).

This issue is one that program stakeholders raised with the GAO. According to several union and contractor officials interviewed in the 2011 report, the age of the Davis-Bacon ''nonunion-prevailing rates'' means they often do not reflect actual prevailing wages. 2011 GAO Report at 18.[61] As a result, the officials said it is ''more difficult for both union and nonunion contractors to successfully bid on Federal projects because they cannot recruit workers with artificially low wages but risk losing contracts if their bids reflect more realistic wages.'' *Id.* Regularly updating these rates would alleviate this situation and better protect workers' wage rates. The Department anticipates that updated rates would also better reflect construction industry compensation in communities where federally funded construction is occurring.

This proposal to update non-collectively bargained rates is consistent with, and builds upon, the current regulatory text at 29 CFR 1.6(c)(1), which provides that wage determinations ''may be modified from time to time to keep them current.'' This regulatory provision provides legal authority for updating wage rates, and it has been used as a basis for updating collectively bargained prevailing wage rates based on CBA submissions between surveys. *See* Manual of Operations at 74–75. In this rule, the Department proposes to extend this practice to non-collectively bargained rates based on ECI data. The Department believes that ''chang[ed] circumstances''—including an increase in weighted average rates—and the lack of an express mechanism to update non-collectively bargained rates between surveys under the existing regulations support this proposed ''extension of current regulation[s]'' to better effectuate the DBRA's purpose. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983); *see also In re Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1968) (Court ''unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes'' absent ''compelling evidence that such was Congress' intention'').

This proposal is consistent with the Department's broad authority under the statute to ''establish the method to be used'' to determine DBA prevailing wage rates. *Donovan,* 712 F.2d at 63. The Department believes that the new periodic adjustment proposal will ''on balance result in a closer approximation of the prevailing wage'' for these rates and therefore is an appropriate extension of the current regulation. *Id.* at 630 (citing *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.,* 387 U.S. 397, 416 (1967)).

This proposed new provision is particularly appropriate because it seeks to curb a practice the DBA and Related Acts were enacted to prevent: Payment of ''substandard'' wages (here, out-of-date non-collectively bargained rates) on covered construction projects that are less than current wages for similar work prevailing in the private sector. Regularly increasing non-collectively bargained weighted average and prevailing rates that are more than 3 years old would be consistent with the DBA's purpose of protecting local wage standards.

[58] WHD similarly updates weighted average rates based entirely on collectively bargained rates (currently designated as ''UAVG'' rates) using periodic wage and fringe benefit increases in the CBAs.

[59] ''Nonunion-prevailing rates,'' as used in the GAO report, is a misnomer, as it refers to weighted average rates that, as noted, are published whenever the same wage rate is not paid to a majority of workers in the classification, including when much or even most of the data reflects union wages, just not that the same union wage was paid to a majority of workers in the classification.

[60] *See* note 8, *supra.*

[61] *See* note 8, *supra.*

As proposed, the periodic adjustment provision would help effectuate the DBA's purpose by updating significantly out-of-date non-collectively bargained wage rates, including thousands of wage rates that were published decades ago, that have not been updated since, and that therefore likely have fallen behind currently prevailing local rates. As of September 30, 2018, over 7,100 non-collectively bargained wage rates, or 5.3 percent of the 134,738 total unique published rates at that time, had not been updated in 11 to 40 years. *See* 2019 OIG Report at 3, 5. Updating such out-of-date construction wages would better align with the DBRA's main objective.

Tethering the proposed periodic updates to existing non-collectively bargained prevailing wage rates is intended to keep such rates more current in the interim period between surveys. It is reasonable to assume that non-collectively bargained rates, like other rates that the Secretary has determined to prevail, generally increase over time like other construction compensation measures. *See, e.g.,* Table A (showing recent annual rates of union and non-union construction wage increases in the United States); Table B (showing Employment Cost Index changes from 2001 to 2020).

TABLE A—CURRENT POPULATION SURVEY (CPS) WAGE GROWTH BY UNION STATUS—CONSTRUCTION

Year	Median weekly earnings		Members of unions (%)	Non-union (%)
	Members of unions	Non-union		
2015	$1,099	$743	.....	.....
2016	1,168	780	6	5
2017	1,163	797	0	2
2018	1,220	819	5	3
2019	1,257	868	3	6
2020	1,254	920	0	6
Average	.....	.....	3	4

Source: Current Population Survey, Table 43: Median weekly earnings of full-time wage and salary workers by union affiliation, occupation, and industry, Bureau of Labor Statistics, *https://www.bls.gov/cps/cpsaat43.htm* (last modified Jan. 22, 2021).
Note: Limited to workers in the construction industry.

TABLE B—EMPLOYMENT COST INDEX (ECI), 2001–2020, TOTAL COMPENSATION OF PRIVATE WORKERS IN CONSTRUCTION, AND EXTRACTION, FARMING, FISHING, AND FORESTRY OCCUPATIONS

[Average 12-month percent changes (rounded to the nearest tenth)]

Year	Average % change
2001	4.5
2002	3.5
2003	3.9
2004	4.5
2005	3.1
2006	3.5
2007	3.5
2008	3.7
2009	1.7
2010	2.0
2011	1.6
2012	1.5
2013	1.8
2014	2.0
2015	2.0
2016	2.4
2017	2.7
2018	2.3
2019	2.3
2020	2.4

Source: Bureau of Labor Statistics, *https://www.bls.gov/web/eci/eci-constant-real-dollar.pdf.*

(2) Periodic Adjustment Proposal

This proposal seeks to update non-collectively bargained rates that are 3 or more years old by adjusting them regularly based on total compensation data to keep pace with current construction wages and benefits. Specifically, the Department proposes to add language to § 1.6(c)(1) to expressly permit adjustments to non-collectively bargained rates on general wage determinations based on U.S. Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) data or its successor data. The Department's proposal provides that non-collectively bargained rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication, continuing until the next survey results in a new general wage determination. This proposed interval would be consistent with WHD's goal to increase the percentage of Davis-Bacon wage rates that are 3 years old or less. Under the proposal, non-collectively bargained rates (wages and fringe benefits) would be adjusted from the date the rate was originally published and brought up to their present value. Going forward under the proposed 30-percent rule, any non-collectively bargained prevailing or weighted average rates published after this rule became effective would be updated if they were not re-surveyed within 3 years after publication. The Department anticipates implementing this new regulatory provision by issuing general wage determination modifications.

The Department believes that ECI data is appropriate for these proposed rate adjustments because the ECI tracks both wages and benefits, and may be used as a proxy for construction compensation changes over time. Therefore, the Department proposes to use a compensation growth rate based on the change in the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations to adjust non-collectively bargained rates (both base hourly and fringe benefit rates) published in 2001 or after.[62]

In addition, because updating non-collectively bargained rates would be resource-intensive, the Department does not anticipate making all initial adjustments to such rates that are 3 or more years old simultaneously, but rather anticipates that such adjustments would be made over a period of time (though as quickly as is reasonably possible). Similarly, particularly due to the effort involved, the process of adjusting non-collectively bargained rates that are 3 or more years old is

[62] Because this particular index is unavailable prior to 2001, the Department proposes to use the compensation growth rate based on the change in the ECI total compensation index for the goods-producing industries (which includes the construction industry) to bring the relatively small percentage of non-collectively bargained rates published before 2001 up to their 2000 value. The Department would then adjust the rates up to the present value using the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations.

unlikely to begin until approximately 6 months to a year after a final rule implementing this proposal becomes effective.

The Department seeks comments on this proposal, and invites comments on alternative data sources to adjust non-collectively bargained rates. The Department considered proposing to use the Consumer Price Index (CPI) but considers this data source to be a less appropriate index to use to update non-collectively bargained rates because the CPI measures movement of consumer prices as experienced by day-to-day living expenses, unlike the ECI, which measures changes in the costs of labor in particular. The CPI does not track changes in wages or benefits, nor does it reflect the costs of construction workers nationwide. The Department nonetheless invites comments on use of the CPI to adjust non-collectively bargained rates.

(D) 29 CFR 1.6(f)

Section 1.6(f) addresses post-award determinations that a wage determination has been wrongly omitted from a contract. The Department's proposed changes to this subsection are discussed below in part III.B.3.xx (''Post-award determinations and operation-of-law''), together with proposed changes to §§ 5.5 and 5.6.

vii. Section 1.7 Scope of Consideration

The Department's existing regulations in § 1.7 address two related concepts. The first is the level of geographic aggregation of wage data that should be the default for making a wage determination. The second is how the Department should expand that level of geographic aggregation when it does not have sufficient wage survey data to make a wage determination at the default level. The Department is considering whether to update the language of § 1.7 to more clearly describe WHD's process for expanding the geographic scope of survey data, and whether to modify the regulations by eliminating the current bar on mixing wage data from ''metropolitan'' and ''rural'' counties when the geographic scope is expanded.

(A) Background

With regard to the first concept addressed in § 1.7, the default level of geographic aggregation, the DBA specifies that the relevant geographic area for determining the prevailing wage is the ''civil subdivision of the State'' where the contract is performed. 40 U.S.C. 3142(b). For many decades now, the Secretary has used the county as the default civil subdivision for making a wage determination. The Department codified this procedure in the 1981–1982 rulemaking in § 1.7(a), in which it stated that the relevant area for a wage determination will ''normally be the county.'' 29 CFR 1.7(a); s*ee* 47 FR 23644, 23647 (May 28, 1982).

The use of the county as the default ''area'' means that in making a wage determination the Administrator first considers the wage survey data WHD has received from projects of a ''similar character'' in a given county. *See* 40 U.S.C. 3142(b). If there is sufficient county-level data for a ''corresponding class[ ]'' of covered workers (*e.g.,* laborers, painters, etc.) working on those projects, the Administrator then makes a determination of the prevailing wage rate for that class of workers. *Id;* 29 CFR 1.7(a). This has a practical corollary for contracting agencies—in order to determine what wages apply to a given construction project, the agency needs to identify the county (or counties) in which the project will be constructed and obtain the wage determination for the correct type of construction for that county (or counties) from *SAM.gov*.

The second concept currently addressed in § 1.7 is the procedure that WHD follows when it does not receive sufficient survey wage data at the county level to determine a prevailing wage rate for a given classification of workers. This process is described in detail in the 2013 *Chesapeake Housing* ARB decision. 2013 WL 5872049. In short, if there is insufficient data to determine a prevailing wage rate for a classification of workers in a given county, WHD will determine that county's wage-rate for that classification by progressively expanding the geographic scope of data (still for the same classification of workers) that it uses to make the determination. First, WHD expands to include a group of surrounding counties at a ''group'' level. *See* 29 CFR 1.7(b) (discussing consideration of wage data in ''surrounding counties''); *Chesapeake Housing,* 2013 WL 5872049, at *2–3. If there is still not sufficient data at the group level, WHD considers a larger grouping of counties in the State called a ''supergroup,'' and thereafter uses data at a statewide level. *See* 29 CFR 1.7(c); *Chesapeake Housing,* 2013 WL 5872049, at *2–3.[63] Currently, WHD identifies county groupings by using metropolitan statistical areas (MSAs) and other related designations from the Office of Management and Budget (OMB). *See* 75 FR 37246 (June 28, 2010).

The current regulations do not define the term ''surrounding counties'' that delineates the initial county grouping level. However, the provision at § 1.7(b) that describes ''surrounding counties'' limits the counties that may be used in this grouping by excluding the use of any data from a ''metropolitan'' county in any wage determination for a ''rural'' county, and vice versa. 29 CFR 1.7(b). To be consistent with the existing prohibition at § 1.7(b), WHD's current practice is to use the OMB designations (discussed above) to identify whether a county is metropolitan or rural.[64] Under the current constraints, such a proxy designation is reasonable, and the practice has been approved by the ARB. *See Mistick Construction,* 2006 WL 861357, at *7–8. Although the language in § 1.7(b) does not apply explicitly to the consideration of data above the surrounding county level, *see* § 1.7(c), the Department's current procedures do not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

(B) Proposals for Use of ''Metropolitan'' and ''Rural'' Wage Data

The current language in § 1.7(b) barring the cross-consideration of metropolitan and rural wage data was added to the Department's regulations in the 1981–1982 rulemaking. *See* 47 FR 23644 (May 28, 1982). As the Department noted in that rulemaking, the prior practice up until that point had been to allow the Department to look to metropolitan wage rates for nearby rural areas when there was insufficient data from the rural area to determine a prevailing wage rate. *See id.* at 23647. In explaining the change in the longstanding policy, the Department noted commenters had stated that ''importing'' higher rates from metropolitan areas caused labor disruptions where workers were ''unwilling to return to their usual pay scales after the project was completed.'' *Id.* The Department stated that a more

[63] As discussed above in part III.B.1.iii.(A), for residential and building construction, this expansion of the scope of data considered also involves the use of data from Federal and federally assisted projects subject to Davis-Bacon labor standards at each county-grouping level when data from non-Federal projects is not sufficient. Data from Federal and federally assisted projects subject to Davis-Bacon labor standards is used in all instances to determine prevailing wage rates for heavy and highway construction.

[64] OMB does not specifically identify counties as ''rural'' and disclaims that its MSA standards ''produce an urban-rural classification.'' 75 FR 37246, 37246 (June 28, 2010). Nonetheless, because OMB identifies counties that have metropolitan characteristics as part of MSAs, the practice of the WHD Administrator has been to designate counties as rural if they are not within an OMB-designated MSA and metropolitan if they are within an MSA. *See Mistick Construction,* 2006 WL 861357, at *8.

appropriate alternative would be to use data from rural counties in other parts of the State. *See id.* To effectuate this, it imposed the bar on cross-consideration of rural and metropolitan county data in § 1.7(b).

The Department has received feedback that that this blanket decision did not adequately consider the heterogeneity of commuting patterns and local labor markets between and among counties that may be designated overall as ''rural'' or ''metropolitan.'' As noted in the 2011 GAO report, the DBA program has been criticized for using ''arbitrary geographic divisions,'' given that the relevant regional labor markets, which are reflective of area wage rates, ''frequently cross county and state lines.'' 2011 GAO Report at 24.[65] OMB itself notes that ''[c]ounties included in Metropolitan and Micropolitan Statistical Areas and many other counties may contain both urban and rural territory and population.'' 75 FR 37246, 37246 (June 28, 2010).

The Department understands the point articulated in the GAO report that actual local labor markets are not constrained by or defined by county lines—even those lines between counties identified (by OMB or otherwise) as ''metropolitan'' or ''rural.'' This is particularly the case for the construction industry, in which workers tend to commute longer distances than other professionals—resulting in geographically larger labor markets. *See, e.g.,* Keren Sun et al., Hierarchy Divisions of the Ability to Endure Commute Costs: An Analysis based on a Set of Data about Construction Workers, J. of Econ. & Dev. Stud., Dec. 2020, at 1, 6.[66] Even within the construction industry, workers in certain trades have greater or lesser tolerance for longer commutes. Keren Sun, Analysis of the Factors Affecting the Commute Distance/Time of Construction Workers, Int'l J. of Arts & Humanities, June 2020, at 34–35.[67]

By excluding a metropolitan county's wage rates from consideration in a determination for a bordering rural county, the current language in § 1.7(b) ignores the potential for projects in both counties to compete for the same supply of construction workers and be in the same local construction labor market. In many cases, the workers working on the metropolitan county projects may themselves live across the county lines in the neighboring rural county and commute to the urban projects. In such cases, under the current bar, the Department may not be able to use the wage rates of the same workers to determine the prevailing wage rate for projects in the county in which they live. Instead, WHD would import wage rates from other ''rural''-designated counties, potentially somewhere far across the State. Such a practice can result in Davis-Bacon wage rates that are lower than the wage rates that actually prevail in a bi-county labor market and that are based on wage data from distant locales rather than from neighboring counties.

For these reasons, the Department believes that limitations based on binary rural and metropolitan designations at the county level can result in geographic groupings that at times do not fully account for the realities of relevant construction labor markets. To address this concern, the Department has considered the possibility of using smaller basic units than the county as the initial area for a wage determination—and expanding to labor market areas that do not directly track county lines. The Department, however, has concluded that continuing the longstanding practice of using counties as the civil subdivision basis unit is more administratively feasible.[68] As a result, the Department is now considering the option of eliminating the metropolitan-rural bar in § 1.7(b) and relying instead on other approaches to determine how to appropriately expand geographic aggregation when necessary.

In addition to allowing WHD to account for actual construction labor market patterns, this proposal could have other benefits. It could allow WHD to publish more rates at the group level rather than having to rely on data from larger geographic areas, because it could increase the number of counties that may be available to supply data at the group level. The proposal could also allow WHD to publish more rates overall by authorizing the use of both metropolitan and rural county data together when it must rely on statewide data. Combining rural and urban data at the State level would be a final option for geographic expansion when otherwise the data could be insufficient to identify any prevailing wage at all.[69] The Department believes that the purposes of the Act are better served by using such combined statewide data to determine the prevailing wage, when the alternative could be to fail to publish a wage rate at all.

The proposal to eliminate the strict rural-metropolitan bar would result in a program that would be more consistent with the Department's original practice between 1935 and the 1981–1982 rulemaking. Reverting to this prior status quo would be appropriate in light of the text and legislative history of the DBA. Congressional hearings shortly after the passage of the initial 1931 Act suggest that Congress understood the DBA as allowing the Secretary to refer to metropolitan rates where rural rates were not available—including by looking to the nearest city when there was insufficient construction in a village or ''little town'' to determine a prevailing wage. *See* 75 Cong. Rec. 12,366, 12,377 (1932) (remarks of Rep. Connery). Likewise, the Department's original 1935 regulations directed the Department to ''the nearest large city'' when there had been no similar construction in the locality in recent years. *See* Labor Department Regulation No. 503 section 7(2) (1935).

In light of the above, the Department solicits comments on its proposal to allow the Administrator the discretion to determine reasonable county groupings, at any level, without the requirement to make a distinction between counties WHD designates as rural or metropolitan.

(C) Proposals for Amending the County Grouping Methodology

In addition to considering whether to eliminate the metropolitan-rural proviso language in § 1.7(b), the Department is also considering other potential changes to the methods for describing the county groupings procedure.

(1) Defining ''Surrounding Counties''

One potential change is to more precisely define ''surrounding counties,'' as used in § 1.7(b). Because the term is not currently defined, this has from time to time led to confusion among stakeholders regarding whether a county can be considered ''surrounding'' if it does not share a border with the county for which more data is needed. As noted above, WHD's current method of creating ''surrounding county'' groupings is to use OMB-designed MSAs to create pre-determined county groupings. This method does not require that all counties in the grouping share a border with (in other words, be a direct neighbor to) the county in need. Rather,

[65] *See* note 8, *supra.*

[66] *http://jedsnet.com/journals/jeds/Vol_8_No_4_December_2020/1.pdf.*

[67] *http://ijah.cgrd.org/images/Vol6No1/3.pdf.*

[68] The Department also considered this option in the 1981–1982 rulemaking, but similarly concluded that the proposal to use the county as the basic unit of a wage determination was the ''most administratively feasible.'' *See* 47 FR 23644, 23647 (May 28, 1982).

[69] The Department is also considering the option of more explicitly tailoring the ban on mixing metropolitan and rural data so that it applies only at the ''surrounding counties'' level, but not at the statewide level or an intermediate level.

at the ''surrounding county'' grouping, WHD will include counties in a group as long as they are all a part of the same contiguous area of either metropolitan or rural counties—even though each county included may not be directly adjacent to every other county in the group.[70]

For example, in the *Chesapeake Housing* case, one ''surrounding county'' group that WHD had compiled included the independent city of Portsmouth, combined with Virginia Beach, Norfolk, and Suffolk counties. 2013 WL 5872049, at *1, n.1. That was appropriate because those jurisdictions all were part of the same contiguous OMB-designated metropolitan area, and each county thus shared a border with at least one other county in the group—even if they did not all share a border with every other county in the group. *See id.* at *5–6. Thus, by using the group, WHD combined data from Virginia Beach and Suffolk counties at the ''surrounding counties'' level, even though those two counties do not themselves touch each other.

This grouping strategy—of relying on OMB MSA designations—has been found to be consistent both with the term ''surrounding counties'' as well as with the metropolitan-rural limitation proviso in § 1.7(b). *See Mistick,* 2006 WL 861357, at *7–8. An OMB-designated metropolitan statistical area is, at least by OMB's definition, made up entirely of ''metropolitan'' counties and thus WHD can group these counties together without violating the proviso. *See id.;* Manual of Operations at 39. Thus, the Department has used these OMB designations to put together pre-determined groups that can be used as the same first-level county grouping for any county within the grouping. While relying on OMB designations is not the only way that the Department could currently group counties together and comply with the proviso, the Department recognizes that, if it eliminates the metropolitan-rural proviso at § 1.7(b), it could be helpful to include in its place some further language to explain or delimit the meaning of ''surrounding counties'' in another way that would be both administrable and faithful to the purpose of the Davis-Bacon and Related Acts.

The first option would be to eliminate the metropolitan-rural proviso but not replace it with a further definition or limitation for ''surrounding counties.'' The Department has included this proposal in the proposed regulatory text of this NPRM. The term ''surrounding counties'' is not so ambiguous and devoid of meaning that it requires further definition. Even without some additional specific limitation, the Department believes the term could reasonably be read to require that such a grouping be of a contiguous grouping of counties as the Department currently requires in its use of OMB MSAs (as described above), with limited exceptions. Thus, while the elimination of the proviso would allow a nearby rural county to be included in a ''surrounding county'' grouping with metropolitan counties that it borders, it would not allow WHD to append a faraway rural county to a ''surrounding county'' group made up entirely of metropolitan counties with which the rural county shares no border at all. Conversely, the term does not allow the Department to consider a faraway metropolitan county to be part of the ''surrounding counties'' of a grouping of rural counties with which the metropolitan county shares no border at all. Although containing such an inherent definitional limit, this first option would allow the Department the discretion to develop new methodologies of grouping counties at the ''surrounding county'' level and apply them as along as it does so in a manner that is not arbitrary or capricious.[71]

The second option the Department is considering is to limit surrounding counties to solely those counties that share a border with the county for which additional wage data is sought. Such a limitation would create a relatively narrow grouping at the initial county grouping stage—narrower than the current practice of using OMB MSAs. As discussed above, construction workers tend to commute longer than other professionals. This potential one-county-over grouping limitation would ensure that, in the vast majority of cases, the ''surrounding county'' grouping would not expand outward beyond the home counties or commuting range of the construction workers who would work on projects in the county at issue. The narrowness of such a limitation would also be a drawback, as it could lead to fewer wage rates being set at the ''surrounding counties'' group level. Another drawback is that such a limitation would not allow for the use of pre-determined county groupings that would be the same for a number of counties—because each county may have a different set of counties with which it alone shares a border. This could result in a significant burden on WHD in developing far more county-grouping rates than it currently does, and could result in less uniformity in required prevailing wage rates among nearby counties.

A third option would be to include language that would define the ''surrounding counties'' grouping as a grouping of counties that are all a part of the same ''contiguous local construction labor market'' or some comparable definition. In practice, this methodology could result in similar (but not identical) groupings as the current methodology, as the Department could decide to use OMB designations to assist in determining what counties are part of the contiguous local labor market. Without the strict metropolitan-rural proviso, however, this option would allow the Department to use additional evidence on a case-by-case basis to determine whether the OMB designations—which do not track construction markets specifically—are too narrow for a given construction market. Under this option, the Department could consider other measures of construction labor market integration, including whether construction workers in general (or workers in specific construction trades) typically commute between or work in two bordering counties or in a cluster of counties.

This third option also would bring with it some potential benefits and drawbacks. On the one hand, the ability to identify local construction labor markets would allow the Department to make pre-determined county groupings much like it does now. This would reduce somewhat the burden of the second option—of calculating a different county grouping for each individual county to account for the counties that border specifically that county. It would also explicitly articulate the limitation that the Department believes is inherent in the term ''surrounding counties''—that the grouping must be limited to a ''contiguous'' group of counties, with limited exceptions. On the other hand, the case-by-case determination of a local ''construction'' labor market (that might

[70] In addition, in certain limited circumstances, WHD has allowed the aggregation of counties at the ''surrounding counties'' level that are not part of a contiguous grouping of all-metropolitan or all-rural counties. This has been considered appropriate where, for example, two rural counties border an MSA on different sides and do not themselves share a border with each other or with any other rural counties. Under WHD's current practice, those two rural counties could be considered to be a county group at the ''surrounding counties'' level even though they neither share a border nor are part of a contiguous group of counties.

[71] For example, the Department could rely on county groupings in use by State governments for little Davis-Bacon laws or similar purposes, as long as they are contiguous county groupings that reasonably can be characterized as ''surrounding counties.''

be different from an OMB MSA) could also be burdensome on WHD. The definition, however, could allow such a case-by-case determination but not require it. Accordingly, if such case-by-case determinations become too burdensome, WHD could revert to the adoption of designations from OMB or some other externally-defined metric.

Finally, the Department recognizes that even if it retains the metropolitan-rural proviso, doing so does not bind WHD to the current practice of using OMB-designated county groupings and other procedures. Under the language of the current regulation, the Department retains the authority to make its own determinations regarding whether a county is ''metropolitan'' or ''rural.'' *See* 29 CFR 1.7(b). The Department also retains certain flexibility for determining how to group counties at each level and is not limited to using the OMB designations. As noted above, the Department also believes that the plain text of § 1.7(b) does not necessarily limit it from combining metropolitan and rural data beyond the ''surrounding counties'' group level.

(2) Other Proposed Changes to § 1.7

The Department is also considering other proposed changes to § 1.7. These include nonsubstantive changes to the wording of the paragraphs that clarify that the threshold for expansion in each one is insufficient ''current wage data.'' The existing regulation now defines ''current wage data'' in § 1.7(a) as ''data on wages paid on current projects or, where necessary, projects under construction no more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate.'' The Department seeks comment on whether this definition should be kept in its current format or amended to narrow or expand its scope.

The Department is also considering whether to amend § 1.7(c) to better describe the process for expanding from the ''surrounding county'' level to consider data from an intermediary level (such as the current ''supergroup'' level) before relying on statewide data. For example, as the Department has included in the current proposed regulatory text, the Department could describe this second level of county groupings as a consideration of ''comparable counties or groups of counties in the State.'' As with the third option discussed above for defining ''surrounding counties,'' this ''comparable counties'' language in § 1.7(c) would allow the Department to continue to use the procedure described in *Chesapeake Housing* of combining various MSAs or various non-contiguous groups of rural counties to create ''supergroups.'' It would also allow a more nuanced analysis of comparable labor markets using construction market data specifically.

As the foregoing discussion reflects, there is no perfect solution for identifying county groupings in § 1.7. Each possibility described above has potential benefits and drawbacks. In addition, the Department notes that the significance of this section in the wage determination process is also related to the level of participation by interested parties in WHD's voluntary wage survey. If more interested parties participate in the wage survey, then there will be fewer counties without sufficient wage data for which the § 1.7 expansion process becomes relevant. Absent sufficient survey information, however, WHD will need to continue to include a larger geographic scope to ensure that it effectuates the purposes of the DBA and Related Acts—to issue wage determinations to establish minimum wages on federally funded or assisted construction projects. The Department thus seeks comment on all aspects of amending the county grouping methodology of § 1.7—including administrative feasibility and the distinction between rural and metropolitan counties—to ensure that it has considered the relevant possibilities for amending or retaining the various elements of this methodology.

viii. Section 1.8 Reconsideration by the Administrator

The Department proposes revisions to §§ 1.8 and 5.13 to explicitly provide procedures for reconsideration by the Administrator of decisions, rulings, or interpretations made by an authorized representative of the Administrator. Parts 1 and 5 both define the term ''Administrator'' to mean the WHD Administrator or an authorized representative of the Administrator. *See* 29 CFR 1.2(c), 5.2(b). Accordingly, when parties seek rulings, interpretations, or decisions from the Administrator regarding the Davis-Bacon labor standards, it is often the practice of the Department to have such decisions made in the first instance by an authorized representative. After an authorized representative issues a decision, the party may request reconsideration by the Administrator. The decision typically provides a time frame in which to request reconsideration by the Administrator, often 30 days. To provide greater clarity and uniformity, the Department proposes to codify this practice and to clarify how and when reconsideration may be sought.

First, the Department proposes to amend § 1.8, which concerns reconsideration by the Administrator of wage determinations and decisions regarding the application of wage determinations under part 1, to provide that if a decision for which reconsideration is sought was made by an authorized representative of the Administrator, the interested party seeking reconsideration may request further reconsideration by the Administrator of the Wage and Hour Division. The Department proposes that such requests must be submitted within 30 days from the date the decision is issued, and that this time period may be extended for good cause at the Administrator's discretion upon a request by the interested party. Second, the Department proposes to amend § 5.13, which concerns rulings and interpretations under parts 1, 3, and 5, to similarly provide for the Administrator's reconsideration of rulings and interpretations issued by an authorized representative. The Department proposes to apply the same procedures for such reconsideration requests as apply to reconsideration requests under § 1.8. The Department also proposes to divide §§ 1.8 and 5.13 into paragraphs for clarity and readability, and to add email addresses for parties to submit requests for reconsideration or for rulings or interpretations, respectively.

ix. Section 1.10 Severability

The Department proposes to add a new § 1.10, titled ''Severability.'' The proposed severability provision explains that each provision is capable of operating independently from one another, and that if any provision of part 1 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intends that the remaining provisions remain in effect.

x. References to Website for Accessing Wage Determinations

The Department proposes to revise §§ 1.2, 1.5, and 1.6 to reflect, in more general terms, that wage determinations are maintained online without a reference to a specific website.

The current regulations reference Wage Determinations OnLine (WDOL), previously available at *https://www.wdol.gov,* which was established following the enactment of the E-Government Act of 2002, Public Law 107–347, 116 Stat. 2899 (2002). *WDOL.gov* served as the source for Federal contracting agencies to use when obtaining wage determinations.

See 70 FR 50887 (Aug. 26, 2005). *WDOL.gov* was decommissioned on June 14, 2019, and the System for Award Management (*SAM.gov*) became the authoritative and single location for obtaining DBA general wage determinations.[72] The transition of wage determinations onto *SAM.gov* was part of the Integrated Award Environment, a government-wide initiative administered by GSA to manage and integrate multiple online systems used for awarding and administering Federal financial assistance and contracts.[73]

Currently, wage determinations can be found at *https://sam.gov/content/wage-determinations.* In order to avoid outdated website domain references in the regulations should the domain name change in the future, the Department proposes to use the more general term ''Department of Labor-approved website,'' which would refer to any official government website the Department approves for posting wage determinations.

xi. Appendices A and B to Part 1

The Department proposes to remove Appendices A and B from 29 CFR part 1 and make conforming technical edits to sections that reference those provisions. Appendix A lists the Davis-Bacon Act and the Related Acts, in other words, the statutes related to the Davis-Bacon Act that require the payment of wages at rates predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, and Appendix B lists regional offices of the Wage and Hour Division. The Department proposes to rescind these appendices as they are no longer current, and updated information contained in both appendices can be found on WHD's website at *https://www.dol.gov/agencies/whd/.* Specifically, a listing of statutes requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act is currently at *https://www.dol.gov/agencies/whd/government-contracts*, and a listing of WHD regional offices is currently found at *https://www.dol.gov/agencies/whd/contact/local-offices*.

xii. Frequently Conformed Rates

The Department also proposes to revise §§ 1.3 and 5.5 to provide that, where WHD has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, WHD nonetheless may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that the three basic criteria for conformance of a classification and wage and fringe benefit rate have been satisfied: (1) The work performed by the classification is not performed by a classification in the wage determination; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination. The Department specifically proposes that the wage and fringe benefit rates for these classifications be determined in accordance with the ''reasonable relationship'' criterion that is currently used in conforming missing classifications pursuant to current 29 CFR 5.5(a)(1)(ii)(A). The Department welcomes comments regarding all aspects of this proposal, which is described more fully below.

WHD determines DBA prevailing wage rates based on wage survey data that responding contractors and other interested parties voluntarily provide. *See* 29 CFR 1.1 through 1.7. WHD sometimes receives robust participation in its wage surveys, thereby enabling it to publish wage determinations that list prevailing wage rates for numerous construction classifications. However, stakeholder participation can be more limited, particularly in surveys for residential construction or in rural areas, and WHD therefore does not always receive sufficient wage data to publish prevailing wage rates for various classifications generally necessary for various types of construction.

Whenever a wage determination lacks a classification of work that is necessary for performance of DBRA-covered construction, the missing classification and an appropriate wage rate must be added to the wage determination on a contract-specific basis through the conformance process. Conformance is the expedited process by which a classification and wage and fringe benefit rate are added to an existing wage determination applicable to a specific DBRA-covered contract. *See* 29 CFR 5.5(a)(1)(ii)(A). When, for example, a wage determination lists only certain skilled classifications such as carpenter, plumber, and electrician (because they are the skilled classifications for which WHD received sufficient wage data through its survey process), the conformance process is used to provide contractors with minimum wage rates for other necessary classifications (such as, in this example, painters and bricklayers).

''By design, the Davis-Bacon conformance process is an expedited proceeding created to 'fill in the gaps' '' in an existing wage determination, with the ''narrow goal'' of establishing an appropriate wage rate for a classification needed for performance of the contract. *Am. Bldg. Automation, Inc.,* ARB No. 00–067, 2001 WL 328123, at *3 (Mar. 30, 2001). As a general matter, WHD is given ''broad discretion'' in setting a conformed wage rate, and the Administrator's decisions ''will be reversed only if inconsistent with the regulations, or if they are unreasonable in some sense[.]'' *Millwright Loc. 1755,* ARB No. 98–015, 2000 WL 670307, at *6 (May 11, 2000) (internal quotations and citations omitted). *See, e.g., Constr. Terrebonne Par. Juvenile Justice Complex,* ARB No. 17–0056, 2020 WL 5902440, at *2–4 (Sept. 4, 2020) (reaffirming the Administrator's ''broad discretion'' in determining appropriate conformed wage rates); *Courtland Constr. Corp.,* ARB No. 17–074, 2019 WL 5089598, at *2 (Sept. 30, 2019) (same).

The regulations require the following criteria be met for a proposed classification and wage rate to be conformed to a wage determination: (1) The work to be performed by the requested classification is not performed by a classification in the wage determination; (2) the classification is used in the area by the construction industry; and (3) the proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates in the wage determination. *See* 29 CFR 5.5(a)(1)(ii)(A).

Pursuant to the first conformance criterion, WHD may approve a conformance request only where the work of the proposed classification is not performed by any classification on the wage determination. WHD need not ''determine that a classification in the wage determination actually is the prevailing classification for the tasks in question, only that there is evidence to establish that the classification actually performs the disputed tasks in the locality.'' *Am. Bldg. Automation,* 2001 WL 328123, at *4. Even if workers perform only a subset of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate. *See, e.g., Fry Bros. Corp.,* WAB No. 76–06, 1977 WL 24823, at *6

[72] *WDOL.gov* Decommissioning Approved by IAE Governance: System Set to Transition to *beta.SAM.gov* on June 14, 2019, GSA Interact (May 21, 2019), *https://interact.gsa.gov/blog/wdolgov-decommissioning-approved-iae-governance-system-set-transition-betasamgov-june-14-2019.*

[73] About This Site, System for Award Management, *https://sam.gov/content/about/this-site* (last visited Nov. 19, 2021).

(June 14, 1977). In instances where the first and second conformance criteria are satisfied and it has been determined that the requested classification should be added to the contract wage determination, WHD will address whether the third criterion has also been satisfied, *i.e.,* whether ''[t]he proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates'' in the wage determination.

WHD typically receives thousands of conformance requests each year (sometimes over 10,000 in a given year). In some instances, including instances where contractors are unaware that their work falls within the scope of work performed by an established classification on the wage determination, WHD receives conformance requests where conformance plainly is not appropriate because the wage determination already contains a classification that performs the work of the proposed classification. In other instances, however, conformance is necessary because the applicable wage determination does not contain all of the classifications that are necessary to complete the project. The considerable need for conformances due to the absence of necessary classifications on wage determinations reduces certainty for prospective contractors in the bidding process, who may be unsure of what wage rate must be paid to laborers and mechanics performing work on the project, and taxes WHD's resources. If such uncertainty causes contractors to underbid on construction projects and subsequently to pay subminimum wages to workers, missing classifications on wage determinations can result in the underpayment of wages to workers.

To address this issue, the Department proposes revising 29 CFR 1.3 and 5.5(a)(1) to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process. Under this proposal, for key classifications or other classifications for which conformance requests are regularly submitted,[74] the Administrator would be authorized to list the classification on the wage determination along with wage and fringe benefit rates that bear a ''reasonable relationship'' to the prevailing wage and fringe benefit rates contained in the wage determination, using essentially the same criteria under which such classifications and rates are currently conformed by WHD pursuant to current § 5.5(a)(1)(ii)(A)(*3*). In other words, for a classification for which conformance requests are regularly submitted, and for which WHD received insufficient data through its wage survey process, WHD would be expressly authorized to essentially ''pre-approve'' certain conformed classifications and wage rates, thereby providing contracting agencies, contractors and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications. WHD would list such classifications and wage and fringe benefit rates on wage determinations where: (1) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination. The Administrator would establish wage rates for such classifications in accordance with proposed § 5.5(a)(1)(iii)(A)(*3*). Contractors would be required to pay workers performing work within such classifications at no less than the rates listed on the wage determination. Such classifications and rates on a wage determination would be designated with a distinct term, abbreviation, or description to denote that they essentially reflect pre-approved conformed rates rather than prevailing wage and fringe benefit rates that have been determined through the Davis-Bacon wage survey process.

These rates would apply to the applicable classification without the need to submit a conformance request in accordance with current § 5.5(a)(1)(ii)(A)–(C). However, if a contracting agency, contractor, union, or other interested party has questions or concerns about how particular work should be classified—and, specifically, whether the work at issue is performed by a particular classification included on a wage determination (including classifications listed pursuant to this proposal) as a matter of local area practice or otherwise, the contracting agency should submit a conformance request in accordance with § 5.5(a)(1) or seek guidance from WHD under 29 CFR 5.13. Moreover, under this proposal, contracting agencies would still be required to submit conformance requests for any needed classifications not listed on the wage determination, which would be approved, modified or disapproved as warranted after award of the contract, as required by the regulatory provisions applicable to conformance requests.

2. 29 CFR Part 3

''Anti-kickback'' and payroll submission regulations under section 2 of the Act of June 13, 1934, as amended, 40 U.S.C. 3145, popularly known as the Copeland Act, are set forth in 29 CFR part 3. This part details the obligations of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered by the Davis-Bacon labor standards; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

i. Corresponding Edits to Part 3

The Department proposes multiple revisions to various sections in part 3 to update the language and ensure that terms are used in a manner consistent with the terminology used in 29 CFR parts 1 and 5, to update websites and contact information, and to make other similar, non-substantive changes. The Department also proposes conforming edits to part 3 to reflect proposed changes to part 5, such as revising § 3.2 to clarify existing definitions or to add new defined terms also found in parts 1 and 5. The Department welcomes comment on whether it should further consolidate and/or harmonize the definitions in §§ 1.2, 3.2, and 5.2 in a final rule, such as by placing all definitions in a single regulatory section applicable to all three parts.

The Department further proposes to change certain requirements associated with the submission of certified payrolls. To the extent that such

[74] As explained in WHD's Prevailing Wage Resource Book, WHD has identified several ''key classifications'' normally necessary for one of the four types of construction (building, highway, heavy, and residential) for which WHD publishes general wage determinations. Davis-Bacon Surveys at 6. The Prevailing Wage Resource Book contains a table that lists the key classifications for each type of construction. The table, which may be updated periodically as warranted, currently identifies the key classifications for building construction as heat and frost insulators, bricklayers, boilermakers, carpenters, cement masons, electricians, iron workers, laborers (common), painters, pipefitters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, tile setters, and truck drivers; the key classifications for residential construction as bricklayers, carpenters, cement masons, electricians, iron workers, laborers (common), painters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, and truck drivers; and the key classifications for heavy and highway construction as carpenters, cement masons, electricians, iron workers, laborers (common), painters, power equipment operators (operating engineers), and truck drivers. *Id.*

changes are substantive, the reasons for these proposed changes are provided in the discussions of proposed §§ 5.2 and 5.5. The Department also proposes to remove § 3.5(e) regarding deductions for the purchase of United States Defense Stamps and Bonds, as the Defense Stamps and Bonds are no longer available for purchase. Similarly, the Department proposes to simplify the language regarding deductions for charitable donations at § 3.5(g) by eliminating references to specific charitable organizations and instead permitting voluntary deductions to charitable organizations as defined by 26 U.S.C. 501(c)(3).

Finally, the Department proposes to add language to § 3.11 explaining that the requirements set forth in part 3 are considered to be effective as a matter of law, whether or not these requirements are physically incorporated into a covered contract, and cross-referencing the proposed new language discussing incorporation by operation of law at § 5.5(e), discussed further below.

3. 29 CFR Part 5

i. Section 5.1 Purpose and Scope

The Department proposes minor technical revisions to § 5.1 to update statutory references, and further proposes to revise § 5.1 by deleting the listing of laws requiring Davis-Bacon labor standards provisions, given that any such list inevitably becomes out-of-date due to statutory revisions and the enactment of new Related Acts. In lieu of this listing in the regulation, the Department proposes to add new sub-paragraph (a)(1) to reference the WHD website (*https://www.dol.gov/agencies/whd/government-contracts*) on which a listing of laws requiring Davis-Bacon labor standards provisions is currently found and regularly updated.

ii. Section 5.2 Definitions

(A) Agency, Agency Head, Contracting Officer, Secretary, and Davis-Bacon Labor Standards

The Department proposes to revise the definitions of ''agency head'' and ''contracting officer'' and to add a definition of ''agency'' to reflect more clearly that State and local agencies enter into contracts for projects that are subject to the Davis-Bacon labor standards and that they allocate Federal assistance they have received under a Davis-Bacon Related Act to sub-recipients. These proposed definitional changes also are intended to reflect that, for some funding programs, the responsible Federal agency has delegated administrative and enforcement authority to states or local agencies. When the current regulations refer to the obligations or authority of agencies, agency heads, and contracting officers, they are referring to Federal agencies and Federal contracting officers. However, as noted above, State or local agencies and their agency heads and contracting officers exercise similar authority in the administration and enforcement of Davis-Bacon labor standards. Because the existing definitions define ''agency head'' and ''contracting officer'' as particular ''Federal'' officials or persons authorized to act on their behalf, which does not clearly reflect the role of State and local agencies in effectuating Davis-Bacon requirements, including by entering into contracts for projects subject to the Davis-Bacon labor standards and inserting the Davis-Bacon contract clauses in such contracts, the Department proposes to revise these definitions to reflect the role of State and local agencies. The proposed revisions also enable the regulations to specify the obligations and authority held by both State or local and Federal agencies, as opposed to obligations that are specific to one or the other.

The Department also proposes to define the term ''Federal agency'' as a sub-definition of ''agency'' to distinguish those situations where the regulations refer specifically to an obligation or authority that is limited solely to a Federal agency that enters into contracts for projects subject to the Davis-Bacon labor standards or allocates Federal assistance under a Davis-Bacon Related Act.

The Department also proposes to add the District of Columbia to the definition of ''Federal agency.'' The DBA states in part that it applies to every contract in excess of $2,000, to which the Federal Government ''or the District of Columbia'' is a party. *See* 40 U.S.C. 3142(a). As described above, Reorganization Plan No. 14 of 1950 authorizes the Department to prescribe regulations to ensure that the Act is implemented in a consistent manner by all agencies subject to the Act. *See* 5 U.S.C. app 1. Accordingly, the proposed change to the definition of ''Federal agency'' in § 5.2 clarifies that the District of Columbia is subject to the DBA and the regulations implemented by the Department pursuant to Reorganization Plan No. 14 of 1950.[75] The proposed change is also consistent with the definition of ''Federal agency'' in part 3 of this title, which specifically includes the District of Columbia. *See* 29 CFR 3.2(g). The proposed change simply reflects the DBA's applicability to the District of Columbia and is not intended to reflect a broader or more general characterization of the District as a Federal Government entity.

The Department also proposes a change to the definition of ''Secretary'' to delete a reference to the Under Secretary for Employment Standards; as noted above, the Employment Standards Administration was eliminated in a reorganization in 2009 and its authorities and responsibilities were devolved into its constituent components, including WHD.

Lastly, the Department proposes a minor technical edit to the definition of ''Davis-Bacon labor standards'' to reflect proposed changes to § 5.1, discussed above.

(B) Building or Work

(1) Energy Infrastructure and Related Activities

The Department proposes to modernize the definition of the terms ''building or work'' by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of construction activities encompassed by the definition. These proposed changes to the definition are intended to reflect the significance of energy infrastructure and related projects to modern-day construction activities subject to the Davis-Bacon and Related Acts, as well as to illustrate the types of energy-infrastructure and related activities that are encompassed by the definition of ''building or work.''

(2) Coverage of a Portion of a Building or Work

The Department proposes to add language to the definitions of ''building or work'' and ''public building or public work'' to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. The definition of ''building or work'' already states that the terms ''building'' and ''work'' ''generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work,'' and includes ''without limitation, buildings, structures, and improvements of all types.'' 29 CFR 5.2(i). In addition, the

[75] The 1973 Home Rule Act, Public Law 93–198, transferred from the President to the District of Columbia the authority to organize and reorganize specific governmental functions of the District of Columbia, but does not contain any language removing the District of Columbia from the Department's authority to prescribe DBA regulations pursuant to Reorganization Plan No. 14 of 1950.

regulation already provides several examples of construction activity included within the term ''building or work'' that do not constitute an entire building, structure, or improvement, such as ''dredging, shoring, . . . scaffolding, drilling, blasting, excavating, clearing, and landscaping.'' *Id.* Moreover, the current regulations define the term ''construction, prosecution, completion, or repair'' to mean ''all types of work done on a particular building or work at the site thereof . . . including, without limitation . . . [a]ltering, remodeling, installation . . . ; [p]ainting and decorating.'' *Id.* § 5.2(j).

However, to further make plain that ''building or work'' includes not only construction activity involving an entire building, structure, or improvement, but also construction activity involving a portion of a building, structure, or improvement, or the installation of equipment or components into a building, structure, or improvement, the Department proposes to add a sentence to this definition stating that ''[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.'' The Department also proposes to include additional language in the definition of ''public building or public work'' to clarify that a ''public building'' or ''public work'' includes the construction, prosecution, completion, or repair of a portion of a building or work that is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, even where construction of the entire building or work does not fit within this definition.

These proposed revisions are consistent with the Davis-Bacon Act. The concepts of alteration or repair presuppose that only a portion of a building, structure, or improvement will be affected. By specifically including the alteration or repair of public buildings or works within its scope of coverage, the Davis-Bacon Act itself necessitates that construction activity involving merely a portion of a building or work may be subject to coverage.

These proposed revisions are also consistent with the Department's longstanding policy that a ''public building'' or ''public work'' includes construction activity involving a portion of a building or work, or the installation of equipment or components into a building or work when the other requirements for Davis-Bacon coverage are satisfied. *See, e.g.,* AAM 52 (July 9, 1963) (holding that the upgrade of communications systems at a military base, including the installation of improved cabling, constituted the construction, alteration or repair of a public work); Letter from Sylvester L. Green, Director, Division of Contract Standards Operations, to Robert Olsen, Bureau of Reclamation (Mar. 18, 1985) (finding that the removal and replacement of stator cores in a hydroelectric generator was covered under the Davis-Bacon Act as the alteration or repair of a public work); Letter from Samuel D. Walker, Acting Administrator, to Edward Murphy (Aug. 29, 1990) (stating that ''[t]he Department has ruled on numerous occasions that repair or alteration of boilers, generators, furnaces, etc. constitutes repair or alteration of a 'public work' ''); Letter from Nancy Leppink, Deputy Administrator, to Armin J. Moeller (Dec. 12, 2012) (finding that the installation of equipment such as generators or turbines into a hydroelectric plant is considered to be the improvement or alteration of a public work).

Similarly, the proposed revisions are consistent with the Department's longstanding position that a ''public building'' or ''public work'' may include structures, buildings, or improvements that will not be owned by the Federal government when construction is completed, so long as the construction is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. Accordingly, the Department has long held that the Davis-Bacon labor standards provisions may apply to construction undertaken when the government is merely going to have the use of the building or work, such as in lease-construction contracts, depending upon the facts and circumstances surrounding the contract. *See* Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Admin.'s Lease of Med. Facilities, 18 Op. O.L.C. 109, 119 n.10 (May 23, 1994) (''1994 OLC Memorandum'') (''[T]he determination whether a lease-construction contract calls for construction of a public building or public work likely will depend on the details of the particular arrangement.''); FOH 15b07. In AAM 176 (June 22, 1994), WHD provided guidance to the contracting community regarding the DBA's application to lease-construction contracts, and specifically advised that the following non-exclusive list of factors from the 1994 OLC Memorandum should be considered in determining the scope of DBA coverage: (1) The length of the lease; (2) the extent of Government involvement in the construction project (such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work); (3) the extent to which the construction will be used for private rather than public purposes; (4) the extent to which the costs of construction will be fully paid for by the lease payments; and (5) whether the contract is written as a lease solely to evade the requirements of the DBA.

In sum, as noted above, a building or work includes construction activity involving only a portion of a building, structure, or improvement. As also noted above, a public building or public work is not limited to buildings or works that will be owned by the Federal Government, but may include buildings or works that serve the general public interest, including spaces to be leased or used by the Federal Government. Accordingly, it necessarily follows that a contract for the construction of a portion of a building, structure, or improvement may be a covered contract for construction of a ''public building'' or ''public work'' where the other requirements for coverage are met, even if the Federal Government is not going to own, lease, use, or otherwise be involved with the construction of the remaining portions of the building or work. For example, as WHD has repeatedly asserted in connection with one contracting agency's lease-construction contracts, where the Federal government enters into a lease for a portion of an otherwise private building—and, as a condition of the lease, requires and pays for specific tenant improvements requiring alterations and repairs to that portion to prepare the space for government occupancy in accordance with government specifications—Davis-Bacon labor standards may apply to the tenant improvements or other specific construction activity called for by such a contract. In such circumstances, the factors discussed in AAM 176 would still need to be considered to determine if coverage is appropriate, but the factors would be applied specifically with reference to the leased portion of the building and the construction required by the lease.

Finally, these proposed revisions would further the remedial purpose of the Davis-Bacon Act by ensuring that the Act's protections apply to contracts for construction activity for which the government is responsible. *Walsh* v. *Schlecht,* 429 U.S. 401, 411 (1977) (reiterating that the DBA ''was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects'')

(citation and internal quotation marks omitted); 1994 OLC Memorandum, 18 Op. O.L.C. at 121 (''[W]here the government is financially responsible for construction costs, the purposes of the Davis-Bacon Act may be implicated.''). If the Davis-Bacon Act were only applied in situations where the Federal government is involved in the construction of the entire (or even the majority of the) building or work, coverage of contracts would be dependent on the size of the building or work, even if two otherwise equivalent contracts involved the same square footage and the government was paying for the same amount of construction. Such an application of coverage would undermine the statute's remedial purpose by permitting publicly funded construction contracts for millions of dollars of construction activity to evade coverage merely based on the size of the overall structure or building.

Accordingly, and as noted above, the Department proposes revisions to the definitions of ''building or work'' and ''public building or public work'' that serve to clarify rather than change existing coverage requirements. However, the Department understands that in the absence of such clarity under the existing regulations, contracting agencies have differed in their implementation of Davis-Bacon labor standards where construction activity involves only a portion of a building, structure, or improvement, particularly in the context of lease-construction contracts. Thus, as a practical matter, the proposed revisions will result in broader application of Davis-Bacon labor standards. The Department therefore invites comment on the benefits and costs of these proposed revisions to private business owners, workers, and the Federal government, particularly in the context of leasing.

(C) Construction, Prosecution, Completion, or Repair

The Department also proposes to add a new sub-definition to the term ''construction, prosecution, completion, or repair'' in § 5.2, to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards.

In general, the Davis-Bacon labor standards apply to contracts ''for construction, alteration or repair . . . of public buildings and public works[.]'' 40 U.S.C. 3142(a). Early in the DBA's history, the Attorney General examined whether demolition fit within these terms, and concluded that ''[t]he statute is restricted by its terms to 'construction, alteration, and/or repair,' '' and that this language ''does not include the demolition of existing structures'' alone. 38 Op. Atty. Gen. 229 (1935). The Attorney General ''reserve[d] . . . the question . . . of [the coverage of] a razing or clearing operation provided for in a building contract, to be performed by the contractor as an incident of the building project.'' *Id.* Consistent with the Attorney General's opinion, the Department has long maintained that standalone demolition work is generally not covered by the Davis-Bacon labor standards. *See* AAM 190 (Aug. 29, 1998); WHD Opinion Letter SCA–78 (Nov. 27, 1991); WHD Opinion Letter DBRA–40 (Jan. 24, 1986); WHD Opinion Letter DBRA–48 (Apr. 13, 1973); AAM 54 (July 29, 1963); FOH 15d03(a).

However, the Department has understood the Davis-Bacon labor standards to cover demolition and removal under certain circumstances. First, demolition and removal activities are covered by Davis-Bacon labor standards when such activities themselves constitute construction, alteration, or repair of a public building or work. Thus, for example, the Department has explained that removal of asbestos or paint from a facility that will not be demolished—even if subsequent reinsulating or repainting is not considered—is covered by Davis-Bacon because the asbestos or paint removal is an ''alteration'' of the facility. *See* AAM 153 (Aug. 6, 1990). Likewise, the Department has explained that Davis-Bacon can apply to certain hazardous waste removal contracts, because ''substantial excavation of contaminated soils followed by restoration of the environment'' is ''construction work'' under the DBA and because the term ''landscaping'' as used in the DBA regulations includes ''elaborate landscaping activities such as substantial earth moving and the rearrangement or reclamation of the terrain that, standing alone, are properly characterized as the construction, restoration, or repair of the a public work.'' AAM 155 (Mar. 25, 1991); *see also* AAM 190 (noting that ''hazardous waste removal contracts that involve substantial earth moving to remove contaminated soil and recontour the surface'' can be considered DBA-covered construction activities)

Second, the Department has consistently maintained that if future construction that will be subject to the Davis-Bacon labor standards is contemplated on a demolition site—either because the demolition is part of a contract for such construction or because such construction is contemplated as part of a future contract, then the demolition of the previously-existing structure is considered part of the construction of the subsequent building or work and therefore within the scope of the Davis-Bacon labor standards. *See* AAM 190. This position is also articulated in the Department's SCA regulations at 29 CFR 4.116(b). Likewise, the Department has explained that certain activities under hazardous waste removal and remediation contracts, including ''the dismantling or demolition of buildings, ground improvements and other real property structures and . . . the removal of such structures or portions of them'' are covered by Davis-Bacon labor standards ''*if* this work will result in the construction, alteration, or repair of a public building or public work at that location.'' AAM 187 (Nov. 18, 1996), attachment: Superfund Guidance, Davis Bacon Act/Service Contract Act and Related Bonding, Jan. 1992) (emphasis in original).

While the Department has addressed these distinctions to a degree in the SCA regulations and in subregulatory guidance, the Department believes that clear standards for the coverage of demolition and removal and related activities in the DBA regulations will assist agencies, contractors, workers, and other stakeholders in identifying whether contracts for demolition are within the scope of the DBA. This, in turn, would ensure that the correct contract provisions and wage determinations are incorporated into the contract, thereby providing contractors with the correct wage determinations prior to bidding and requiring the payment of Davis-Bacon prevailing wages where appropriate.[76] Accordingly, the Department proposes to add a new paragraph (2)(v) to the definition of ''construction, prosecution, completion, or repair'' to assist agencies, contractors, workers, and other stakeholders in identifying when demolition and related activities fall within the scope of the DBA.

Specifically, the Department proposes to clarify that demolition work is covered under any of three circumstances: (1) Where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing public building or work; (2) where subsequent

[76] The Department notes that under Federal contracts and subcontracts, demolition contracts that do not fall within the DBA's scope are instead service contracts covered by the SCA, and the Department uses DBA prevailing wage rates as a basis for the SCA wage determination. *See* AAM 190. However, federally-funded demolition work carried out by State or local governments that does not meet the criteria for coverage under a Davis-Bacon Related Act would generally not be subject to Federal prevailing wage protections.

construction covered in whole or in part by the Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or (3) where otherwise required by statute.[77]

While determining whether demolition is performed in contemplation of a future construction project is a fact-specific question, the Department also proposes a non-exclusive list of factors that can inform this determination. Although the inclusion of demolition activities in the scope of a contract for the subsequent construction of a public building or work is sufficient to warrant Davis-Bacon coverage, such a condition is not a necessary one. Other factors that may be relevant include the existence of engineering or architectural plans or surveys; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; the disposition of the site after demolition (*e.g.,* whether it is to be sealed and abandoned or left in a State that is prepared for future construction); and other factors. Based on these guidelines, Davis-Bacon coverage may apply, for example, to the removal and disposal of contaminated soil in preparation for construction of a building, or the demolition of a parking lot to prepare the site for a future public park. In contrast, Davis-Bacon likely would not apply to the demolition of an abandoned, dilapidated, or condemned building to eliminate it as a public hazard, reduce likelihood of squatters or trespassers, or to make the land more desirable for sale to private parties for purely private construction.

(D) Contract, Contractor, Prime Contractor, and Subcontractor

The Department proposes non-substantive revisions to the definition of ''contract'' and also proposes new definitions in § 5.2 for the terms ''contractor,'' ''subcontractor'' and ''prime contractor.'' These definitions apply to 29 CFR part 5, including the DBRA contract clauses in § 5.5(a) and (b) of this part.

Neither the DBA nor CWHSSA defines the terms ''contract,'' ''contractor,'' ''prime contractor,'' or ''subcontractor.'' The language of the Davis-Bacon and Related Acts, however, makes it clear that Congress intended the prevailing wage and overtime requirements to apply broadly to both prime contracts executed directly with Federal agencies as well as any subcontracts through which the prime contractors carry out the work on the prime contract. *See* 40 U.S.C. 3142(c); 40 U.S.C. 3702(b), (d). Thus, the Department's existing regulations define the term ''contract'' as including ''any prime contract . . . and any subcontract of any tier thereunder.'' 29 CFR 5.2(h). As indicated by the reference in the existing regulations to the laws listed in § 5.1, the term also may include the contracts between Federal, State or local government entities administering Federal assistance and the direct recipients or beneficiaries of that assistance, where such assistance is covered by one of the Related Acts—as well as the construction contracts and subcontracts of any tier financed by or facilitated by such a contract for assistance.

In other Federal contractor labor standards regulations, the Department has sometimes included more detailed definitions of a ''contract.'' In the regulations implementing Executive Order 13658 (Establishing a Minimum Wage for Contractors), for example, the Department defined contract as ''an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law'' and listed many types of specific instruments that fall within that definition. 29 CFR 10.2. The Department's SCA regulations, while containing a definition of ''contract'' that is similar to the current Davis-Bacon regulatory definition at 29 CFR 5.2(h), separately specify that ''the nomenclature, type, or particular form of contract used . . . is not determinative of coverage'' at 29 CFR 4.111(a).

The term ''contract'' in the Davis-Bacon and Related Acts has been interpreted in a similarly broad manner. *See, e.g., Bldg. & Const. Trades Dep't, AFL–CIO* v. *Turnage,* 705 F. Supp. 5, 6 (D.D.C. 1988) (''The Court finds that it is reasonable to conclude, as the WAB has done, that the nature of the contract is not controlling so long as construction work is part of it.''). Similarly, in its 1994 memorandum, the OLC cited the basic common-law understanding of the term to explain that, for the purposes of the DBA, ''[t]here can be no question that a lease is a contract, obliging each party to take certain actions.'' 1994 OLC Memorandum, 18 Op. O.L.C. at 113 n.3 (citing Arthur Linton Corbin, Corbin on Contracts sections 1.2–1.3 (rev. ed., Joseph M. Perillo, ed., 1993)). The Davis-Bacon and Related Acts thus have been routinely applied to various types of agreements that meet the common-law definition of a ''contract''—such as, for example, leases, utility privatization agreements, individual job orders or task letters issued under basic ordering agreements, and loans or agreements in which the only consideration from the agency is a loan guarantee—as long as the other elements of DBRA coverage are satisfied.

However, the Department considers that it may not be necessary to include in the regulatory text itself a similarly detailed recitation of types of agreements that may be considered to be contracts, because such a list necessarily follows from the use of the term ''contract'' in the statute and the Department is not aware of any argument to the contrary. The Department thus seeks comment on whether a more detailed definition of the term ''contract'' is warranted, including whether aspects of the definition at 29 CFR 10.2 or the SCA regulations should or should not be included in the regulatory definition of contract at § 5.2.

The Department also seeks comment on whether it is necessary to explicitly promulgate in the definition of ''contract'' in § 5.2, or elsewhere in the regulations, an explanation regarding contracts that may be found to be void. The Department intends the use of the term in the regulations to apply also to any agreement in which the parties intended for a contract to be formed, even if (as a matter of the common law) the contract may later be considered to be void ab initio or otherwise fail to satisfy the elements of the traditional definition of a contract. Such usage follows from the statutory requirement that the relevant labor standards clauses must be included not just in ''contracts'' but also in the advertised specifications that may (or may not) become a covered contract. *See* 40 U.S.C. 3142(a).

In addition to the term ''contract,'' the existing DBRA regulations use the terms ''contractor,'' ''subcontractor,'' and ''prime contractor,'' but do not currently define the latter three terms. The Department proposes to include a definition of the term ''contractor'' to clarify that, where used in the regulations, it applies to both prime contractors and subcontractors. In addition, the definition would clarify that sureties may also—under appropriate circumstances—be considered ''contractors'' under the regulations. This is consistent with the Department's longstanding interpretation. *See Liberty Mutual Ins.,* ARB No. 00–018, 2003 WL 21499861 at *6 (June 30, 2003) (finding that the term ''contractor'' included sureties

[77] This third option accounts for Related Acts whose broader language may permit greater coverage of demolition work.

completing a contract pursuant to a performance bond). As the ARB explained in the *Liberty Mutual* case, the term ''contractor'' in the DBA should be interpreted broadly in light of Congress's ''overarching . . . concern'' in the 1935 amendments to the Act that the new withholding authority included in those amendments would ensure workers received the pay they were due. *Id.* (citing S. Rep. No. 1155, at 3 (1935)). As discussed below, the proposed definition of contractor also reflects the long-held interpretation that bona fide ''material suppliers'' are generally not considered to be contractors under the DBRA, subject to certain exceptions.

The Department also proposes a nonsubstantive change to move, with minor nonsubstantive edits, two sentences from the existing definition of ''contract'' to the new definition of ''contractor.'' These sentences clarify that State and local governments are not regarded as contractors or subcontractors under the Related Acts in situations where construction is performed by their own employees, but that under statutes that require payment of Davis-Bacon prevailing wages to all laborers and mechanics employed in the assisted project or in the project's development, State and local recipients of Federal aid must pay these employees according to Davis-Bacon labor standards. In addition, the Department proposes to supplement that language to explain (as the Department has similarly clarified in the SCA regulations) that the U.S. Government, its agencies, and instrumentalities are also not contractors or subcontractors for the purposes of the Davis-Bacon and Related Acts. *Cf.* 29 CFR 4.1a(f).

The Department proposes to add a definition for the term ''prime contractor'' as it is used in part 5 of the regulations. Consistent with the ARB's decision in *Liberty Mutual,* discussed above, the Department proposes a broad definition of prime contractor that prioritizes the appropriate allocation of responsibility for contract compliance and enhances the effectiveness of the withholding remedy. The proposed definition clarifies that the label an entity gives itself is not controlling, and an entity is considered to be a ''prime contractor'' based on its contractual relationship with the Government, its control over the entity holding the prime contract, or the duties it has been delegated.

The definition begins by identifying as a prime contractor any person or entity that enters into a covered contract with an agency. This includes, under appropriate circumstances, entities that may not be understood in lay terms to be ''construction contractors.'' For example, where a non-profit organization, owner/developer, borrower or recipient, project manager, or single-purpose entity contracts with a State or local government agency for covered financing or assistance with the construction of housing—and the other required elements of the relevant statute are satisfied—that owner/developer or recipient entity is considered to be the ''prime contractor'' under the regulations. This is so even if the entity does not consider itself to be a ''construction contractor'' and itself does not employ laborers and mechanics and instead subcontracts with a general contractor to complete the construction. *See, e.g., Phoenix Dev. Co.,* WAB No. 90–09, 1991 WL 494725, at *1 (Mar. 29, 1991) (''It is well settled that prime contractors ('owners-developers' under the HUD contract at hand) are responsible for the Davis-Bacon compliance of their subcontractors.''); *Werzalit of Am., Inc.,* WAB No. 85–19, 1986 WL 193106, at *3 (Apr. 7, 1986) (rejecting petitioner's argument that it was a loan ''recipient'' standing in the shoes of a State or local government and not a prime ''contractor'').

The proposed definition also includes as a ''prime contractor'' the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (*e.g.,* a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing and/or performing the construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. Under this definition, more than one entity on a contract—for example, both the owner/developer and the general contractor—may be considered to be ''prime contractors'' on the same contract. Accordingly, the proposal also explains that any two of these nominally different legal entities are considered to be the ''same prime contractor'' for the purposes of cross-withholding.

Although the Department has not previously included a definition of prime contractor in the implementing regulations, the proposed definition is consistent with the Department's prior enforcement of the DBRA. In appropriate circumstances, for example, the Department has considered a general contractor to be a ''prime contractor'' that is therefore responsible for the violations of its subcontractors under the regulations—even where that general contractor does not directly hold the contract with the Government (or is not the direct recipient of Federal assistance), but instead has been hired by the private developer that holds the overall construction contract. *See Palisades Urb. Renewal Enters. LLP., OALJ No. 2006–DBA–00001 (Aug. 3, 2007), at 16, aff'd,* ARB No. 07–124, (July 30, 2009); *Milnor Constr. Corp.,* WAB No. 91–21, 1991 WL 494763, at *1, 3 (Sept. 12, 1991); *cf. Vulcan Arbor Hill Corp.* v. *Reich,* 81 F.3d 1110, 1116 (D.C. Cir. 1996) (referencing agreement by developer that ''its prime'' contractor would comply with Davis-Bacon standards). Likewise, where a joint venture holds the contract with the government, the Department has characterized the actions of the parties to that joint venture as the actions of ''prime contractors.'' *See Big Six, Inc.,* WAB No. 75–03, 1975 WL 22569, at *2 (July 21, 1975).

The proposed definition of prime contractor is also similar to, although somewhat narrower than, the broad definition of the term ''contractor'' in the FAR part 9 regulations that govern suspension and debarment across a broad swath of Federal procurement contracts. In that context, where the Federal Government seeks to protect its interest in effectively and efficiently completing procurement contracts, the FAR Council has adopted an expansive definition of contractor that includes affiliates or principals that functionally control the prime contract with the government. *See* 48 CFR 9.403. Under that definition, ''Contractor'' means any individual or entity that ''[d]irectly or indirectly (*e.g.,* through an affiliate)'' is awarded a Government contract or ''[c]onducts business . . . with the Government as an agent or representative of another contractor.'' *Id.*[78] The Department has a similar interest here in protecting against the use of the corporate form to avoid

[78] The definition section in 48 CFR 9.403 specifies that it applies only ''as used in this subpart''—referring to subpart 9.4 of the FAR. It thus applies only to the general suspension and debarment provisions of the FAR and thus does not apply to the regulations within the FAR that implement the Davis-Bacon labor standards, which are located in FAR part 22 and the contract clauses FAR part 52. The DBRA-specific provisions of the FAR are based on the Department's regulations in parts 1, 3, and 5 of subtitle 29 of the CFR, which are the subject of this NPRM. Thus, the Department expects that, after this rule is final, the FAR Council will consider how to amend FAR part 22 and the FAR contract clauses to appropriately incorporate the new and amended definitions that are adopted in the Department's final rule. The Department does not anticipate that this rulemaking would affect FAR subpart 9.4.

responsibility for the Davis-Bacon labor standards.

The Department seeks comment on the proposed definition of ''prime contractor,'' in particular as it affects the withholding contract clauses at § 5.5(a)(2) and (b)(3), the prime contractor responsibility provisions at § 5.5(a)(6) and (b)(4), and the proposed provisions in § 5.9 regarding the authority and responsibility of contracting agencies for satisfying requests for cross-withholding.

Finally, the Department proposes a new definition of the term ''subcontractor.'' The proposed definition would affirmatively state that a ''subcontractor'' is ''any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1.'' Like the current definition of ''contract,'' the proposed definition of ''subcontractor'' also reflects that the Act covers subcontracts of any tier—and thus the proposed definition of ''subcontractor'' would state that the term includes subcontractors of any tier. *See* 40 U.S.C. 3412; *Castro* v. *Fid. & Deposit Co. of Md.,* 39 F. Supp. 3d 1, 6–7 (D.D.C. 2014). The proposed definition for ''subcontractor'' necessarily excludes material suppliers (except for narrow exceptions), because such material suppliers are excluded from the definition of ''contractor,'' as proposed, and that definition applies to both prime contractors and subcontractors. Finally, the proposed definition of ''subcontractor'' also clarifies that the term does not include laborers or mechanics for whom a prevailing wage must be paid. As discussed below, and as Congress expressly indicated, the requirement to pay a prevailing wage to ordinary laborers and mechanics cannot be evaded by characterizing such workers as ''owner operators'' or ''subcontractors.'' *See* 40 U.S.C. 3142(c)(1) (requiring payment of prevailing wage ''regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics'').

(E) Apprentice and Helper

The Department proposes to amend the current regulatory definition in § 5.2(n) of ''apprentice, trainee, and helper'' to remove references to trainees. A trainee is currently defined as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by ETA as meeting its standards for on-the-job training programs, but ETA no longer reviews or approves on-the-job training programs so this definition is unnecessary. *See* section III.B.3.iii.(C) (''29 CFR 5.5(a)(4) Apprentices.''). The Department also proposes to modify the definition of ''apprentice and helper'' to reflect the current name of the office designated by the Secretary of Labor, within the Department, to register apprenticeship programs.

(F) Laborer or Mechanic

The Department proposes to amend the regulatory definition of ''laborer or mechanic'' to remove the reference to trainees and to replace the term ''foremen'' with the gender-neutral term ''working supervisors.'' [79] The Department does not propose any additional substantive changes to this definition.

However, because the Department frequently receives questions pertaining to the application of the definition of ''laborer or mechanic''—and thus the application the Davis-Bacon labor standards—to members of survey crews, the Department provides the following information to clarify when survey crew members are laborers or mechanics under the existing definition of that term.

The Department has historically recognized that members of survey crews who perform primarily physical and/or manual work on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards.[80] Whether or not a specific survey crew member is covered by these standards is a question or fact, which takes into account the actual duties performed and whether these duties are ''manual or physical in nature'' including the ''use of tools or . . . work of a trade.'' When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker's different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they do not meet the tests for exemption as professional, executive, or administrative employees under part 541). If their work meets other required criteria (*i.e.,* it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.

The Department seeks comment on issues relevant to the application of the current definition to survey crew members, especially the range of duties performed by, and training required of, survey crew members who perform work on construction projects and whether the range of duties or required training varies for different roles within a survey crew based on the licensure status of the crew members, or for different types of construction projects.

(G) Site of the Work and Related Provisions

The Department proposes the following revisions related to the DBRA's ''site of the work'' requirement: (1) Revising the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, (2) clarifying the application of the ''site of the work'' principle to flaggers, (3) revising the regulations to better delineate and clarify the ''material supplier'' exemption, and (4) revising the regulations to set clear standards for DBA coverage of truck drivers.

(1) Current Statutory and Regulatory Provisions Related to Site of the Work

a. Site of the Work

The DBA and Related Acts generally apply to ''mechanics and laborers employed directly on the site of the work'' by ''contractor[s]'' and ''subcontractor[s]'' on contracts for ''construction, alteration, or repair, including painting and decorating, of [covered] public buildings and public works.'' 40 U.S.C. 3142(a), (c)(1). The Department's current regulations define ''site of the work'' as including ''the physical place or places where the building or work called for in the contract will remain'' and ''any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.'' 29 CFR 5.2(l)(1). They further provide that in general, ''job headquarters, tool yards, batch plants, borrow pits, etc.'' are part of the

[79] The proposal addressing trainees is discussed in greater detail below in section III.B.3.iii.(C) (''29 CFR 5.5(a)(4) Apprentices.'').

[80] *See, e.g.,* AAM 212 (Mar. 22, 2013). While AAM 212 was rescinded to allow the Department to seek a broader appreciation of the coverage issue it addressed and due to its incomplete implementation, *see* AAM 235 (Dec. 14, 2020), its rescission did not change the applicable standard, which is the definition of ''laborer or mechanic'' as currently set forth in 29 CFR 5.2(m).

''site of the work'' if they are ''dedicated exclusively, or nearly so, to performance of the covered contract or project'' and also are ''adjacent or virtually adjacent to the site of the work'' itself. 29 CFR 5.2(l)(2).

The ''site of the work'' requirement does not apply to Related Acts that extend Davis-Bacon coverage to all laborers and mechanics employed in the ''development'' of a project; such statutes include the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996. *See* § 5.2(j)(1); 42 U.S.C. 1437j(a); 25 U.S.C. 4114(b)(1), 4225(b)(1)(B); 42 U.S.C. 12836(a). As the Department has previously noted, ''the language and/or clear legislative history'' of these statutes ''reflected clear congressional intent that a different coverage standard be applied.'' 65 FR 80267 at 80275; *see, e.g., L.T.G. Constr. Co.,* WAB Case No. 93–15, 1994 WL 764105, at *4 (Dec. 30, 1994) (noting that ''the Housing Act [of 1937] contains no 'site of work' limitation similar to that found in the Davis-Bacon Act'').

b. Off-Site Transportation

The ''site of the work'' requirement is also referenced in the current regulation's definition of ''construction, prosecution, completion, or repair,'' which provides that ''the transportation of materials or supplies to or from the site of the work'' is not covered by the DBRA, except for such transportation under the statutes to which the ''site of the work'' requirement does not apply. 29 CFR 5.2(j)(2). However, transportation to or from the site of the work is covered by the DBRA where a covered laborer or mechanic (1) transports materials between an ''adjacent or virtually adjacent'' dedicated support site that is part of the site of the work pursuant to 29 CFR 5.2(l)(2), or (2) transports portions of the building or work between a site where a significant portion of the building or work is constructed and that is established specifically for contract or job performance, which is part of the site of the work pursuant to 29 CFR 5.2(l)(1), and the physical place or places where the building or work will remain.[81]

c. Material Supplier Exception

While not explicitly set out in the statute, the DBA has long been understood to exclude from coverage employees of bona fide ''material suppliers'' or ''materialmen'' whose sole responsibility is to provide materials (such as sand, gravel, and ready-mixed concrete) to a project if they also supply those materials to the general public, and the plant manufacturing the materials is not established specifically for a particular contract or located at the site of the work. *See* AAM 45 (Nov. 9, 1962) (enclosing WHD Opinion Letter DB–30 (Oct. 15, 1962)); AAM 36 (Mar. 16, 1952) (enclosing WHD Opinion Letter DB–22 (Mar. 12, 1962)); *H.B. Zachry Co.* v. *United States,* 344 F.2d 352, 359 (Ct. Cl. 1965); FOH 15e16. This principle has generally been understood to derive from the limitation of the DBA's statutory coverage to ''contractor[s]'' and ''subcontractor[s].'' *See* AAM 36, WHD Opinion Letter DB–22, at 2 (discussing ''the application of the term subcontractor, as distinguished from materialman or submaterialman''); *cf. MacEvoy* v. *United States,* 322 U.S. 102 (1944) (distinguishing a ''subcontractor'' from ''ordinary laborers and materialmen'' under the Miller Act); FOH 15e16 (''[B]ona fide material suppliers are not considered contractors under DBRA.''). As the Department has explained, this exception applies to employees of companies ''whose *only* contractual obligations for on-site work are to deliver materials and/or pick up materials.'' PWRB, DBA/DBRA Compliance Principles at 7 (emphasis added).

Like the ''site of the work'' restriction, the material supplier exception does not apply to work under statutes that extend Davis-Bacon coverage to all laborers and mechanics employed in the ''development'' of a project, regardless of whether they are employed by ''contractors'' or ''subcontractors.'' *See* existing regulation 29 CFR 5.2(j)(1) (defining ''construction, prosecution, completion, or repair'' as including ''[a]ll types of work done on a particular building or work at the site thereof . . . by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project)''); existing regulation 29 CFR 5.2(i) (''The manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.'').

d. Relevant Regulatory History and Case Law

The regulatory provisions discussed above were shaped by three appellate court decisions between 1992 and 2000. The language in § 5.2(l) that deems dedicated sites such as batch plants and borrow pits part of the site of the work only if they are ''adjacent or virtually adjacent'' to the construction site was adopted in 2000 in response to *Ball, Ball & Brosamer, Inc.* v. *Reich,* 24 F. 3d 1447 (D.C. Cir. 1994) and *L.P. Cavett Company* v. *U.S. Dep't of Labor,* 101 F.3d 1111 (6th Cir. 1996), which concluded that batch plants located only a few miles from the construction site (2 miles in *Ball,* 3 miles in *L.P. Cavett*) were not part of the ''site of the work.'' *See* 65 FR 80268 (''2000 final rule'').[82] The ''adjacent or virtually adjacent'' requirement in the current regulatory text is one that the courts in *Ball* and *L.P. Cavett* suggested would be permissible. Similarly, the provision in § 5.2(j)(2) that excludes, with narrow exceptions, ''the transportation of materials or supplies to or from the site of the work'' from coverage stems from a 1992 interim final rule, *see* 57 FR 19204 (May 4, 1992) (''1992 IFR''), that implemented *Building & Construction Trades Dep't, AFL–CIO* v. *U.S. Dep't of Labor Wage Appeals Bd. (Midway),* in which the D.C. Circuit held that drivers of a prime contractor's subsidiary who picked up supplies and transported them to the job site were not covered by the DBA because ''the Act applies only to employees working directly on the physical site of the public building or public work under construction.'' 932 F.2d 985, 990 (D.C. Cir. 1991).[83]

(2) Proposed Regulatory Revisions

The Department proposes the following regulatory changes related to the ''site of the work'' requirement: (1) Revising the definition of ''site of the work'' to further encompass certain construction of significant portions of a

[81] For more detail on this topic, see the section titled ''Coverage of Construction Work at Secondary Construction Sites.''

[82] Prior to 2000, the Department had interpreted ''site of the work'' more broadly to include, in addition to the site where the work or building would remain, ''adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the 'site.' '' 29 CFR 5.2(l) (1990); *see* 65 FR 80268, 80269 (Dec. 20, 2000); AAM 86 (Feb. 11, 1970).

[83] Prior to 1992, the Department had interpreted the DBA as covering the transportation of materials and supplies to or from the site of the work by workers employed by a contractor or subcontractor. *See* 29 CFR 5.2(j) (1990).

building or work at secondary worksites, (2) clarifying the application of the ''site of the work'' principle to flaggers, (3) revising the regulations to better delineate and clarify the ''material supplier'' exemption, and (4) revising the regulations to set clear standards for DBA coverage of truck drivers. Each proposal is explained in turn.

a. Coverage of Construction Work at Secondary Construction Sites

In the 2000 final rule, the Department amended the definition of ''site of the work'' to include a site away from the location where the building or work will remain, where the site is established specifically for the performance of the contract or project and a ''significant portion'' of a building or work is constructed at the site. 29 CFR 5.2(l)(1). The Department explained that this change was intended to respond to technological developments that had enabled companies in some cases to construct entire portions of public buildings or works off-site, leaving only assembly or placement of the building or work remaining. *See* 65 FR 80273 (describing ''the innovative construction techniques developed and currently in use, which allow significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work''). The Department cited examples, including a dam project where ''two massive floating structures, each about the length of a football field'' were constructed upriver and then floated downriver and submerged, the construction and assembly of military housing units in Portland for final placement in Alaska, and the construction of modular units to be assembled into a mobile service tower for Titan missiles. *See id.* (citing *ATCO Construction, Inc.,* WAB No. 86–1 (Aug. 22, 1986), and *Titan IV Mobile Serv. Tower,* WAB No. 89–14 (May 10, 1991)).

The Department stressed that this new provision would apply only at a location where ''such a large amount of construction is taking place that it is fair and reasonable to view such location as a site where the public building or work is being constructed,'' and reaffirmed its longstanding position that ''[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components,'' are not part of the site of the work. 65 FR at 80274; s*ee, e.g.,* AAM 86 (Feb. 11, 1970) at 1–2 (explaining that the site of the work does not include a contractor's permanent ''fabrication plant[s] . . . whose locations and continuance are governed by his general business operations . . . even though mechanics and laborers working at such an establishment may . . . make doors, windows, frames, or forms''). It accordingly described this expansion of coverage as a narrow one. *See* 65 FR at 80276 (''[T]he Department believes that the instances where substantial amounts of construction are performed at one location and then transported to another location for final installation are rare.''). Consistent with this amendment, the Department also revised § 5.2(j) to cover transportation of portion(s) of the building or work between such a site and the location where the building or work would remain.

Since 2000, technological developments have continued to facilitate off-site construction that replaces on-site construction to an even greater degree, and the Department expects such trends to continue in the future. For example, one recent industry analysis notes that both design firms and contractors ''are forecasting expanded use of both [prefabrication and modular construction] over the coming years as the benefits are more widely measured, owners become increasingly comfortable with the process and the outcomes, and the industry develops more resources to support innovative applications.'' Dodge Data and Analytics, Prefabrication and Modular Construction 2020 (2020), at 4.[84] In the specific context of Federal government contracting, a GSA document cites several benefits to ''pre-engineered'' or ''modular'' construction, including decreased construction time, cost savings, and fewer environmental and safety hazards. GSA, Schedule 56—Building and Building Materials, Industrial Service and Supplies, Pre-Engineered/Prefabricated Buildings Customer Ordering Guide (GSA Schedule 56), at 5–7.[85]

In the 2000 final rule, the Department explained that ''[i]t [was] the Department's intention in [that] rulemaking to require in the future that workers who construct significant portions of a Federal or federally assisted project at a location other than where the project will finally remain, will receive prevailing wages as Congress intended when it enacted the Davis-Bacon and related Acts.'' 65 FR at 80274. However, by limiting such coverage to facilities that are established specifically for the performance of a particular contract or project, the current regulation falls short of its stated goal. The Department stated at the time that this limit was necessary to exclude ''[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components.'' 65 FR at 80274. However, such an exclusion can be more effectively accomplished with language that expands on the term ''significant portion.''

The Department accordingly proposes to revise Davis-Bacon coverage of off-site construction of ''significant portions'' of a building or work so that such coverage is not limited to facilities established specifically for the performance of a contract or project. Rather, the Department proposes to amend the definition of ''site of the work'' to include off-site construction where the ''significant portions'' are constructed for specific use in a designated building or work, rather than simply reflecting products that the contractor or subcontractor makes available to the general public. The Department also proposes to explain the term ''significant portions'' to ensure that this expansion does not result in the coverage of activities that have long been understood to be outside the DBA's scope.

Specifically, the Department proposes to explain that ''significant portion'' means that entire portions or modules of the building or work, as opposed to smaller prefabricated components, are delivered to the place where the building or work will remain, with minimal construction work remaining other than the installation and/or assembly of the portions or modules. As the *Midway* court observed, the 1932 House debate on the DBA demonstrates that its drafters understood that off-site *prefabrication* sites would generally not beconsidered part of the site of the work. *See Midway,* 932 F.2d at 991 n.12. As in 2000, the Department does not propose to alter this well-established principle. Such prefabrication, however, is distinguishable from modern methods of ''pre-engineering'' or ''modular'' construction, in which significant portions of a building or work are constructed and then simply assembled onsite ''similar to a child's building block kit.'' GSA Schedule 56 at 5.[86] Under the latter circumstances, as the Department noted in 2000, ''such a large amount of construction is taking place [at an offsite location] that it is fair and reasonable to view such location as a site where the public building or work is being constructed.'' 65 FR at 80274; *see also id.* at 80272 (stating that ''the Department views such [secondary construction] locations as the actual

[84] *http://modular.org/documents/public/PrefabModularSmartMarketReport2020.pdf.*

[85] *https://www.gsa.gov/cdnstatic/SCHEDULE_56_-_ORDERING_GUIDE.pdf.*

[86] *See* note 85, *supra.*

physical site of the public building or work being constructed''). In other words, when ''significant portions'' of a building or work that historically would have been built where the building or work will ultimately remain are instead constructed elsewhere, the exclusion from the DBA of laborers and mechanics engaged in such construction is inconsistent with the DBA.

In light of the contractor/material supplier distinction discussed above, the Department also proposes to add, as an additional requirement for coverage of offsite construction, that the portions or modules are constructed for specific use in a designated building or work, rather than simply reflecting products that the contractor or subcontractor makes available to the general public. When significant portions or modules are constructed specifically for a particular building or work and not as part of the contractor's regular manufacturing operations, the company is not a material supplier but a contractor or subcontractor. *See United Constr. Co., Inc.,* WAB No. 82–10, 1983 WL 144675, at *3 (Jan. 14, 1983) (examining, as part of an inquiry into whether support activities are on the ''site of the work,'' ''whether the activities are sufficiently independent of the primary project to determine that the function of the support activities may be viewed as similar to that of materialman'').

For clarity, the Department also proposes to amend § 5.2 to use the term ''secondary construction sites'' to describe such locations, and to use the term ''primary construction sites'' to describe the place where the building or work will remain. The Department additionally proposes to use the term ''nearby dedicated support site'' to describe locations such as batch plants that are part of the site of the work because they are dedicated exclusively, or nearly so, to the project, and are adjacent or nearly adjacent to a primary or secondary construction site.

The Department specifically seeks public comment on (1) examples of the types of off-site construction techniques described above, and the extent to which they are used in government and government-funded contracting, and (2) whether the proposed limits, including the clarification of ''significant portion,'' are appropriate.

b. Clarification of Application of ''Site of the Work'' Principle to Flaggers

The Department also proposes to clarify that workers engaged in traffic control and related activities adjacent or nearly adjacent to the primary construction site are working on the site of the work. Often, particularly for heavy and highway projects, it is necessary to direct pedestrian or vehicular traffic around or away from the primary construction site. Certain workers of contractors or subcontractors, typically called ''flaggers'' or ''traffic directors,'' may therefore engage in activities such as setting up barriers and traffic cones, using a flag and/or stop sign to control and direct traffic, and related activities such as helping heavy equipment move in and out of construction zones. Although some flaggers work within the confines of the primary construction site, others work outside of that area and do not enter the construction zone itself.

The Department has previously explained that flaggers are laborers or mechanics within the meaning of the DBA. *See* AAM 141 (Aug. 16, 1985); FOH 15e10(a); *Superior Paving & Materials, Inc.,* ARB No. 99–065 (June 12, 2002). The Department now proposes to clarify, in the definition of ''nearby dedicated support sites,'' that such workers, even if they are not working precisely on the site where the building or work would remain, are working on the site of the work if they work at a location adjacent or virtually adjacent to the primary construction site, such as a few blocks away or a short distance down a highway. Although the Department believes that any adjacent or virtually adjacent locations at which such work is performed are included within the current regulatory ''site of the work'' definition, given that questions have arisen regarding this coverage issue, the Department proposes to make this principle explicit.

As the Department has previously noted, such work by flaggers and traffic operators is integrally related to other construction work at the worksite and construction at the site would not be possible otherwise. *See* AAM 141; FOH 15e10(a). Additionally, as noted above and as the ARB has previously explained, the principle of adjacency or virtual adjacency in this context is consistent with the statutory ''site of the work'' limitation as interpreted by courts. *See Bechtel Constructors Corp.,* ARB No. 97–149, 1998 WL 168939, at *5 (March 25, 1998) (explaining that ''it is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work,'' such as where a crane in an urban environment is positioned adjacent to the future building site). This proposed change would therefore be consistent with the DBA and would eliminate any ambiguity regarding these workers' coverage.

c. Clarification of ''Material Supplier'' Distinction

Next, the Department proposes to clarify the distinction between subcontractors and ''material suppliers'' and to make explicit that employees of material suppliers are not covered by the DBA and most of the Related Acts. Although, as explained above, this distinction has existed since the DBA's inception, the precise line between ''material supplier'' and ''subcontractor'' is not always clear, and is sometimes the subject of litigation.

The Department proposes to clarify the scope of the material supplier exception consistent with case law and WHD guidance. First, the Department proposes to add a new definition of ''material supplier'' to § 5.2, and to define the term as an employer meeting three criteria: First, the employer's only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery; [87] second, the employer also supplies materials to the general public; and third, the employer's facility manufacturing the materials, articles, supplies, or equipment, is neither established specifically for the contract or project nor located at the site of the work. *See H.B. Zachry,* 344 F.2d at 359; AAM 5 (Dec. 26, 1957); AAM 31 (Dec. 11, 1961); AAM 36 (Mar. 16, 1962); AAM 45 (Nov. 9, 1962); AAM 53 (July 22, 1963). The subsection further clarifies that if an employer, in addition to being engaged in material supply and pickup, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier but a subcontractor. *See* PWRB, DBA/DBRA Compliance Principles, at 7–8 (''[I]f a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work would be subject to Davis-Bacon labor standards in the same manner as those employed by any other

[87] The Department notes that under this definition, an employer that contracts *only* for pickup of materials from the site of the work is not a material supplier but a subcontractor. This is consistent with the plain meaning of the term ''material supplier'' and with the Department's case law. *See Kiewit-Shea,* Case No. 84–DBA–34, 1985 WL 167240 (OALJ Sept. 6, 1985), at *2 (concluding that companies whose contractual duties ''called for hauling away material and not for its supply'' were subcontractors, not material suppliers''), *aff'd, Maryland Equipment, Inc.,* WAB No. 85–24, 1986 WL 193110 (June 13, 1986).

contractor or subcontractor.''); FOH 15e16(c) (same).

While the Davis-Bacon regulations have not previously included definitions of ''contractor'' or ''subcontractor,'' this proposed rule, as discussed above, would add such definitions into § 5.2. The Department therefore proposes to incorporate the material supplier exception into the proposed new definition of ''contractor,'' which is incorporated into the proposed definition of ''subcontractor.'' Specifically, the Department proposes to exclude material suppliers from the regulatory definition of ''contractor,'' with the exception of entities performing work under Related Acts that apply the Davis-Bacon labor standards to all laborers and mechanics employed in a project's development, given that, as explained, the application of such statutes is not limited to ''contractors'' or ''subcontractors.''

d. Coverage of Time for Truck Drivers

Finally, the Department proposes to revise the regulations to clarify coverage of truck drivers under the DBA. Since *Midway,* various questions have arisen regarding the application of the DBA and the Related Acts to truck drivers. While the Department's regulations address this issue to a certain extent, the Department has expanded on these issues in regulatory preambles and subregulatory guidance, which differ depending on whether truck drivers are employed by material suppliers or by contractors or subcontractors.

As noted above, the DBA does not apply to workers employed by bona fide material suppliers. However, under current WHD policy, if a material supplier, in addition to providing supplies, also performs onsite construction, alteration, or repair work as a subcontractor—such as a precast concrete item supplier that also repairs and cleans such items at the worksite or an equipment rental dealer that also repairs its leased equipment onsite—then its workers are covered for any on-site time for such construction work that is ''more than . . . incidental.'' FOH 15e16(c); PWRB, DBA/DBRA Compliance Principles at 7–8. For enforcement purposes, if a material supplier's worker spends more than 20 percent of the workweek performing such construction work on-site, all of the employee's on-site time during that workweek is covered.

For truck drivers employed by contractors or subcontractors, the Department has explained that such drivers' time is covered under certain circumstances. *See* FOH 15e22. First, ''truck drivers who haul materials or supplies from one location on the site of the work to another location on the site of the work'' are covered. 65 FR at 80275. Such ''on-site hauling'' is unaffected by *Midway,* which concerned the coverage of off-site hauling. Based on the same principle, any other construction work that drivers perform on the site of the work that is not related to off-site hauling is also covered. *See* FOH 15e22(a)(1) (stating that drivers are covered ''for time spent working on the site of the work''). Second, ''truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the site of the work'' are covered for all of their time spent in those activities. 65 FR at 80275–76; 29 CFR 5.2(j)(1)(iv)(A); FOH 15e22(a)(3). Such drivers are hauling materials or supplies between two locations on the site of the work, and given the requirement of adjacency or virtual adjacency, any intervening off-site time is likely extremely minimal. Third, drivers are covered for time spent transporting portion(s) of the building or work between a secondary site, established specifically for contract or project performance and where a ''significant portion'' of the work is constructed, and the site where the building or work will remain. *See* 29 CFR 5.2(j)(1)(iv)(B); 65 FR at 80276; FOH 15e22(a)(4). As the Department has explained, ''under these circumstances[,] the site of the work is literally moving between the two work sites,'' 65 FR 57269, 57273, and as such, ''workers who are engaged in transporting a significant portion of the building or work between covered sites . . . are 'employed directly upon the site of the work[.]' '' 65 FR at 80276. Fourth, drivers are covered for any time spent on the site of the work that is related to hauling materials to or from the site, such as loading or unloading materials, provided that such time is more than *de minimis*—a standard that, as currently applied, excludes drivers ''who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.'' 65 FR at 80276; FOH 15e22(a)(2); PWRB, DBA/DBRA Compliance Principles, at 6–7.

Feedback from stakeholders, including contractors and contracting agencies, indicates that there is significant uncertainty regarding this topic. Such uncertainty includes the distinction between drivers for material supply companies versus drivers for construction contractors or subcontractors; what constitutes *de minimis;* whether the *de minimis* determination is made on a per trip, per day, or per week basis; and whether the 20 percent threshold for construction work performed onsite by material supply drivers is also applicable to delivery time spent on site by drivers employed by a contractor or subcontractor. This lack of clarity has also led to divergent interpretations by Department ALJs. *Compare Rogers Group,* ALJ No. 2012–DBA–00005 (OALJ May 28, 2013) (concluding that a subcontractor was not required to pay its drivers prevailing wages for sometimes-substantial amounts of on-site time (as much as 7 hours 30 minutes in a day) making deliveries of gravel, sand, and asphalt from offsite) *with E.T. Simonds Constr. Co.,* ALJ No. 2021–DBA–00001 (OALJ May 25, 2021), *appeal pending,* ARB No. 21–054 (concluding that drivers employed by a subcontractor who hauled materials from the site of the work and spent at least 15 minutes per hour—25 percent of the workday—on site were covered for their onsite time).

Taking the above into account, the Department proposes to revise the regulations to clarify coverage of truck drivers in the following manner:

First, as noted above, the Department has proposed to clarify that employees of ''material suppliers'' are not covered by the DBRA, except for those Related Acts to which the material supplier exception does not apply. The proposed definition of a ''material supplier'' is limited to companies whose only contractual responsibilities are material supply and thus excludes companies that also perform any on-site construction, alteration, or repair. The Department believes that this proposed clarification will make the distinction between contractors/subcontractors and material suppliers clear. It also obviates the need for the 20 percent threshold for coverage of construction work performed onsite by material supply drivers discussed above, because, by definition, any drivers whose responsibilities include performing onsite construction work in addition to material supply are employed by subcontractors, not material suppliers. Thus, under this proposed rule, any time that drivers spend performing such construction work on the site of the work would be covered regardless of amount, as is the case for other laborers and mechanics.

Second, the Department proposes to amend its regulations concerning the coverage of transportation by truck drivers who are included within the DBA's scope generally (*i.e.,* truck drivers employed by contractors and subcontractors, as well as any truck drivers employed in project

construction or development under certain Related Acts). Specifically, the Department proposes to amend the definition of ''construction, prosecution, completion, or repair'' in § 5.2 to include ''transportation'' under five specific circumstances, which the Department proposes to define, collectively, as ''covered transportation'': (1) Transportation that takes place entirely within a location meeting the definition of site of the work (for example, hauling materials from one side of a construction site to the other side of the same site); (2) transportation of portion(s) of the building or work between a ''secondary construction site'' and a ''primary construction site''; (3) transportation between a ''nearby dedicated support site'' and either a primary or secondary construction site; (4) a driver or driver's assistant's ''onsite activities essential or incidental to offsite transportation,'' discussed further below, where the driver or driver's assistant's time spent on the site of the work is not so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded; and (5) any transportation and related activities, whether on or off the site of the work, by laborers and mechanics under a statute that extends Davis-Bacon coverage to all laborers and mechanics employed in the construction or development of a project.

Items (1), (2), (3), and (5) set forth principles reflected in the current regulations, but in a clearer and more transparent fashion. Item (4) seeks to resolve the ambiguities discussed above regarding the coverage of on-site time by delivery drivers. Specifically, the Department proposes to explain that truck drivers and their assistants are covered for their time engaged in ''onsite activities essential or incidental to offsite transportation,'' defined as activities by a truck driver or truck driver's assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as unloading, loading, and waiting time, where the driver or assistant's time is not ''so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded.''

This proposed language is identical to the standard the Department uses to describe the *de minimis* principle under the Fair Labor Standards Act. *See* 29 CFR 785.47. Importantly, while the amount of time is relevant to this principle, the key inquiry is not merely whether the amount of time is small, but rather whether it is administratively feasible to track it, as the FLSA *de minimis* rule ''applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, *and* where the failure to count such time is due to considerations justified by industrial realities.'' *Id.* (emphasis added). Moreover, ''an employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.'' *Id.* Thus, under the proposed language, where a driver's duties include dropping off and/or picking up materials on the site of the work, the driver must be compensated under the DBRA for any ''practically ascertainable'' time spent on the site of the work. The Department anticipates that in the vast majority of cases, it will be feasible to record the amount of time a truck driver or driver's assistant spends on the site of the work, and, therefore, that the Davis-Bacon labor standards will apply to any such time under the proposed rule. However, under the narrow circumstances where it is infeasible or impractical to measure a driver's very small amount of time spent on the site of the work, such time need not be compensated under this proposed rule.

This proposal is also consistent with the statutory ''site of the work'' restriction as interpreted in *Midway.* As the Department has previously explained, given the small amount of time the *Midway* drivers spent on-site, no party in the case had argued whether such on-site time alone could be subject to coverage. *See* 65 FR at 80275–76. Given that the court did not consider this issue, the Department does not understand *Midway* as precluding coverage of any time that drivers spend on the site of the work, ''no matter how brief.'' 65 FR at 80275–76. However, as with the FLSA, the Department proposes to exclude such time from DBRA coverage under the rare circumstances where it is very small in duration and industrial realities make it impossible or impractical to measure such time.

e. Non-Substantive Changes for Conformance and Clarity

In addition to the above changes, the Department proposes a number of revisions to the regulatory definitions related to the ''site of the work'' and ''material supplier'' principle to conform to the above substantive revisions and for general clarity. The Department proposes to delete, from the definition of ''building or work,'' the language explaining that in general, ''[t]he manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work.'' Instead, the Department proposes to clarify in the definition of the term ''construction (or prosecution, completion, or repair)'' that ''construction, prosecution, completion, or repair'' only includes ''manufacturing or furnishing of materials, articles, supplies or equipment'' under certain limited circumstances. Additionally, the Department proposes to remove the citation to *Midway* from the definition of the term ''construction (or prosecution, completion, or repair)''; although, as discussed above, some of the regulatory changes the Department has made reflect the holdings in the three appellate cases noted above, the Department does not believe it is necessary to cite the case in the regulation.

The Department also proposes defining the term ''development statute'' to mean a statute that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project. As noted above, some statutes extend Davis-Bacon coverage to all laborers and mechanics employed in the ''development'' of a project, regardless of whether they are working on the site of the work or employed by ''contractors'' or ''subcontractors.'' The current regulations reference three specific statutes—the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996—that fit this description, but do not consistently reference all three. Use of the defined term ''development statute'' would improve regulatory clarity and ensure that the regulations to not become obsolete if existing statutes meeting this description are revised or if new statutes meeting this description are added. The Department proposes to make conforming changes in § 5.5 to incorporate this new term.

Finally, the Department proposes several linguistic changes to defined terms in § 5.2 to improve clarity and readability.

(H) Paragraph Designations

The Department is also proposing to amend § 5.2 to remove paragraph designations of defined terms and instead to list defined terms in alphabetical order. The Department proposes to make conforming edits throughout parts 1, 3, and 5 in any

provisions that currently reference lettered paragraphs of § 5.2.

iii. Section 5.5 Contract Provisions and Related Matters

The Department proposes to remove the table at the end of § 5.5 related to the display of OMB control numbers. This table aids in fulfilling the requirements of the Paperwork Reduction Act; however, the Department maintains an inventory of OMB control numbers on *https://www.reginfo.gov* under ''Information Collection Review.'' This website is updated regularly and interested persons are encouraged to consult this website for the most up-to-date information.

(A) 29 CFR 5.5(a)(1)

The Department proposes to add language to § 5.5(a)(1) to state that the conformance process may not be used to split or subdivide classifications listed in the wage determination, and that conformance is appropriate only where the work which a laborer or mechanic performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title. This language reflects the principle that conformance is not appropriate when the work of the proposed classification is already performed by a classification on the wage determination. *See* 29 CFR 5.5(a)(1)(ii)(A)*(1).* Even if workers perform only some of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate. *See, e.g., Fry Bros. Corp.,* 1977 WL 24823, at *6 (contractor could not divide carpentry work between carpenters and carpenter tenders in order to pay a lower wage rate for a portion of the work; under the DBA it is not permissible to divide the work of a classification into several parts according to the contractor's assessment of each worker's skill and to pay for such division of the work at less than the specified rate for the classification). The proposed regulatory language is also in line with the principle that WHD must base its conformance decisions on the work to be performed by the proposed classification, not on the contractor's own classification or perception of the workers' skill. *See* 29 CFR 5.5(a)(1)(i) (''Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits . . . for the classification of work actually performed, without regard to skill . . . .''); *see also, e.g., Tele-Sentry Sec., Inc.,* WAB No. 87–43, 1987 WL 247062, at *7 (Sept. 11, 1987) (workers who performed duties falling within the electrician classification must be paid the electrician rate regardless of the employer's classification of workers as laborers). The Department welcomes any comments on this proposal.

The Department also proposes to make non-substantive revisions to current § 5.5(a)(1)(ii)(B) and (C) to more clearly describe the conformance request process, including by providing that contracting officers should submit the required conformance request information to WHD via email using a specified WHD email address.

The Department has also proposed changes relating to the publication of rates for frequently conformed classifications. The Department's proposed changes to this subsection are discussed above in part III.B.1.xii (''Frequently conformed rates''), together with proposed changes to § 1.3.

The Department also proposes to add language to the contract clauses at § 5.5(a)(1)(vi), (a)(6), and (b)(4) requiring the payment of interest on any underpayment of wages or monetary relief required by the contract. This language is consistent with and would be subject to the proposed discussion of interest in 29 CFR 5.10 (Restitution, criminal action), which requires that calculations of interest be carried out at the rate specified by the Internal Revenue Code for underpayment of taxes and compounded daily.

(B) 29 CFR 5.5(a)(3)

The Department proposes a number of revisions to § 5.5(a)(3) to better effectuate compliance and enforcement by clarifying and supplementing existing recordkeeping requirements. Similar changes proposed in § 5.5(c) are discussed here.

As an initial matter, all references to employment (*e.g.,* employee, employed, employing, etc.) in § 5.5(a)(3) and (c), as well as in § 5.6 and various other sections, have been revised to refer instead to ''workers'' or ''laborers and mechanics.'' These changes are discussed in greater detail below in section xxii, ''Employment Relationship Not Required.''

(1) 29 CFR 5.5(a)(3)(i)

The Department proposes to amend § 5.5(a)(3)(i) to clarify its longstanding interpretation and enforcement of this recordkeeping regulation to require contractors to maintain and preserve basic records and information, as well as certified payrolls. The required basic records include but are not limited to regular payroll (sometimes referred to as ''in-house'' payroll) and additional records relating to fringe benefits and apprenticeship and training. The term regular payroll refers to any written or electronic records that the contractor uses to document workers' days and hours worked, rate and method of payment, compensation, contact information, and other similar information, which provide the basis for the contractor's subsequent submission of certified payroll.

The Department also proposes to amend § 5.5(a)(3)(i) to clarify that regular payrolls and other basic records required by this section must be preserved for a period of at least 3 years after all the work on the prime contract is completed. In other words, even if a project takes more than 3 years to complete, contractors and subcontractors must keep payroll and basic records for at least 3 years after all the work on the prime contract has been completed. This revision expressly states the Department's longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3).

The Department also proposes a new requirement that records required by § 5.5(a)(3) and (c) must include last known worker telephone numbers and email addresses. Updating the Davis-Bacon regulations to require this additional worker contact information would reflect more modern and efficient methods of communication between workers and contractors, subcontractors, contracting agencies, and the Department's authorized representatives.

Another proposed revision in this section, as well as in § 5.5(c), clarifies the Department's longstanding interpretation of these regulatory provisions that contractors and subcontractors must maintain records of each worker's correct classification or classifications of work actually performed and the hours worked in each classification. *See, e.g., Pythagoras Gen. Contracting Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *7 (Mar. 1, 2011) (''If workers perform labor in more than one job classification, they are entitled to compensation at the appropriate wage rate for each classification according to the time spent in that classification, which time the employer's payroll records must accurately reflect.''), *aff'd sub nom. Pythagoras Gen. Contracting Corp.* v. *U.S. Dep't of Lab.,* 926 F. Supp. 2d 490 (S.D.N.Y. 2013). Current regulations permit contractors and subcontractors to pay ''[l]aborers or mechanics performing work in more than one classification . . . at the rate specified for each classification for the

time actually worked therein,'' but only if ''the employer's payroll records accurately set forth the time spent in each classification in which work is performed.'' 29 CFR 5.5(a)(1)(i). The proposed revisions similarly recognize that laborers or mechanics may perform work in more than one classification and more expressly provide that, in such cases, it is the obligation of contractors and subcontractors to accurately record information required by this section for each separate classification of work performed.

By revising the language in § 5.5(a)(3)(i) and (c) to require records of the ''correct classification(s) of work actually performed,'' the Department intends to clarify its longstanding interpretation that contractors and subcontractors must keep records of (and include on certified payrolls) hours worked segregated by each separate classification of work performed. It would continue to be the case that if a contractor or subcontractor fails to maintain such records of actual daily and weekly hours worked and correct classifications, then it must pay workers the rates of the classification of work performed with the highest prevailing wage and fringe benefits due.

It is implicit—and expressly stated in various parts of current § 5.5—that records that contractors and subcontractors are required to maintain must be accurate and complete. *See also* 40 U.S.C. 3145(b). The Department proposes to put contractors and subcontractors on further notice of their statutory, regulatory, and contractual obligations to keep accurate, correct, and complete records by adding the term ''actually'' in § 5.5(a)(3)(i) and (c) to modify ''hours worked'' and ''work performed.'' The current regulations require maintenance of records containing ''correct classifications'' and ''actual wages paid,'' and this proposed revision is not intended to make any substantive change to the longstanding requirement that contractors and subcontractors keep accurate, correct, and complete records of all the information required in these sections.

(2) 29 CFR 5.5(a)(3)(ii)–(iii)

The Department proposes to revise the language in § 5.5(a)(3)(ii) and (iii) to expressly apply to all entities that might be responsible for maintaining the payrolls and basic records a contractor is required to submit weekly when a Federal agency is not a party to the contract. Currently, the specified records must be submitted to the ''applicant, sponsor, or owner'' if a Federal agency is not a party to the contract. The proposed revision would add the language ''or other entity, as the case may be, that maintains such records'' to clarify that this requirement applies regardless of the role or title of the recipient of Federal assistance (through grants, loans, loan guarantees or insurance, or otherwise) under any of the statutes referenced by § 5.1.

The Department proposes to revise § 5.5(a)(3)(ii) by replacing the phrase ''or audit of compliance with prevailing wage requirements'' with ''or other compliance action.'' This revision clarifies that compliance actions may be accomplished by various means, not solely by an investigation or audit of compliance. A similar change is proposed in § 5.6. Compliance actions include, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations. This proposed revision expressly sets forth the Department's longstanding practice and interpretation of this current regulatory language to encompass all types of Davis-Bacon compliance actions currently used by the Department, as well as any additional types that the Department may use in the future. This revision does not impose any new or additional requirements upon Federal agencies, applicants, sponsors, owners, or other entities, or on the Department, contractors, or subcontractors.

The Department also proposes to add language to § 5.5(a)(3)(ii)(A) to codify the Department's longstanding policy that contracting agencies and prime contractors can permit or require contractors to submit their certified payrolls through an electronic system, provided that the electronic submission system requires a legally valid electronic signature, as discussed below, and the contracting agency or prime contractor permits other methods of payroll submission in situations where the contractor is unable or limited in its ability to use or access the electronic system. *See generally* PWRB, DBA/DBRA Compliance Principles, at 26. The Department encourages all contracting agencies to permit submission of certified payrolls electronically, so long as all of the required information and certification requirements are met. Nevertheless, contracting agencies determine which, if any, electronic submissions systems they will use, as certified payrolls are submitted directly to the contracting agencies. Electronic submission systems can reduce the recordkeeping burden and costs of record maintenance, and many such systems include compliance monitoring tools that may streamline the review of such payrolls.[88]

However, under the proposal, agencies that require the use of an electronic submission system would be required to allow contractors to submit certified payrolls by alternative methods when contractors are not able to use the agency's electronic submission system due to limitations on the contractor's ability to access the system. For example, if a contractor does not have internet access or is unable to access the electronic submission system due to a disability, the contracting agency would be required to allow such a contractor to submit certified payrolls in a manner that accommodates these circumstances.

The Department also proposes a new sub-paragraph, § 5.5(a)(3)(ii)(D), to reiterate the Department's longstanding policy that, to be valid, the contractor's signature on the certified payroll must either be an original handwritten signature or a legally valid electronic signature. Both of these methods are sufficient for compliance with the Copeland Act. *See* WHD Ruling Letter (Nov. 12, 2004) (''Current law establishes that the proper use of electronic signatures on certified payrolls . . . satisfies the requirements of the Copeland Act and its implementing regulations.'').[89] Valid electronic signatures include any electronic process that indicates acceptance of the certified payroll record and includes an electronic method of verifying the signer's identity. Valid electronic signatures do not include a scan or photocopy of a written signature. The Department recognizes that electronic submission of certified payroll expands the ability of contractors and contracting agencies to comply with the requirements of the Davis-Bacon and Copeland Acts. As a matter of longstanding policy, the Department considers an original signature to be legally binding evidence of the intention of a person with regard to a document, record, or transaction. Modern technologies and evolving business practices are rendering the

[88] The Department does not endorse or approve the use of any electronic submission system or monitoring tool(s). Although electronic monitoring tools can be a useful aid to compliance, successful submission of certified payrolls to an electronic submission system with such tools does not guarantee that a contractor is in compliance, particularly since not all violations can be detected through electronic monitoring tools. Contractors that use electronic submission systems remain responsible for ensuring compliance with Davis-Bacon labor standards provisions.

[89] *https://www.fhwa.dot.gov/construction/cqit/111204dol.cfm.*

distinction between original paper and electronic signatures nearly obsolete.

The Department proposes to add paragraph (a)(3)(iii) to § 5.5 to require all contractors, subcontractors, and recipients of Federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed. These related documents include, without limitation, contractors' and subcontractors' bids and proposals, as well as amendments, modifications, and extensions to contracts, subcontracts, or agreements.

WHD routinely requests these contract documents in its DBRA investigations. In the Department's experience, contractors and subcontractors that comply with the Davis-Bacon labor standards requirements usually, as a good business practice, maintain these contracts and related documents. It is also the Department's experience that Davis-Bacon contractors and subcontractors that do not keep their contracts, agreements, and related legally binding documents are more likely to disregard their obligations to workers and subcontractors. Adding an express regulatory requirement that contractors and subcontractors maintain and provide these records to WHD would bolster enforcement of the labor standards provisions of the statutes referenced by § 5.1. This requirement would not relieve contractors or subcontractors from complying with any more stringent record retention requirements (*e.g.,* longer record retention periods).

This proposed revision also could help level the playing field for contractors and subcontractors that comply with Davis-Bacon labor standards. Like the current recordkeeping requirements, non-compliance with this new proposed requirement may result in the suspension of any further payment, advance, or guarantee of funds and may also be grounds for debarment action pursuant to 29 CFR 5.12.

The Department proposes to renumber current § 5.5(a)(3)(iii) as § 5.5(a)(3)(iv). In addition, the Department proposes to revise this re-numbered paragraph to clarify the records contractors and subcontractors are required to make available to the Federal agency (or applicant, sponsor, owner, or other entity, as the case may be) or the Department upon request. Specifically, the proposed revisions to § 5.5(a)(3)(ii) and (iv), and the proposed new § 5.5(a)(3)(iii), expand and clarify the records contractors and subcontractors are required to make available for inspection, copying, or transcription by authorized representatives specified in this section. The Department also proposes adding a requirement that contractors and subcontractors must make available any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1.

Current § 5.5(a)(3)(iii) requires contractors and subcontractors to make available the records set forth in § 5.5(a)(3)(i) (Payrolls and basic records). The proposed revisions to re-numbered § 5.5(a)(3)(iv) ensure that contractors and subcontractors are aware that they are required to make available not only payrolls and basic records, but also the payrolls actually submitted to the contracting agency (or applicant, sponsor, owner, or other entity, as the case may be) pursuant to § 5.5(a)(3)(ii), including the Statement of Compliance, as well as any contracts and related documents required by the proposed § 5.5(a)(3)(iii). These records help WHD determine whether contractors are in compliance with the labor standards provisions of any of the statutes referenced by § 5.1, and what the appropriate back wages and other remedies, if any, should be. The Department believes that these clarifications will remove doubt or uncertainty as to whether contractors are required to make such records available to the Federal agency (or applicant, sponsor, owner, or other entity, as the case may be) or the Department upon request. These revisions make explicit the Department's longstanding practice and do not impose any new or additional requirements upon a Federal agency (or applicant, sponsor, owner, or other entity, as the case may be).

The new or additional recordkeeping requirements in the proposed revisions to § 5.5(a)(3) likely do not impose an undue burden on contractors or subcontractors, as they likely already maintain worker telephone numbers and email addresses and may already be required by contracting agencies to keep contracts and related documents. These revisions also enhance the Department's ability to provide education, outreach and compliance assistance to contractors and subcontractors awarded contracts subject to the Davis-Bacon labor standards provisions.

Finally, the Department in re-numbered § 5.5(a)(3)(iv)(B) proposes to add a sanction for contractors and other persons that fail to submit the required records in § 5.5(a)(3) or make those records available to WHD within the time WHD requests that the records be produced. Specifically, the Department proposes that contractors that fail to comply with WHD record requests will be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD. The Department proposes this sanction to enhance enforcement of recordkeeping requirements and encourage cooperation with its investigations and other compliance actions. The proposal provides that WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

(C) 29 CFR 5.5(a)(4) Apprentices

The Department proposes to reorganize § 5.5(a)(4)(i) so that each of the four apprentice-related topics it addresses—rate of pay, fringe benefits, apprenticeship ratios, and reciprocity—are more clearly and distinctly addressed. These proposed revisions are not substantive. In addition, the Department proposes to revise the subsection of § 5.5(a)(4)(i) regarding reciprocity to better align with the purpose of the DBA and the Department's Employment and Training Administration (ETA) regulation at 29 CFR 29.13(b)(7) regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered.

Section 5.5(a)(4)(i) provides that apprentices may be paid less than the prevailing rate for the work they perform if they are employed pursuant to, and individually registered in, a bona fide apprenticeship program registered with ETA's Office of Apprenticeship (OA) or with a State Apprenticeship Agency (SAA) recognized by the OA. In other words, in order to employ apprentices on a Davis-Bacon project at lower rates than the prevailing wage rates applicable to journeyworkers, contractors must ensure that the apprentices are participants in a federally registered apprenticeship program or a State apprenticeship program registered by a recognized SAA. Any worker listed on a payroll at an apprentice wage rate who is not employed pursuant to and individually registered in such a bona fide apprenticeship program must be paid the full prevailing wage listed on

the applicable wage determination for the classification of work performed. Additionally, any apprentice performing work on the site of the work in excess of the ratio permitted under the registered program must be paid not less than the full wage rate listed on the applicable wage determination for the classification of work performed.

In its current form, § 5.5(a)(4)(i) further provides that when a contractor performs construction on a project in a locality other than the one in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) specified in the contractor's or subcontractor's registered program will be observed. Under this provision, the ratios and wage rates specified in a contractor's or subcontractor's registered program are ''portable,'' such that they apply not only when the contractor performs work in the locality in which it was originally registered (sometimes referred to as the contractor's ''home State'') but also when a contractor performs work on a project located in a different State (sometimes referred to as the ''host State''). In contrast, as part of a 1979 NPRM, the Department proposed essentially the opposite approach, *i.e.,* that apprentice ratios and wage rates would not be portable and that, instead, when a contractor performs construction on a project in a locality other than the one in which its program is registered, ''the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in plan(s) registered for that locality shall be observed.'' [90]

In adopting the current approach in a final rule issued in 1981, the Department noted that several commenters had objected to the proposal to apply the apprentice ratios and wage rates in the location where construction is performed, rather than the ratios and wage rates applicable in the location in which the program is registered.[91] The Department explained that, in light of these comments, ''[u]pon reconsideration, we decided that to impose different plans on contractors, many of which work in several locations where there could be differing apprenticeship standards, would be adding needless burdens to their business activities.'' [92]

In 2008, ETA amended its apprenticeship regulations in a manner that is seemingly in tension with the 1981 final rule's approach to Davis-Bacon apprenticeship ''portability.'' Specifically, in December 2007, ETA issued an NPRM to revise the agency's labor standards for the registration of apprenticeship programs regulations.[93] One of the NPRM proposals was to expand the provisions of then-existing 29 CFR 29.13(b)(8), which at that time provided that in order to be recognized by ETA, an SAA must grant reciprocal recognition to apprenticeship programs and standards registered in other States—except for apprenticeship programs in the building and construction trades.[94] ETA proposed to move the provision to 29 CFR 29.13(b)(7) and to remove the exception for the building and construction trades.[95] In the preamble to the final rule issued on October 29, 2008, ETA noted that several commenters had expressed concern that it was ''unfair and economically disruptive to allow trades from one State to use the pay scale from their own State to bid on work in other States, particularly for apprentices employed on projects subject to the Davis-Bacon Act.'' [96] The preamble explained that ETA ''agree[d] that the application of a home State's wage and hour and apprentice ratios in a host State could confer an unfair advantage to an out-of-state contractor bidding on a Federal public works project.'' [97] Further, the preamble noted that, for this reason, ETA's negotiations of memoranda of understanding with States to arrange for reciprocal approval of apprenticeship programs in the building and construction trades have consistently required application of the host State's wage and hour and apprenticeship ratio requirements. Accordingly, the final rule added a sentence to 29 CFR 29.13(b)(7) to clarify that the program sponsor seeking reciprocal approval must comply with the host State's wage and hour and apprentice ratio standards.[98]

In order to better harmonize the Davis-Bacon regulations and ETA's apprenticeship regulations, the Department proposes to revise § 5.5(a)(4)(i) to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which the apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the project locality. As noted above, the general rule in § 5.5(a)(4)(i) is that contractors may pay less than the prevailing wage rate for the work performed by an apprentice employed pursuant to and individually registered in a bona fide apprenticeship program registered with ETA or an OA-recognized SAA. Under ETA's regulation at 29 CFR 29.13(b)(7), if a contractor has an apprenticeship program registered for one State but wishes to employ apprentices to work on a project in a different State with an SAA, the contractor must seek and obtain reciprocal approval from the project State SAA and adhere to the wage rate and ratio standards approved by the project State SAA. Accordingly, upon receiving reciprocal approval, the apprentices in such a scenario would be considered to be employed pursuant to and individually registered in the program in the project State, and the terms of that reciprocal approval would apply for purposes of the DBRA. The Department's proposed revision requiring contractors to apply the ratio and wage rate requirements from the relevant apprenticeship program for the locality where the laborers and mechanics are working therefore better aligns with ETA's regulations on recognition of SAAs and is meant to eliminate potential confusion that could result for Davis-Bacon contractors subject to both ETA and WHD rules regarding apprentices. The proposed revision also better comports with the DBA's statutory purpose to eliminate the unfair competitive advantage conferred on contractors from outside of a geographic area bidding on a Federal construction contract based on lower wage rates (and, in the case of apprentices, differing ratios of apprentices paid a percentage of the journeyworker rate for the work performed) than those that prevail in the location of the project.

The Department notes that multiple apprenticeship programs may be registered in the same State, and that such programs may cover different localities of that State and require

[90] Proposed Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 44 FR 77080, 77085 (Dec. 28, 1979).

[91] Final Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 46 FR 4380, 4383 (Jan. 16, 1981).

[92] *Id.* The 1981 final rule was suspended, but the apprenticeship portability provision in § 5.5 was ultimately proposed and issued unchanged by a final rule issued in 1982. *See* Final Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 47 FR 23658, 23669 (May 28, 1982).

[93] *See* Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations Notice of Proposed Rulemaking, 72 FR 71020 (Dec. 13, 2007).

[94] *Id.* at 71026.

[95] *Id.*

[96] Final Rule, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 73 FR 64402, 64419 (Oct. 29, 2008).

[97] *Id.*

[98] *Id.* at 64420. *See* 29 CFR 29.13(b)(7).

different apprenticeship wage rates and ratios within those separate localities. If apprentices registered in a program covering one State locality will be doing apprentice work in a different locality of the same State, and different apprentice wage and ratio standards apply to the two different localities, the proposed rule would require compliance with the apprentice wage and ratio standards applicable to the locality where the work will be performed. The Department welcomes comments as to whether adoption of a consistent rule, applicable regardless of whether the project work is performed in the same State as the registered apprenticeship program, best aligns with the statutory purpose of the DBA and would likely be less confusing to apply.

Lastly, the Department proposes to remove the regulatory provisions regarding trainees currently set out in §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to remove the references to trainees and training programs throughout parts 1 and 5. Current § 5.5(a)(4)(ii) permits ''trainees'' to work at less than the predetermined rate for the work performed, and § 5.2(n)(2) defines a trainee as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by ETA as meeting its standards for on-the-job training programs. Sections 5.2(n)(2) and 5.5(a)(4)(ii) were originally added to the regulations over 50 years ago.[99] However, ETA no longer reviews or approves on-the-job training programs and, relatedly, WHD has found that § 5.5(a)(4)(ii) is seldom if ever applicable to DBRA contracts. The Department therefore proposes to remove the language currently in §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to retitle § 5.5(a)(4) ''Apprentices.'' The Department also proposes a minor revision to proposed § 5.5(a)(4)(ii) to align with the gender-neutral term of ''journeyworker'' used by ETA in its apprenticeship regulations. The Department also proposes to rescind and reserve §§ 5.16 and 5.17, as well as delete references to such trainees and training programs in §§ 1.7, 5.2, 5.5, 5.6, and 5.15. The Department encourages comments on this proposal, including any relevant information about the use of training programs in the construction industry.

(D) Flow-Down Requirements in §§ 5.5(a)(6) and 5.5(b)(4)

The Department proposes to add clarifying language to the DBRA- and CWHSSA-specific contract clause provisions at § 5.5(a)(6) and (b)(4), respectively. Currently, these contract clauses contain explicit contractual requirements for prime contractors and upper-tier subcontractors to flow-down the required contract clauses into their contracts with lower-tier subcontractors. The clauses also explicitly state that prime contractors are ''responsible for the compliance by any subcontractor or lower tier subcontractor.'' 29 CFR 5.5(a)(6) and (b)(4). The Department's proposed rule would affect these contract clauses in several ways.

(1) Flow-Down of Wage Determinations

The Department proposes adding clarifying language to § 5.5(a)(6) that the flow-down requirement also requires the inclusion in such subcontracts of the appropriate wage determination(s).

(2) Application of the Definition of ''Prime Contractor''

As noted above in the discussion of § 5.2, the Department is proposing to codify a definition of ''prime contractor'' in § 5.2 that would include controlling shareholders or members, joint venturers or partners, and general contractors or others to whom all or substantially all of the construction or Davis-Bacon labor standards compliance duties have been delegated under the prime contract. These entities would therefore also be ''responsible'' under § 5.5(a)(6) and (b)(4) for the same violations as the legal entity that signed the prime contract. The proposed change is intended to ensure that contractors do not interpose single-purpose corporate entities as the nominal ''prime contractor'' in order to escape liability or responsibility for the contractors' Davis-Bacon labor standards compliance duties.

(3) Responsibility for the Payment of Unpaid Wages

The proposal includes new language underscoring that being ''responsible for . . . compliance'' means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. This is consistent with the Department's longstanding interpretation of this provision. *See M.A. Bongiovanni, Inc.,* WAB No. 91–08, 1991 WL 494751, at *1 (Apr. 19, 1991); *see also All Phase Elec. Co.,* WAB No. 85–18, 1986 WL 193105, at *1–2 (June 18, 1986) (withholding contract payments from the prime contractor for subcontractor employees even though the labor standards had not been flowed down into the subcontract).[100] Because such liability for prime contractors is contractual, it represents strict liability and does not require that the prime contractor knew of or should have known of the subcontractors' violations. *Bongiovanni,* 1991 WL 494751, at *1. As the WAB explained in *Bongiovanni,* this rule ''serves two vital functions.'' *Id.* First, ''it requires the general contractor to monitor the performance of the subcontractor and thereby effectuates the Congressional intent embodied in the Davis-Bacon and Related Acts to an extent unattainable by Department of Labor compliance efforts.'' *Id.* Second, ''it requires the general contractor to exercise a high level of care in the initial selection of its business associates.'' *Id.*

(4) Potential for Debarment for Disregard of Responsibility

The proposed new language clarifies that underpayments of a subcontractor's workers may in certain circumstances subject the prime contractor itself to debarment for violating the responsibility provision. Under the existing regulations, there is no reference in the § 5.5(a)(6) or (b)(4) responsibility clauses to a potential for debarment. However, the existing § 5.5(a)(7) does currently explain that ''[a] breach of the contract clauses in 29 CFR 5.5''—which thus includes the responsibility clause at § 5.5(a)(6)—''may be grounds . . . for debarment[.]'' 29 CFR 5.5(a)(7). The proposed new language would provide more explicit notice (in § 5.5(a)(6) and (b)(4) themselves) of this potential that a prime contractor may be debarred where there are violations on the contract (including violations perpetrated by a subcontractor) and the prime contractor has failed to take responsibility for compliance.

In providing this additional notice of the potential for debarment, the Department does not intend to change the core standard for when a prime contractor or upper tier subcontractor may be debarred for the violations of a lower tier subcontractor. The potential for debarment for a violation of the responsibility requirement, unlike the responsibility for back wages, is not currently subject to a strict liability

[99] *See* Final Rule, Labor Standards Applicable to Contracts Covering Federally Financed and Assisted Construction, 36 FR 19304 (Oct. 2, 1971) (defining trainees as individuals working under a training program certified by ETA's predecessor agency, the Manpower Administration's Bureau of Apprenticeship and Training).

[100] The new language also clarifies that, consistent with the proposed language in § 5.10, such responsibility also extends to any interest assessed on backwages or other monetary relief.

standard. Rather, in the cases in which prime contractors have been debarred for the underpayments of subcontractors' workers, they were found to have some level of intent that reflected a disregard of their own obligations. See, *e.g.,* H.P. Connor & Co., WAB No. 88–12, 1991 WL 494691, at *2 (Feb. 26, 1991) (affirming ALJ's recommendation to debar prime contractor for ''run[ning] afoul'' of 29 CFR 5.5(a)(6) because of its ''knowing or grossly negligent participation in the underpayment'' of the workers of its subcontractors).[101]

(5) The Department Does Not Intend To Change This Standard. Responsibility and Liability of Upper-Tier Subcontractors

The proposed language in § 5.5(a)(6) and (b)(4) would also eliminate confusion regarding the responsibility and liability of upper-tier subcontractors. The existing language in § 5.5(a)(6) and (b)(4) creates express contractual responsibility of upper-tier subcontractors to flow down the required contract clauses to bind their lower-tier subcontractors. *See* § 5.5(a)(6) (stating that the prime contractor ''or subcontractor'' must insert the required clauses in ''any subcontracts''); § 5.5(b)(4) (stating that the flow-down clause must ''requir[e] the subcontractors to include these clauses in any lower tier subcontracts''). The Department has long recognized that with this responsibility comes the potential for sanctions against upper-tier subcontractors that fail to properly flow down the contract clauses. *See* AAM 69 (DB–51), at 2 (July 29, 1966).[102]

The current contract clauses in § 5.5(a)(6) and (b)(4) do not expressly identify further contractual responsibility or liability of upper-tier subcontractors for violations that are committed against the employees of their lower-tier subcontractors. However, although the Department has not had written guidance to this effect, it has in many circumstances held upper-tier subcontractors responsible for the failure by their own lower-tier subcontractors to pay required prevailing wages. *See, e.g., Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *6 (Feb. 27, 2004); *Norsaire Sys., Inc.,* WAB No. 94–06, 1995 WL 90009, at *1 (Feb. 28, 1995)

In *Ray Wilson Co.,* for example, the ARB upheld the debarment of an upper-tier subcontractor because of its lower-tier subcontractor's misclassification of workers. As the ARB held, the higher-tier subcontractor had an ''obligation[ ] to be aware of DBA requirements and to ensure that its lower-tier subcontractor . . . properly complied with the wage payment and record keeping requirements on the project.'' 2004 WL 384729, at *10. The Department sought debarment because the upper-tier subcontractor had discussed the misclassification scheme with the lower-tier subcontractor and thus ''knowingly countenanced'' the violations. *Id.* at *8.

The Department proposes in this rulemaking to clarify that upper-tier subcontractors (in addition to prime contractors) may be responsible for the violations committed against the employees of lower-tier subcontractors. The proposal would clarify that this responsibility would require upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subject upper-tier subcontractors to debarment in appropriate circumstances (*i.e.,* where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors). The proposal would include, in the § 5.5(a)(6) and (b)(4) contract clauses, language adding that ''any subcontractor[ ] responsible'' for the violations is also liable for back wages and potentially subject to debarment. This language is intended to place liability not only on the lower-tier subcontractor that is directly employing the worker who does not receive required wages, but also on the upper-tier subcontractors that may also have disregarded their obligations to be responsible for compliance.

With this proposal, the Department does not intend to place the same strict liability responsibility on all upper-tier subcontractors as, discussed above, the existing language already places on prime contractors for lower-tier subcontractors' back wages. Rather, the new proposed language is intended to clarify that, in appropriate circumstances, as in *Ray Wilson Co.,* upper-tier subcontractors may be held responsible—both subjecting them to possible debarment and requiring them to pay back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages.

A key principle in enacting regulatory requirements is that liability should, to the extent possible, be placed on the entity that best can control whether or not a violation occurs. *See Bongiovanni,* 1991 WL 494751, at *1.[103] For this reason, the Department proposes language assigning liability to upper-tier subcontractors, who have the ability to choose the lower-tier subcontractors they hire, notify lower-tier subcontractors of the prevailing wage requirements of the contract, and take action if they have any reason to believe there may be compliance issues. By clarifying that upper-tier subcontractors may be liable under appropriate circumstances—but are not strictly liable as are prime contractors—the Department believes that it has struck an appropriate balance that is consistent with historical interpretation, the statutory language of the DBA, and the feasibility and efficiency of future enforcement.

(E) 29 CFR 5.5(d)—Incorporation by Reference

Proposed new section 5.5(d) clarifies that, notwithstanding the continued requirement that agencies incorporate contract clauses and wage determinations ''in full'' into a covered contract, the clauses and wage determinations are equally effective if they are incorporated by reference. The Department's proposal for this subsection is discussed further below in part III.B.3.xx (''Post-award determinations and operation-of-law''), together with proposed changes to §§ 1.6(f), 5.5(e), and 5.6.

(F) 29 CFR 5.5(e)—Operation of Law

In a new section at § 5.5(e), the Department proposes language making effective by operation of law a contract

[101] *See also Martell Constr. Co.,* ALJ No. 86–DBA–32, 1986 WL 193129, at *9 (DOL OALJ Aug. 7, 1986), *aff'd,* WAB No. 86–26, 1987 WL 247045 (July 10, 1987). In *Martell,* the prime contractor had failed to flow down the required contract clauses and investigate or question irregular payroll records submitted by subcontractors. The ALJ explained that the responsibility clause in § 5.5(a)(6) places a burden on the prime contractor ''to act on or investigate irregular or suspicious situations as necessary to assure that its subcontractors are in compliance with the applicable sections of the regulations.'' 1986 WL 193129, at *9.

[102] In AAM 69, the Department noted that ''the failure of the prime contractor or a subcontractor to incorporate the labor standards provisions in its subcontracts may, under certain circumstances, be a serious violation of the contract requirements which would warrant the imposition of sanctions under either the Davis-Bacon Act or our Regulations.''

[103] *Cf. Am. Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.,* 456 U.S. 556, 572–73 (1982) (''[A] rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.''). The same principle supports the Department's proposed codification of the definition of ''prime contractor.'' Where the nominal prime contractor is a single-purpose entity with few actual workers, and it contracts with a general contractor for all relevant aspects of construction and monitoring of subcontractors, the most reasonable enforcement structure would place liability on both the nominal prime contractor *and* the general contractor that actually has the staffing, experience, and mandate to assure compliance on the job site.

clause or wage determination that was wrongly omitted from the contract. The Department's proposal for this subsection is discussed below in part III.B.3.xx (''Post-award determinations and operation-of-law''), together with proposed changes to §§ 1.6(f), 5.5(d), and 5.6.

iv. Section 5.6 Enforcement

(A) 29 CFR 5.6(a)(1)

The Department proposes to revise § 5.6(a)(1) by renumbering the existing regulatory text § 5.6(a)(1)(i), and adding an additional sub-section, § 5.6(a)(1)(ii), to include a provision clarifying that where a contract is awarded without the incorporation of the required Davis-Bacon labor standards clauses required by § 5.5, the Federal agency must incorporate the clauses or require their incorporation. The Department's proposal for this subsection is discussed further below in part III.B.3.xx (''Post-award determinations and operation-of-law''), together with proposed changes to §§ 1.6(f) and 5.5(e).

(B) 29 CFR 5.6(a)(2)

The Department proposes to amend § 5.6(a)(2) to reflect the Department's longstanding practice and interpretation that certified payrolls required pursuant to § 5.5(a)(3)(ii) may be requested—and Federal agencies must produce such certified payrolls—regardless of whether the Department has initiated an investigation or other compliance action. The term ''compliance action'' includes, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations.[104] The Department further proposes revising this paragraph to clarify that, in those instances in which a Federal agency does not itself maintain such certified payrolls, it is the responsibility of the Federal agency to ensure that those records are provided to the Department upon request, either by obtaining and providing the certified payrolls to the Department, or by requiring the entity maintaining those certified payrolls to provide the records directly to the Department.

The Department also proposes to replace the phrase ''payrolls and statements of compliance'' with ''certified payrolls'' to continue to more clearly distinguish between certified payrolls and regular payroll and other basic records and information that the contractor is also required to maintain under § 5.5(a)(3), as discussed above.

First, the proposed revisions are intended to clarify that an investigation or other compliance action is not a prerequisite to the Department's ability to obtain from the Federal agency certified payrolls submitted pursuant to § 5.5(a)(3)(ii). Second, the proposed revisions are intended to remove any doubt or uncertainty that the Federal agency has an obligation to produce such certified payrolls, even in those circumstances in which it may not be the entity actually maintaining the requested certified payrolls. These revisions would make explicit the Department's longstanding practice and interpretation of this provision.

These proposed revisions would not place any new or additional requirements or recordkeeping burdens on contracting agencies, as they are already required to maintain these certified payrolls and provide them to the Department upon request.

These proposed revisions enhance the Department's ability to provide compliance assistance to various stakeholders, including Federal agencies, contractors, subcontractors, sponsors, applicants, owners, or other entities awarded contracts subject to the provisions of the DBRA. Specifically, these proposed revisions would facilitate the Department's review of certified payrolls on covered contracts where the Department has not initiated any specific compliance action. Conducting such reviews promotes the proper administration of the DBRA because, in the Department's experience, such reviews often enable the Department to identify compliance issues and circumstances in which additional outreach and education would be beneficial.

(C) 29 CFR 5.6(a)(3)–(5), 5.6(b)

The Department proposes revisions to § 5.6(a)(3) and (5) and (b), similar to the above-mentioned proposed changes to § 5.6(a)(2), to clarify that an investigation is only one method of assuring compliance with the labor standards clauses required by § 5.5 and the applicable statutes referenced in § 5.1. The Department proposes to supplement the term ''investigation,'' where appropriate, with the phrase ''or other compliance actions.'' The proposed revisions align with all the types of compliance actions currently used by the Department, as well as any additional categories that the Department may use in the future. These revisions make explicit the Department's longstanding practice and interpretation of these provisions and do not impose any new or additional requirements upon a Federal agency.

Proposed revisions to § 5.6(a)(3) clarify the records and information that contracting agencies should include in their DBRA investigations. These proposed changes conform to proposed changes in § 5.5(a)(3).

The Department also proposes updating current § 5.6(a)(5) to reflect its practice of redacting portions of confidential statements of workers or other informants that would tend to reveal those informants' identities. Finally, the Department proposes renumbering current § 5.6(a)(5) as a stand-alone new paragraph § 5.6(c). This proposed change is made to emphasize—without making substantive changes—that this regulatory provision mandating protection of information that identifies or would tend to identity confidential sources, or constitute an unwarranted invasion of personal privacy, applies to both the Department's and other agencies' confidential statements and other related documents.

v. Section 5.10 Restitution, Criminal Action

To correspond with proposed language in the underlying contract clauses, the Department proposes to add references to monetary relief and interest to the description of restitution in § 5.10, as well as an explanation of the method of computation of interest applicable generally to any circumstance in which there has been an underpayment of wages under a covered contract.

The Department has proposed new anti-retaliation contract clauses at § 5.5(a)(11) and (b)(5), along with a related section of the regulations at § 5.18. Those clauses and section provide for the provision of monetary relief that would include, but not be limited to, back wages. Reference to this relief in § 5.10 is proposed to correspond to those proposed new clauses and section. For further discussion of those proposals, see part III.B.3.xix (''Anti-Retaliation'').

The reference to interest in § 5.10 is similarly intended to correspond to proposed new language requiring the payment of interest on any underpayment of wages in the contract clauses at § 5.5(a)(1)(vi), (a)(2) and (6), and (b)(2) through (4), and on any other monetary relief for violations of the proposed anti-retaliation clauses. The existing Davis-Bacon regulations and contract clauses do not specifically provide for the payment of interest on back wages. The ARB and the Department's administrative law judges, however, have held that interest calculated to the date of the underpayment or loss is generally appropriate where back wages are due

[104] *See* 2020 GAO Report, note 12, *supra,* at 6 tbl.1, for descriptions of WHD Compliance Actions.

under other similar remedial employee protection statutes enforced by the Department. *See, e.g., Lawn Restoration Serv. Corp.,* No. 2002–SCA–00006, slip op. at 74 (OALJ Dec. 2, 2003) (awarding prejudgment interest under the SCA).[105] Under the DBRA, as in the INA and SCA and other similar statutes, an assessment of interest on back wages and other monetary relief will ensure that the workers Congress intended to protect from substandard wages will receive the full compensation that they were owed under the contract.[106]

The proposed language establishes that interest will be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and will be compounded daily. Various OSHA whistleblower regulations use the tax underpayment rate and daily compounding because that accounting best achieves the make-whole purpose of a back-pay award. *See* Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule, 80 FR 11865, 11872 (Mar. 5, 2015).

vi. Section 5.11 Disputes Concerning Payment of Wages

The Department proposes minor revisions to § 5.11(b)(1) and (c)(1), to clarify that where there is a dispute of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification, the Administrator may notify the affected contractors and subcontractors, if any, of the investigation findings by means other than registered or certified mail, so long as those other means would normally assure delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier and express delivery services, or by personal service to the last known address. As has been recently highlighted during the COVID–19 pandemic, while registered or certified mail may generally be a reliable means of delivery, in some circumstances other delivery methods may be just as reliable or even more successful at assuring delivery. These revisions allow the Department to choose methods to ensure that the necessary notifications are delivered to the affected contractors and subcontractors.

In addition, the Department proposes similar changes to allow contractors and subcontractors to also provide their response, if any, to the Administrator's notification of the investigative findings by any means that would normally assure delivery. The Department also proposes replacing the term ''letter'' with the term ''notification'' in this section, since the notification of investigation findings may be delivered by letter or other means, such as email. Similarly, the Department proposes to replace the term ''postmarked'' with ''sent'' to reflect that other methods of delivery may be confirmed by other means, such as by the date stamp on an email or the delivery confirmation provided by a commercial delivery service.

For additional discussion related to § 5.11, see part III.B.3.xxi (''Debarment'').

vii. Section 5.12. Debarment Proceedings

The Department proposes minor revisions to § 5.12(b)(1) and (d)(2)(iv)(A), to clarify that the Administrator may notify the affected contractors and subcontractors, if any, of the investigation findings by means other than registered or certified mail, so long as those other means would normally assure delivery. As discussed above in reference to identical changes proposed to § 5.11, these proposed revisions will allow the Department to choose the most appropriate method to confirm that the necessary notifications reach their recipients. The Department proposes similar changes to allow the affected contractors or subcontractors to use any means that would normally assure delivery when making their response, if any, to the Administrator's notification.

The Department also proposes a slight change to § 5.12(b)(2), to state that the Administrator's findings will be final if no hearing is requested within 30 days of the date of the Administrator's notification, as opposed to the current language, which states that the Administrator's findings shall be final if no hearing is requested within 30 days of receipt of the Administrator's notification. This proposed change would align the time period available for requesting a hearing in § 5.12(b)(2) with similar requirements in § 5.11 and other paragraphs in § 5.12, which state that such requests must be made within 30 days of the date of the Administrator's notification.

For additional discussion related to § 5.12, see part III.B.3.xxi (''Debarment'').

viii. Section 5.16 Training Plans Approved or Recognized by the Department of Labor Prior to August 20, 1975

As noted above (*see* part III.B.3.iii(C) ''29 CFR 5.5(a)(4) Apprentices.''), the Department proposes to rescind and reserve § 5.16. Originally published along with § 5.5(a)(4)(ii) in a 1975 final rule, § 5.16 is essentially a grandfather clause permitting contractors, in connection with certain training programs established prior to August 20, 1975, to continue using trainees on Federal and federally assisted construction projects without having to seek additional approval from the Department pursuant to § 5.5(a)(4)(ii). *See* 40 FR 30480. Since § 5.16 appears to be obsolete more than four decades after its issuance, the Department proposes to rescind and reserve the section. The Department also proposes several technical edits to § 5.5(a)(4)(ii) to remove references to § 5.16.

ix. Section 5.17 Withdrawal of Approval of a Training Program

As discussed in detail above, the Department proposes to remove references to trainees and training programs throughout parts 1 and 5 (*see* section iii(C) ''29 CFR 5.5(a)(4) Apprentices.'') as well as rescind and reserve § 5.16 (*see* section *viii* ''Section 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.''). Accordingly, the Department also proposes to rescind and reserve § 5.17.

x. Section 5.20 Scope and Significance of This Subpart

The Department proposes two technical corrections to § 5.20. First, the Department proposes to correct a typographical error in the citation to the Portal-to-Portal Act of 1947 to reflect that the relevant section of the Portal-to-Portal Act is codified at 29 U.S.C. 259, not 29 U.S.C. 359. Second, the last sentence of § 5.20 currently states, ''Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.12.'' However, the regulatory provision titled ''Rulings and Interpretations,'' which this section is

[105] *See also Greater Mo. Med. Pro-care Providers, Inc.,* ARB No. 12–015, 2014 WL 469269, at *18 (Jan. 29, 2014) (approving of pre-judgment and post-judgment interest on back pay award for H–1B visa cases under the Immigration and Nationality Act (INA)), *aff'd sub nom. Greater Mo. Med. Pro-care Providers, Inc.* v. *Perez,* No. 3:14–CV–05028, 2014 WL 5438293 (W.D. Mo. Oct. 24, 2014), *rev'd on other grounds,* 812 F.3d 1132 (8th Cir. 2015).

[106] The Department does not propose any requirement of interest on assessments of liquidated damages under the CWHSSA clause at § 5.5(b)(2). Under CHWSSA, unlike the FLSA, there is no requirement that liquidated damages be provided to affected workers. Contracting agencies can provide liquidated damages that they recover to employees, but they are also allowed to retain liquidated damages to compensate themselves for the costs of enforcement or otherwise for their own benefit. *See* 40 U.S.C. 3702(b)(2)(B), 3703(b)(2)(A).

meant to reference, is currently located at § 5.13. The Department therefore proposes to replace the incorrect reference to § 5.12 with the correct reference to § 5.13.

xi. Section 5.23 The Statutory Provisions

The Department proposes to make technical, non-substantive changes to § 5.23. The existing text of § 5.23 primarily consists of a lengthy quotation of a particular fringe benefit provision of the 1964 amendments to the DBA. The Department proposes to replace this text with a summary of the statutory provision at issue for two reasons. First, due to a statutory amendment, the quotation set forth in existing § 5.23 no longer accurately reflects the statutory language. Specifically, on August 21, 2002, Congress enacted legislation which made several non-substantive revisions to the relevant 1964 DBA amendment provisions and recodified those provisions from 40 U.S.C. 276a(b) to 40 U.S.C. 3141.[107] The Department proposes to update § 5.23 to include a citation to 40 U.S.C. 3141(2). Second, the Office of the Federal Register disfavors lengthy block quotations of statutory text.[108] In light of this drafting convention, and because the existing quotation in § 5.23 no longer accurately reflects the statutory language, the Department is proposing to revise § 5.23 so that it paraphrases the statutory language set forth at 40 U.S.C. 3141(2).

xii. Section 5.25 Rate of Contribution or Cost for Fringe Benefits

The Department proposes to add new paragraph (c) to existing § 5.25 to codify the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers also work on private projects. While existing guidance generally requires the use of annualization to compute the hourly equivalent of fringe benefits, annualization is not currently addressed in the regulations. The Department's proposal would require annualization of fringe benefits unless a contractor is approved for an exception and provide guidance on how to properly annualize fringe benefits. The proposed revision also creates a new administrative process that contractors must follow to obtain approval by the Administrator for an exception from the annualization requirement.

Consistent with the Secretary's authority to set the prevailing wage, WHD has long concluded that a contractor generally may not calculate Davis-Bacon credit for all its contributions to a fringe benefit plan in a given time period based solely upon the workers' hours on a Davis-Bacon project when the contractor's workers also work on private projects for the contractor in that same time period. *See, e.g., Miree Constr. Corp.* v. *Dole,* 930 F.2d 1536, 1545–46 (11th Cir. 1991); *see also, e.g.,* WHD Opinion Letter DBRA–72 (June 5, 1978); WHD Opinion Letter DBRA–134 (June 6, 1985); WHD Opinion Letter DBRA–68 (May 22, 1984); FOH 15f11(b). WHD's guidance explains that contributions made to a fringe benefit plan for government work generally may not be used to fund the plan for periods of non-government work, and a contractor typically must convert its total annual contributions to the fringe benefit plan to an hourly cash equivalent by dividing the cost of the fringe benefit by the total number of working hours (DBRA and non-covered) to determine the amount creditable towards meeting its obligation to pay the prevailing wage under the DBRA. *See* FOH 15f11(b), 15f12(b).

This principle, which is referred to as ''annualization,'' thus generally compels a contractor performing work on a Davis-Bacon covered project to divide its contributions to a fringe benefit plan for a worker by that worker's total hours of work on both Davis-Bacon and private projects for the employer in that year, rather than attribute those contributions solely to the worker's work on Davis-Bacon covered projects. Annualization effectively prohibits contractors from using fringe benefit plan contributions attributable to work on private jobs to meet their prevailing wage obligation for DBRA-covered work. *See, e.g., Miree Constr.,* 930 F.2d at 1545 (annualization ensures receipt of the prevailing wage by ''prevent[ing] employers from receiving Davis-Bacon credit for fringe benefits actually paid to employees during non-Davis-Bacon work''). Annualization is intended to prevent the use of DBRA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and that constitute compensation for all the worker's work, both Davis-Bacon covered and private. Despite the longstanding nature of this policy, however, the concept of annualization is not expressly referred to in the Davis-Bacon regulations.

For many years, WHD has required contractors to annualize contributions for most types of fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans, and sick leave plans. WHD's rationale for requiring annualization is that such contributions finance benefits that: (1) Are continuous in nature, and (2) reflect compensation for all of the work performed by a laborer or mechanic, including work on both DBA-covered and private projects. One notable exception to this general rule compelling the annualization of fringe benefit plan contributions, however, is that WHD has not required annualization for defined contribution pension plans (DCPPs) that provide for immediate participation and essentially immediate vesting (*e.g.,* 100 percent vesting after a worker works 500 or fewer hours). *See* WHD Opinion Letter DBRA–134 (June 6, 1985); *see also* FOH 15f14(f)(1). The rationale for such exclusion is that DCPPs are not continuous in nature, as the benefits are not available until a worker's retirement, and that they ensure that the vast majority of workers will receive the full amount of contributions made on their behalf. However, WHD does not currently have any public guidance explaining the extent to which other plans may also share those characteristics and warrant an exception from the annualization principle.

To clarify when an exception to the general annualization principle may be appropriate, the Department proposes language stating that a fringe benefit plan may only qualify for such an exception when three criteria are satisfied: (1) The benefit provided is not continuous in nature; (2) the benefit does not provide compensation for both public and private work; and (3) the plan provides for immediate participation and essentially immediate vesting. In accordance with the Department's longstanding guidance, a plan will generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours. These criteria are not necessarily limited to DCPPs. However, to ensure that the criteria are applied correctly and that workers' Davis-Bacon wages are not disproportionately used to fund benefits during periods of private work, such an exception can only apply when the plan in question has been submitted to the Department for review and approval. Such requests may be submitted by plan administrators, contractors, or their representatives. However, to avoid any disruption to the provision of worker benefits, the Department also proposes that any plan that does not require

[107] *See* Revision of Title 40, U.S.C., ''Public Buildings, Property, and Works,'' Public Law 107–217, 3141, 116 Stat. 1062, 1150 (Aug. 21, 2002).

[108] *See* Office of the Federal Register, Document Drafting Handbook § 3.6 (Aug. 2018 ed., rev. Mar. 24, 2021), available at *https://www.archives.gov/files/Federal-register/write/handbook/ddh.pdf.*

annualization under the Department's existing guidance, such as DCPPs, may continue to use such an exception until the plan has either requested and received a review of its exception status under this process, or until 18 months have passed from the effective date of this rule, whichever comes first.

By requiring annualization, the proposed paragraph (c) furthers the above policy goal of protecting workers' fringe benefits from dilution by preventing contractors from taking credit for fringe benefits attributable to work on non-governmental projects against fringe benefits required on DBA-covered work. The proposed exception also provides the flexibility for plans that do not dilute workers' fringe benefits to avoid the annualization requirement if they meet the proposed criteria, which are based on the Department's existing guidance with which stakeholders are already familiar. In this way, the Department hopes to strike a balance between protecting workers and preserving access to the types of plans that have traditionally been considered exempt from the annualization requirement.

xiii. Section 5.26 '' * * * Contribution Irrevocably Made * * * to a Trustee or to a Third Person''

The Department proposes several non-substantive technical corrections to § 5.26 to improve clarity and readability.

xiv. Section 5.28 Unfunded Plans

The Department proposes several revisions to this section. First, the Department proposes a technical correction to the citation to the DBA to reflect the codification of the relevant provision at 40 U.S.C. 3141(2)(B)(ii), as well as a number of non-substantive revisions.

Additionally, the Department proposes adding a new paragraph (b)(5) to this section, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and a new paragraph (c) explaining the process contractors and subcontractors must use to request such approval. To accommodate these proposed additions, the text currently located in paragraph (c) of this section would be moved to new paragraph (d).

As other regulatory sections make clear, if a contractor provides its workers with fringe benefits through an unfunded plan instead of by making irrevocable payments to a trustee or other third person, the contractor may only take credit for any costs reasonably anticipated in providing such fringe benefits if it has submitted a request in writing to the Department and the Secretary has determined that the applicable standards of the DBA have been met. *See* 29 CFR 5.5(a)(1)(iv), 5.29(e). However, § 5.28 does not mention this approval requirement, even though it is the section that most specifically discusses requirements for unfunded plans. Incorporating this requirement and a description of the approval process into § 5.28 would therefore help improve regulatory clarity. Accordingly, the Department proposes to revise § 5.28 to clarify that, for payments under an unfunded plan or program to be credited as fringe benefits, contractors and subcontractors must submit a written request, including sufficient documentation, for the Secretary to consider in determining whether the plan or program, and the benefits proposed to be provided thereunder, are ''bona fide,'' meet the factors set forth in § 5.28(b)(1)–(4), and are otherwise consistent with the Act. The Department also proposes to add language to explain that such requests must be submitted by mail to WHD's Division of Government Contracts Enforcement, via email to *unfunded@dol.gov* or any successor address, or via any other means directed by the Administrator.

The proposed revised regulation provides that a request for approval of an unfunded plan must include sufficient documentation to enable the Department to evaluate whether the plan satisfies the regulatory criteria. To provide flexibility, the proposed revised regulation does not itself specify the documentation that must be submitted with the request. However, current paragraph (c) of this section, and proposed paragraph (d), explain that the words ''reasonably anticipated'' contemplate a plan that can ''withstand a test'' of ''actuarial soundness.'' While WHD's determination whether or not an unfunded plan meets the statutory and regulatory requirements will be based on the totality of the circumstances, the type of information WHD will require from contractors or subcontractors in order to make such a determination will typically include: (1) Identification of the benefit(s) to be provided; (2) an explanation of the funding/contribution formula; (3) an explanation of the financial analysis methodology used to estimate the costs of the plan or program benefits and how the contractor has budgeted for those costs; (4) a specification of how frequently the contractor either sets aside funds in accordance with the cost calculations to meet claims as they arise, or otherwise budgets, allocates, or tracks such funds to ensure that they will be available to meet claims; (5) an explanation of whether employer contribution amounts are different for Davis-Bacon and non-prevailing wage work; (6) identification of the administrator of the plan or program and the source of the funds the administrator uses to pay the benefits provided by the plan or program; (7) specification of the Employee Retirement Income Security Act of 1974 (ERISA) status of the plan or program; and (8) an explanation of how the plan or program is communicated to laborers or mechanics.

xv. Section 5.29 Specific Fringe Benefits

The Department proposes to revise § 5.29 to add a new paragraph (g) that addresses how contractors may claim a fringe benefit credit for the costs of an apprenticeship program. While § 5.29(a) states that fringe benefits may be used for the defrayment of the costs of apprenticeship programs, the regulations do not presently address how to properly credit such contributions against a contractor's fringe benefit obligations. The proposed revision would codify the Department's longstanding practice and interpretation. *See* WHD Opinion Letters DBRA–116 (May 17, 1978), DBRA–18 (Sept. 7, 1983), DBRA–16 (July 28, 1987), DBRA–160 (March 10, 1990); *see also* FOH 15f17. The proposed revision also reflects relevant case law. *See Miree Constr. Corp.,* WAB No. 87–13, 1989 WL 407466 (Feb. 17, 1989); *Miree Constr. Corp.* v. *Dole,* 730 F. Supp. 385 (N.D. Ala. 1990); *Miree Constr. Corp.* v. *Dole,* 930 F.2d at 1537.

Proposed paragraph (g) clarifies when a contractor may take credit for contributions made to an apprenticeship program and how to calculate the credit a contractor may take against its fringe benefit obligation. First, the proposed paragraph states that for a contractor or subcontractor to take credit for the costs of an apprenticeship program, the program, in addition to meeting all other requirements for fringe benefits, must be registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. Additionally, the proposed paragraph explains that contractors may take credit for the actual costs of the apprenticeship program, such as tuition, books, and materials, but may not take credit for additional contributions that are beyond the costs actually incurred for the apprenticeship program. It also reiterates the Department's position that the contractor may only claim credit

towards its prevailing wage obligations for the classification of laborer or mechanic that is the subject of the apprenticeship program. For example, if a contractor has apprentices registered in a bona fide apprenticeship program for carpenters, the contractor could claim a credit for the costs of the apprenticeship program towards the prevailing wages due to the carpenters on a Davis-Bacon project, but could not apply that credit towards the prevailing wages due to the electricians or laborers on the project. Likewise, the proposed paragraph explains that, when applying the annualization principle discussed above, the workers whose total working hours are used to calculate the hourly contribution amount are limited to those workers in the same classification as the apprentice, and that this hourly amount may only be applied toward the wage obligations for such workers.

The Department also proposes a minor technical revision to subsection (e) to include a citation to § 5.28, which provides additional guidance on unfunded plans.

xvi. Section 5.30 Types of Wage Determinations

The Department proposes several non-substantive revisions to § 5.30. In particular, the Department proposes to update the illustrations in § 5.30(c) to more closely resemble the current format of wage determinations issued under the DBA. The current illustrations in § 5.30(c) list separate rates for various categories of fringe benefits, including ''Health and welfare,'' ''Pensions,'' ''Vacations,'' ''Apprenticeship program,'' and ''Others.'' However, current Davis-Bacon wage determinations typically contain a single combined fringe benefit rate per classification, rather than separately listing rates for different categories of fringe benefits. To avoid confusion, the Department proposes to update the illustrations to reflect the way in which fringe benefits are typically listed on wage determinations. The Department has also proposed several non-substantive revisions to § 5.30(a) and (b), including revisions pertaining to the updated illustrations in § 5.30(c).

xvii. Section 5.31 Meeting Wage Determination Obligations

The Department has proposed to update the illustrations in § 5.30(c) to more closely resemble the current format of wage determinations under the DBRA. The Department therefore proposes to make technical, non-substantive changes to § 5.31 to reflect the updated illustration in § 5.30(c).

xviii. Section 5.33 Administrative Expense of a Contractor or Subcontractor

The Department proposes to add a new § 5.33 to codify existing WHD policy under which a contractor or subcontractor may not take Davis-Bacon credit for its own administrative expenses incurred in connection with the administration of a fringe benefit plan. *See* WHD Opinion Letter DBRA–72 (June 5, 1978); *see also* FOH 15f18. This is consistent with Department case law under the DBA, under which such payments are viewed as ''part of [an employer's] general overhead expenses of doing business and should not serve to decrease the direct benefit going to the employee.'' *Collinson Constr. Co.,* WAB No. 76–09, 1977 WL 24826, at *2 (Apr. 20, 1977) (also noting that the DBA's inclusion of ''costs'' in the provision currently codified at 40 U.S.C. 3141(2)(B)(ii) refers to ''the costs of *benefits* under an unfunded plan'') (emphasis in original); *see also Cody-Zeigler, Inc.,* ARB Nos. 01–014, 01–015, 2003 WL 23114278, at *20 (Dec. 19, 2003) (applying *Collinson* and concluding that a contractor improperly claimed its administrative costs for ''bank fees, payments to clerical workers for preparing paper work and dealing with insurance companies'' as a fringe benefit). This is also consistent with the Department's regulations and guidance under the SCA. *See* 29 CFR 4.172; FOH 14j00(a)(1).

The Department also seeks public comment regarding whether it should clarify this principle further with respect to third-party administrative costs. Under both the DBA and SCA, fringe benefits include items such as health insurance, which necessarily involves both the payment of benefits and administration of benefit claims. 40 U.S.C. 3141(2)(B); 41 U.S.C. 6703(2). Accordingly, reasonable costs incurred by a third-party fiduciary in its administration and delivery of fringe benefits to employees are creditable under the SCA. *See* WHD Opinion Letter SCA–93 (Jan. 27, 1994) (noting, in a circumstance in which an SCA contractor contributed to a pension plan on behalf of its employees, that ''the plan itself may recoup [its] administrative costs''). For example, a contractor may take credit for the premiums it pays to a health insurance carrier, and the insurance carrier may use those premium payments both to pay for workers' medical expenses and to pay the reasonable costs of tasks related to the administration and delivery of benefits, such as evaluating benefit claims, deciding whether they should be paid, and approving referrals to specialists. *See* FOH 14j00(a)(2). The Department applies a similar standard under the DBA.

However, whether fees charged by a third party are creditable depends on the facts and circumstances. As noted above, a contractor's own administrative costs incurred in connection with the provision of fringe benefits are not creditable, as they are considered the contractor's business expenses. *See Collinson,* 1977 WL 24826, at *2; 29 CFR 4.172. As such, WHD has previously advised that if a third party is merely performing on the contractor's behalf administrative functions associated with providing fringe benefits to employees, rather than actually administering claims and paying benefits, the contractor's payments to such a third party are not creditable because they substitute for the contractor's own administrative costs. Such functions include, for example, tracking the amount of the contractor's fringe benefit contributions, making sure those contributions cover the fringe benefit credit claimed by the contractor, tracking and paying invoices from third-party administrators, and sending lists of new hires to the plan administrators. Essentially, the principle explained in 29 CFR 4.172, FOH 14j00(a)(1), FOH 15f18, and proposed § 5.33 that a contractor may not take credit for its own administrative expenses applies regardless of whether a contractor uses its own employees to perform this sort of administrative work or engages another company to handle these tasks.

The Department has received an increasing number of inquiries in recent years regarding the extent to which fees charged by third parties for performing such administrative tasks are or are not creditable. As such, while not proposing specific regulatory text, the Department proposes to clarify this matter in a final rule. The Department seeks comment on whether it should incorporate the above-described policies, or other policies regarding third-party entities, into its regulations. In addition, the Department seeks comment on examples of the administrative duties performed by third parties that do not themselves pay benefits or administer benefit claims.

The Department also seeks comment on the extent to which third-party entities both (1) perform administrative functions associated with providing fringe benefits to employees, such as tracking a contractor's fringe benefit contributions, and (2) actually administer and deliver benefits, such as evaluating and paying out medical

claims, and on how the Department should treat payments to any such entities. For instance, should the Department consider the cost of the administrative functions in (1) non-creditable business expenses, and the cost of actual benefits administration and payment in (2) to be creditable as fringe benefit contributions? Alternatively, should the creditability of payments to such an entity depend on what the third-party entity's primary function is? Should the answer to these questions depend on whether the third-party entity is an employee welfare plan within the meaning of ERISA, 29 U.S.C. 1002(1)?

xix. Anti-Retaliation

The Department proposes to add anti-retaliation provisions to enhance enforcement of the DBRA, and their implementing regulations in 29 CFR parts 1, 3, and 5. The proposed new anti-retaliation provisions are intended to discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in WHD investigations or other compliance actions and enable prevailing wage violations to go undetected. The proposed anti-retaliation regulations are also intended to provide make-whole relief for any worker who has been discriminated against in any manner for taking, or being perceived to have taken, certain actions concerning the labor standards provisions of the DBA, CWHSSA and other Related Acts, and the regulations in parts 1, 3, and 5.

In most WHD DBRA investigations or other compliance actions, effective enforcement requires worker cooperation. Information from workers about their actual hours worked and their pay is often essential to uncover violations such as falsification of certified payrolls or wage underpayments by contractors or subcontractors who fail to keep any pay or time records, or whose records are inaccurate or incomplete. Workers are often reluctant to come forward with information about potential violations of the laws WHD enforces because they fear losing their jobs or suffering other adverse consequences. Workers are similarly reluctant to raise these issues with their supervisors. Such reluctance to inquire or complain internally may result in lost opportunities for early correction of violations by contractors.

The current Davis-Bacon regulations protect the identity of confidential worker-informants in large part to prevent retribution by contractors for whom they work. *See* 29 CFR 5.6(a)(5), 6.5. This protection helps combat the ''possibility of reprisals'' by ''vindictive employers'' against workers who speak out about wage and hour violations, but does not eliminate it. *Cosmic Constr. Co.,* WAB No. 79–19, 1980 WL 95656, at *5 (Sept. 2, 1980).

When contractors retaliate against workers who cooperate or are suspected of cooperating with WHD or who make internal complaints, neither worker confidentiality nor the Davis-Bacon remedial measures of back wages or debarment can make workers whole. The Department's proposed anti-retaliation provisions aim to remedy such situations by providing make-whole relief to workers who are retaliated against, as well as by deterring or correcting interference with Davis-Bacon worker protections.

The Department's authority to promulgate the anti-retaliation provisions stems from 40 U.S.C. 3145 and Reorganization Plan No. 14 of 1950. In transmitting the Reorganization Plan to Congress, President Truman noted that ''the principal objective of the plan is more effective enforcement of labor standards,'' and that the plan ''will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' Special Message to the Congress Transmitting Reorganization Plan No. 14 of 1950, *reprinted in* 5 U.S.C. app. 1 (Mar. 13, 1950) (1950 Special Message to Congress).

It is well settled that the Department has regulatory authority to debar Related Act contractors even though the Related Acts do not expressly provide for debarment. *See Janik Paving & Constr., Inc.* v. *Brock,* 828 F.2d 84, 90, 91 (2d Cir. 1987) (upholding debarment for CWHSSA violations even though that statute ''specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment''). In 1951 the Department added a new part 5 to the DBRA regulations, including the Related Act debarment regulation. *See* 16 FR 4430. The Department explained it was doing so in compliance with the directive of Reorganization Plan No. 14 of 1950 to ''assure coordination of administration and consistency of enforcement of the labor standards provisions'' of the DBRA. *Id.* Just as regulatory debarment is a permissible exercise of the Department's ''implied powers of administrative enforcement,'' *Janik,* 828 F.2d at 91, so too are the proposed anti-retaliation provisions—as well as the revised Related Act debarment provisions discussed below in part III.B.3.xxi (''Debarment''). The Department believes that it would be both efficient and consistent with the remedial purpose of the DBRA to investigate and adjudicate complaints of retaliation as part of WHD's enforcement of the DBRA. These proposed measures will help achieve more effective enforcement of the Davis-Bacon labor standards.

Currently, debarment is the primary mechanism under the DBRA civil enforcement scheme for remedying retribution against workers who assert their right to prevailing wages. Debarment is also the main tool for addressing less tangible discrimination such as interfering with investigations by intimidating or threatening workers. Such unscrupulous behavior may be both a ''disregard of obligations'' to workers under the DBA and ''aggravated or willful'' violations under the current Related Act regulations that warrant debarment. *See* 40 U.S.C. 3144(b)(1); 29 CFR 5.12(a)(1), (a)(2), (b)(1).

Both the ARB and ALJs have debarred contractors in part because of their retaliatory conduct or interference with WHD investigations. *See, e.g., Pythagoras Gen. Contracting Corp.,* 2011 WL 1247207, at *13 (affirming debarment of contractor and its principal in a DBRA case in part because of the ''attempt [by principal and other officials of the contractor] at witness coercion or intimidation'' when they visited former employees to talk about their upcoming hearing testimony); *R.J. Sanders, Inc.,* WAB No. 90–25, 1991 WL 494734, at *1–2 (Jan. 31, 1991) (affirming ALJ's finding that employer's retaliatory firing of an employee who reported to a Navy inspector being paid less than the prevailing wage was ''persuasive evidence of a willful violation of the [DBA]''); *Early & Sons, Inc.,* ALJ No. 85–DBA–140, 1986 WL 193128, at *8 (OALJ Aug. 5, 1986) (willful and aggravated DBRA violations evidenced in part where worker who ''insisted on [receiving the mandated wage] . . . was told, in effect, to be quiet or risk losing his job''), *rev'd on other grounds,* WAB No. 86–25, 1987 WL 247044, at *2 (Jan. 29, 1987); *Enviro & Demo Masters, Inc.,* ALJ No. 2011–DBA–00002, Decision and Order, slip op. at 9–10, 15, 59, 62–64 (OALJ Apr. 23, 2014) (*Enviro* D&O) (debarring subcontractor, its owner, and a supervisor because of ''aggravated and willful avoidance of paying the required prevailing wages'' which included firing an employee who refused to sign a declaration repudiating his DBRA rights, and instructing workers to lie about their pay and underreport their hours if questioned by investigators).

There are also criminal sanctions for certain coercive conduct by DBRA contractors. The Copeland Anti-Kickback Act makes it a crime to induce DBRA-covered construction workers to give up any part of compensation due ''by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever.'' 18 U.S.C. 874; *cf.* 29 CFR 5.10(b) (discussing criminal referrals for DBRA violations). Such prevailing wage kickback schemes are also willful or aggravated violations of the civil Copeland Act (a Related Act) that warrant debarment. *See* 40 U.S.C. 3145; *see, e.g., Killeen Elec. Co.,* WAB No. 87–49, 1991 WL 494685, at *5 (Mar. 21, 1991).

Interference with WHD investigations or other compliance actions may also warrant criminal prosecution. For example, in addition to owing 37 workers $656,646 in back wages in the DBRA civil administrative proceeding, *see Enviro* D&O at 66, both the owner of Enviro & Demo Masters and his father, the supervisor, were convicted of Federal crimes including witness tampering and conspiracy to commit witness tampering. These officials instructed workers at the jobsite to hide from and ''lie to investigators about their working hours and wages,'' and they fired workers who spoke to investigators or refused to sign false documents. *Naranjo* v. *United States,* No. 17–CV–9573, 2021 WL 1063442, at *1–2 (S.D.N.Y. Feb. 26, 2021), *report and recommendation adopted by* 2021 WL 1317232 (S.D.N.Y. Apr. 8, 2021); *see also Naranjo, Sr.* v. *United States,* No. 16 Civ. 7386, 2019 WL 7568186, at *1 (S.D.N.Y. Dec. 16, 2019), *report and recommendation adopted by* 2020 WL 174072, at *1 (S.D.N.Y. Jan. 13, 2020).

Though contractors, subcontractors, and their responsible officers may be debarred—and even criminally prosecuted—for retaliatory conduct, laborers and mechanics who have been discriminated against for speaking up, or for having been perceived as speaking up, currently have no redress under the Department's regulations implementing the DBA or Related Acts to the extent that back wages do not make them whole. For example, WHD currently may not order reinstatement of workers fired for their cooperation with investigators or as a result of an internal complaint to their supervisor. Nor may the Department award back pay for the period after a worker is fired. Similarly, WHD cannot require contractors to compensate workers for the difference in pay resulting from retaliatory demotions or reductions in hours. The addition of anti-retaliation provisions is a logical extension of the DBA and Related Acts debarment remedial measure. It would supplement debarment as an enforcement tool to more effectively prevent retaliation and interference or any other such discriminatory behavior. An anti-retaliation mechanism would also build on existing back-wage remedies by extending compensation to a fuller range of harms.

The Department therefore proposes to add two new regulatory provisions concerning anti-retaliation, as well as to update several other regulations to reflect the new anti-retaliation provisions.

(A) Proposed New § 5.5(a)(11) and (b)(5)

The Department proposes to implement anti-retaliation in part by adding a new anti-retaliation provision to all contracts subject to the DBA or Related Acts. Proposed contract clauses provided for in § 5.5(a)(11) and (b)(5) state that it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or to cause any person to do the same, against any worker for engaging in a number of protected activities. The protected activities include notifying any contractor of any conduct which the worker reasonably believes constitutes a violation; filing any complaints, initiating or causing to be initiated any proceeding, or otherwise asserting any right or protection; cooperating in an investigation or other compliance action, or testifying in any proceeding; or informing any other person about their rights under the DBA, Related Acts, or the regulations in 29 CFR parts 1, 3, or 5, for proposed § 5.5(a)(11), or the CWHSSA or its implementing regulations in 29 CFR part 5, for proposed § 5.5(b)(5).

The scope of these anti-retaliation provisions is intended to be broad in order to better effectuate the remedial purpose of the DBRA to protect workers and ensure that they are not paid substandard wages. Workers must feel free to speak openly—with contractors for whom they work and contractors' responsible officers and agents, with the Department, and with co-workers—about conduct that they reasonably believe to be a violation of the prevailing wage requirements or other Davis-Bacon labor standards. These proposed anti-retaliation provisions recognize that worker cooperation is critical to enforcement of the DBRA. They also incentivize compliance and seek to eliminate any competitive disadvantage borne by government contractors and subcontractors that follow the rules.

In line with those remedial goals, the Department intends the proposed anti-retaliation provisions to protect internal complaints, or other assertions of workers' Davis-Bacon or CWHSSA labor standards protections set forth in § 5.5(a)(11) and (b)(5), as well as interference that may not have an adverse monetary impact on the affected workers. Similarly, the Department intends the anti-retaliation provisions to also apply in situations where there is no current work or employment relationship between the parties; for example, it would prohibit retaliation by a prospective or former employer or contractor (or both). Finally, the Department's proposed rule seeks to protect workers who make oral as well as written complaints, notifications, or other assertions of their rights protected under § 5.5(a)(11) and (b)(5).

(B) Proposed New § 5.18

The Department proposes remedies to assist in enforcement of the DBRA labor standards provisions. Section 5.18 sets forth the proposed remedies for violations of the new anti-retaliation provisions. This proposed section also includes the process for notifying contractors and other persons found to have violated the anti-retaliation provisions of the Administrator's investigative findings, as well as for Administrator directives to remedy such violations and provide make-whole relief.

Make-whole relief and remedial actions under this provision are intended to restore the worker subjected to the violation to the position, both economically and in terms of work or employment status (*e.g.,* seniority, leave balances, health insurance coverage, 401(k) contributions, etc.), that the worker would have occupied had the violation never taken place. Available remedies include, but are not limited to, any back pay and benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; interest on back pay or other monetary relief from the date of the loss; and appropriate equitable or other relief such as reinstatement or promotion; expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and posting of notices that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements.

In addition, proposed § 5.18 specifies that when contractors, subcontractors, responsible officers, or other persons dispute findings of violations of

§ 5.5(a)(11) or (b)(5), the procedures in 29 CFR 5.11 or 5.12 will apply.

Conforming revisions are being proposed to the withholding provisions at §§ 5.5(a)(2) and (b)(3) and 5.9 to indicate that withholding includes monetary relief for violations of the anti-retaliation provisions, § 5.5(a)(11) and (b)(5), in addition to withholding of back wages for DBRA prevailing wage violations and CWHSSA overtime violations.

Similarly, conforming changes are being proposed to §§ 5.6(a)(4) and 5.10(a). Computations of monetary relief for violations of the anti-retaliation provisions have been added to the limited investigatory material that may be disclosed without the permission and views of the Department under § 5.6(a)(4). In proposed § 5.10(a), monetary violations of anti-retaliation provisions have been added as a type of restitution.

As explained above, contractors, subcontractors, and their responsible officers have long been subject to debarment for their retaliatory actions. This rulemaking updates DBRA enforcement mechanisms by ensuring that workers may cooperate with WHD or complain internally about perceived prevailing wage violations without fear of reprisal. This proposed rule is a reasonable extension of the Department's broad regulatory authority to enforce and administer the DBRA. Further, adding anti-retaliation would amplify existing back wage and debarment remedies by making workers whole who suffer the effects of retaliatory firings, demotions, and other actions that reduce their earnings. This important new tool will help carry out the DBRA's remedial purposes by bolstering WHD's enforcement.

xx. Post-Award Determinations and Operation-of-Law

The Department proposes several revisions throughout parts 1 and 5 to update and codify the administrative procedure for enforcing Davis-Bacon labor standards requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract.

(A) Current Regulations

The current regulations require the insertion of the relevant contract clauses and wage determination(s) in covered contracts. 29 CFR 5.5. Section 5.5(a) requires that the appropriate contract clauses are inserted ''in full'' into any covered contracts, and the contract clause language at § 5.5(a)(1) states that the wage determination(s) are ''attached'' to the contract.

The existing regulations at § 1.6(f) provide instruction for how the Department and contracting agencies must act when a wage determination has been wrongly omitted from a contract. Those regulations provide a procedure through which the Administrator makes a finding that a wage determination should have been included in the contract. After the finding by the Administrator, the contracting agency must either terminate and resolicit the contract with the valid wage determination, or incorporate the wage determination retroactively by supplemental agreement or change order. The same procedure applies where the Administrator finds that the wrong wage determination was incorporated into the contract. The existing regulations at § 1.6(f) specify that the contractor must be compensated for any increases in wages resulting from any supplemental agreement or change order issued in accordance with the procedure.

Under the current regulations, WHD has faced multiple longstanding enforcement challenges. First, the language of § 1.6(f) explicitly refers only to omitted wage determinations and does not expressly address the situation where a contracting agency has mistakenly omitted the contract clauses from the contract. Although WHD has historically relied on § 1.6(f) to address this situation, the ambiguity in the regulations has caused confusion in communications between WHD and contracting agencies and delay in resolving conflicts. *See, e.g.,* WHD Opinion Letters DBRA–167 (Aug. 29, 1990); DBRA–131 (Apr. 18, 1985).

Second, under the existing regulations, affected workers have suffered from significant delays while contracting agencies determine the appropriate course of action. At a minimum, such delays cause problems for workers who must endure long waits to receive their back wages. At worst, the delay can result in no back wages recovered at all where witnesses are lost or there are no longer any contract payments to withhold when a contract is finally modified or terminated. In all cases, the identification of the appropriate mechanism for contract termination or modification can be difficult and burdensome on Federal agencies—in particular during later stages of a contract or after a contract has ended.

The process provided in the current § 1.6(f) is particularly problematic where a contracting agency has questions about whether an existing contract can be modified without violating another non-DBRA statute or regulation. This problem has arisen in particular in the context of multiple award schedule (MAS) contracts, blanket purchase agreements (BPAs), and other similar schedule contracts negotiated by GSA.[109] Contracting agencies that have issued task orders under GSA schedule contracts have been reluctant to modify those task orders to include labor standards provisions where the governing Federal schedule contract does not contain the provisions. Under those circumstances, contracting agencies have argued that such a modification could render that task order ''out of scope'' and therefore arguably unlawful.

Although the Department believes it is incorrect that a contract modification to incorporate required labor standards clauses or wage determinations could render a contract or task order out of scope,[110] concerns about this issue have interfered with the Department's enforcement of the labor standards. If a contracting agency believes it cannot modify a contract consistent with applicable procurement law, it may instead decide to terminate the contract without retroactively including the required clauses or wage determinations. In those circumstances, the regulations currently provide no clear mechanism that would allow the Department or contracting agencies to seek to recover the back wages that the workers should have been paid on the terminated contract.

(B) Proposed Regulatory Revisions

To address these longstanding enforcement challenges, the Department proposes to exercise its authority under Reorganization Plan No. 14 of 1950 and

[109] Sales on the GSA Multiple Award Schedule (MAS), for example, have increased dramatically in recent decades—from $4 billion in 1992 to $36.6 billion in 2020. Gov't Accountability Office, High Risk Series: An Update, GAO–05–207 (Jan. 2005), at 25 (Figure 1) (noting these types of contracting vehicles ''contribute to a much more complex environment in which accountability has not always been clearly established''), available at *https://www.gao.gov/assets/gao-05-207.pdf;* Gen. Servs. Admin., GSA FY 2020 Annual Performance Report, at 11, available at: *https://www.gsa.gov/cdnstatic/GSA%20FY%202020%20Annual%20Performance%20Report%20v2.pdf.*

[110] This argument tends to conflate the change associated with incorporating a missing contract clause or wage determination with any unexpected changes by the contracting agency to the actual work to be performed under the task order or contract. As a general matter, a Competition in Contracting Act (CICA) challenge based solely on the incorporation of missing labor standards clauses or appropriate wage determinations is without merit. *See Booz Allen Hamilton Eng'g Servs., LLC,* B–411065 (May 1, 2015), available at *https://www.gao.gov/products/b-411065.*

40 U.S.C. 3145 to adopt several changes to §§ 1.6, 5.5, and 5.6.

(1) § 5.5(e) Proposed Operation-of-Law Language

The Department proposes to include language in a new paragraph at § 5.5(e) to provide that the labor standards contract clauses and appropriate wage determinations are effective ''by operation of law'' in circumstances where they have been wrongly omitted from a covered contract. This proposed language would assure that, in all cases, a mechanism exists to enforce Congress's mandate that workers on covered contracts receive prevailing wages—notwithstanding any mistake by an executive branch official in an initial coverage decision or in an accidental omission of the labor standards contract clauses. It would also ensure that workers receive the correct prevailing wages if the correct wage determination was not attached to the original contract or was not incorporated during the exercise of an option. In addition, as discussed below, the Department is proposing language in other regulatory provisions to reflect this change and to provide safeguards for both contractors and contracting agencies.

Under the proposed language in § 5.5(e), erroneously omitted contract clauses and appropriate wage determinations would be effective by operation of law and therefore enforceable retroactive to the beginning of the contract or construction. The proposed language provides that all of the contract clauses set forth in § 5.5—the contract clauses at § 5.5(a) and the CWHSSA contract clauses at § 5.5(b)—are considered to be a part of every covered contract, whether or not they are physically incorporated into the contract. This includes the contract clauses requiring the payment of prevailing wages and overtime at § 5.5(a)(1) and (b)(1), respectively; the withholding clauses at § 5.5(a)(2) and (b)(3); and the labor-standards disputes clause at § 5.5(a)(9).

The operation-of-law proposal is intended to complement the existing requirements in § 1.6(f) and would not entirely replace them. Thus, the contracting agency would still be required to take action as appropriate to terminate or modify the contract. Under the new proposed procedure, however, the Administrator would not need to await a contract modification to assess back wages and seek withholding, because the wage requirements and withholding clauses would be read into the contract as a matter of law.[111] The application of the clauses and the correct wage determination as a matter of law would also provide the Administrator with a tool to enforce the labor standards on any contract that a contracting agency decides it must terminate instead of modify.

Under the proposal, when the contract clause or wage determination is incorporated into the prime contract by operation of law, prime contractors would be responsible for the payment of applicable prevailing wages to all workers under the contract—including the workers of their subcontractors—retroactive to the contract award or beginning of construction, whichever occurs first. This is consistent with the current Davis-Bacon regulations and case law. *See* 29 CFR 5.5(a)(6); *All Phase Elec. Co.,* WAB No. 85–18 (June 18, 1986) (withholding contract payments from the prime for subcontractor employees even though the labor standards had not been flowed down into the subcontract). This responsibility, however, would be offset by proposed language in § 5.5(e) adding a compensation provision that would require that the prime contractor be compensated for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law under § 5.5(e). This proposed language is modeled after similar language that has been included in § 1.6(f) since 1983.[112]

The Department recognizes that post-award coverage or correction determinations can cause difficulty for contracting agencies. Contracting agencies avoid such difficulty by proactively incorporating the Davis-Bacon labor standards clauses and applicable wage determinations into contracts or using the existing process for requesting a coverage ruling or interpretation from the Administrator prior to contract award. *See* 29 CFR 5.13.[113] In addition, the new language provides that a contracting agency will continue to be able to request that the Administrator grant an exemption from retroactive enforcement of wage determinations and contract clauses (or, where permissible, an exemption from prospective application) under the same conditions currently applicable to post-award determinations. *See* 29 CFR 1.6(f); 29 CFR 5.14; *City of Ellsworth,* ARB No. 14–042, 2016 WL 4238460, at *6–*8 (June 6, 2016).[114]

The operation-of-law provision in proposed § 5.5(e) is similar to the Department's existing regulations enacting Executive Order 11246—Equal Employment Opportunity. *See* 41 CFR 60–1.4(e); *United States* v. *Miss. Power & Light Co.,* 638 F.2d 899, 905–06 (5th Cir. 1981) (finding 41 CFR 60–1.4(e) to be valid and have force of law). The operation-of-law provision at 41 CFR 60–1.4(e), like the proposed language in § 5.5(e), operates in addition to and complements the other provisions in the Executive Order's regulations that require the equal opportunity contract clause to be inserted in full into the contract. *See* 41 CFR 60–1.4(a).

Unlike 41 CFR 60–1.4(e), the Department's proposed language in the new § 5.5(e) would apply the ''operation of law'' provision only to prime contracts and not to subcontracts. The reason for this difference is that, as noted above, the Davis-Bacon regulations and case law provide that the prime contractor is responsible for the payment of applicable wages on all subcontracts. If the prime contract contains the labor standards as a matter of law, then the prime contractor is required to ensure that all employees on the contract—including subcontractors' employees—receive all applicable prevailing wages. Accordingly, the Department does not believe that extending the operation-of-law provision itself to subcontracts is necessary to enforce the Congressional mandate that all covered workers under the contract are paid the applicable prevailing wages.

The proposed operation-of-law provision is also similar in many, but not all, respects to the judicially-

[111] The Department proposes parallel language in 29 CFR 5.9 (Suspension of funds) to clarify that funds may be withheld under the contract clauses and appropriate wage determinations whether they have been incorporated into the contract physically, by reference, or by operation of law.

[112] *See* 46 FR 4306, 4313 (Jan. 16, 1981); 47 FR 23644, 23654 (May 28, 1982) (implemented by 48 FR 19532 (Apr. 29, 1983)).

[113] A ruling of the Administrator under § 5.13 that Davis-Bacon labor standards do not apply to the contract is authoritative and prevents a different post-award determination unless the Administrator determines that the pre-award ruling was based on a factual description provided by the contracting agency that was incomplete or inaccurate at the time, or that no longer is accurate after unanticipated changes were made to the scope of the contractor's work.

[114] Factors that the Administrator considers in making a determination regarding retroactive application are discussed in the ARB's ruling in *City of Ellsworth,* ARB No. 14–042, at *6–*10. Among the non-exclusive list of potential factors are ''the reasonableness or good faith of the contracting agency's coverage decision'' and ''the status of the procurement (*i.e.* to what extent the construction work has been completed).'' *Id.* at *10. In considering the status of the procurement, the Administrator will consider the status of construction at the time that the coverage or correction issue is first raised with the Administrator.

developed *Christian* doctrine, named for the 1963 Court of Claims decision, *G.L. Christian & Assocs.* v. *United States,* 312 F.2d 418 (Ct. Cl.), *reh'g denied,* 320 F.2d 345 (Ct. Cl. 1963). Under the doctrine, courts and administrative tribunals have held that required contractual provisions may be effective by operation of law in Federal government contracts, even if they were not in fact included in the contract. The doctrine applies even when there is no specific ''operation of law'' regulation as proposed here.

The *Christian* doctrine flows from the basic concept in all contract law that ''the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law.'' 11 Williston on Contracts § 30:19 (4th ed. 2021); *see Ogden* v. *Saunders,* 25 U.S. 213 (1827). Thus, those who contract with the government are charged with having ''knowledge of published regulations.'' *PCA Health Plans of Texas, Inc.* v. *LaChance,* 191 F.3d 1353, 1356 (Fed. Cir. 1999) (citation omitted).

Under the *Christian* doctrine, a court can find a contract clause effective by operation of law if that clause ''is required under applicable [F]ederal administrative regulations'' and ''it expresses a significant or deeply ingrained strand of public procurement policy.'' *K-Con, Inc.* v. *Sec'y of Army,* 908 F.3d 719, 724 (Fed. Cir. 2018). Where these prerequisites are satisfied, it does not matter if the contract clause at issue was wrongly omitted from a contract. A court will find that a Federal contractor had constructive knowledge of the regulation and that the required contract clause applies regardless of whether it was included in the contract.

The recent decision of the Federal Circuit in *K-Con* is helpful to understanding why it is appropriate to provide that the DBA labor standards clauses are effective by operation of law. In *K-Con,* the Federal Circuit held that the *Christian* doctrine applies to the 1935 Miller Act. 908 F.3d at 724–26. The Miller Act contains mandatory coverage provisions that are similar to those in the DBA, though with different threshold contract amounts. The Miller Act requires that contractors furnish payment and performance bonds before a contract is awarded for ''the construction, alteration, or repair of any public building or public work.'' 40 U.S.C. 3131(b). The DBA, as amended, requires that the prevailing wage stipulations be included in bid specifications ''for construction, alteration, or repair, including painting and decorating, of public buildings and public works.'' 40 U.S.C. 3142(a).

Like the Miller Act, the 90-year old Davis-Bacon Act also expresses a significant and deeply ingrained strand of public procurement policy. The Miller Act and the Davis-Bacon Act are of similar vintage. The DBA was enacted in 1931. The DBA amendments were enacted in 1935, almost simultaneously with the Miller Act. Through both statutes, Congress aimed to protect participants on government contracts from nonpayment by prime contractors and subcontractors. Thus, the same factors that the Federal Circuit found sufficient to apply the *Christian* doctrine to the Miller Act also apply to the DBA and suggest that the proposed operation-of-law regulation would be appropriate.[115]

The Department's proposal, however, differs from the *Christian* doctrine in two critical respects. First, as noted above, the proposed language at § 5.5(e) would be paired with a contractor compensation provision similar to the existing provision in § 1.6(f). The *Christian* doctrine does not incorporate such protection for contractors, and as a result, can have the effect of shifting cost burdens from the government to the contractor. In *K-Con,* for example, the doctrine supported the government's defense against a claim for equitable adjustment by the contractor. 908 F.3d at 724–28.

Second, the *Christian* doctrine is effectively self-executing and renders contract clauses applicable by operation of law solely on the basis of the underlying requirement that they be inserted into covered contracts. The doctrine contains no specific mechanism through which the government can limit its application to avoid any unexpected or unjust results—other than simply deciding not to raise it as a defense or affirmative argument in litigation. The proposed provision here at § 5.5(e), on the other hand, would pair the enactment of the operation-of-law language with the traditional authority of the Administrator to waive retroactive enforcement or grant a variance, tolerance, or exemption from the regulatory requirement under 29 CFR 1.6(f) and 5.14, which the Department believes will foster a more orderly and predictable process and reduce the likelihood of any unintended consequences.

In proposing this new regulatory provision, the Department has considered the implications of *Universities Research Ass'n, Inc.* v. *Coutu.* In that case, the Supreme Court held that there was no implied private right of action for workers to sue under the Davis-Bacon Act—at least when the contract clauses were not included in the contract. *Coutu,* 450 U.S. at 768–69 & nn.17, 19. The Court also stated that the workers could not rely on the *Christian* doctrine to read the missing DBA contract clause into the contract. *Id.* at 784 & n.38. The Department has carefully considered the *Coutu* decision, and for the reasons discussed below, has determined that the proposed regulation is consistent with *Coutu* and that the distinctions between the proposed regulation and the *Christian* doctrine address the concerns that animated the *Coutu* Court in that case.

One of the Court's fundamental concerns in *Coutu* was that an implied private right of action could allow parties to evade the Department of Labor's review of whether a contract should be covered by the Act. The Court noted that there was at the time ''no administrative procedure that expressly provides review of a coverage determination after the contract has been let.'' 450 U.S. at 761 n.9.[116] If an implied private right of action existed under those circumstances, private parties could effectively avoid raising any questions about coverage with the Department or with the contracting agency—and instead bring them directly to a Federal court to second-guess the administrative determinations. *Id.* at 783–84.

Another of the Court's concerns was that such an implied private right of action would undermine Federal contractors' reliance on the wage determinations that the Federal government had (or had not) incorporated into bid specifications. The Supreme Court noted that one of the purposes of the 1935 amendments to the DBA was to ensure that contractors could rely on the predetermination of wage rates that apply to each contract. 450 U.S. at 776. If, after a contract had

[115] The Federal Circuit has also noted that the *Christian* doctrine applies to the SCA, which has a similar purpose as the DBA and dates only to 1965. *See Call Henry, Inc.* v. *United States,* 855 F.3d 1348, 1351 & n.1 (Fed. Cir. 2017). Because the Davis-Bacon Act and Service Contract Act are similar statutes with the same basic purpose, the Department has long noted that court decisions relating to one of these acts have a direct bearing on the other. *See* WHD Opinion Letter SCA–3 (Dec. 7, 1973).

[116] Subsection 1.6(f) did not go into effect until April 29, 1983, nearly 2 years after the *Coutu* decision. *See* 48 FR 19532. Moreover, although the Department has used § 1.6(f) to address post-award coverage determinations, as discussed above, the language of that subsection references wage determinations and does not explicitly address the omission of required contract clauses. The Department now seeks to remedy that ambiguity in § 1.6(f) by adding similar language to § 5.6, as discussed below, in addition to the proposed operation-of-law language at § 5.5(e).

already been awarded, a court could find that a higher prevailing wage applied to that contract than had been previously determined, the contractor could lose money because of its mistaken reliance on the prior rates—all of which would undermine Congress's intent. *Id.* at 776–77.

The Department's current proposed procedure would alleviate both of these concerns. As described above, the procedure differs from the *Christian* doctrine because—as under the existing regulation at § 1.6(f)—contractors will be compensated for any increase in costs caused by the government's failure to properly incorporate the clauses or wage determinations. The proposed procedure therefore will not undermine contractors' reliance on an initial determination by the contracting agency that the DBRA did not apply or that a wage determination with lower rates applied.

Nor does the proposal risk creating an end-run around the administrative procedures set up by contracting agencies and the Department pursuant to Reorganization Plan No. 14. Instead, the operation-of-law provision would function as part of an administrative structure implemented by the Administrator and subject to the Administrator's decision to grant a variance, tolerance, or exemption. Its enactment should not affect one way or another whether any implied private right of action exists under the statute. Executive Order 11246 provides a helpful comparator. In 1968, the Department promulgated the regulation clarifying that the Executive Order's equal opportunity contract clause would be effective by ''operation of the Order'' regardless of whether it is physically incorporated into the contract. 41 CFR 60–1.4(e). That regulation was upheld, and the *Christian* doctrine was also found to apply to the required equal opportunity contract clause. *See Miss. Power & Light,* 638 F.2d at 905–06. Nonetheless, courts have widely held that E.O. 11246 does not convey an implied private right of action. *See, e.g., Utley* v. *Varian Assocs., Inc.,* 811 F.2d 1279, 1288 (9th Cir. 1987).

The Department has also considered whether the proposal would lead to an increase in bid protest litigation or expand the authority of the Court of Federal Claims or other contracting appeal tribunals to develop their own case law on the application of the DBRA without the input of the Department. In exploring this question, the Department considered proposing an alternative procedure in which the operation-of-law rule would only become effective after a determination by the Administrator or a contracting agency that a contract was in fact covered. The Department, however, does not believe that such an approach is necessary because both the GAO and the Federal Circuit maintain strict waiver rules that prohibit post-award bid protests based on errors or ambiguities in the solicitation. *See NCS/EML JV, LLC,* B–412277, 2016 WL 335854, at *8 n.10 (Comp. Gen. Jan. 14, 2016) (citing GAO decisions); *Blue & Gold Fleet, L.P.* v. *United States,* 492 F.3d 1308, 1312–13 (Fed. Cir. 2007).[117]

The proposal as currently drafted also would not affect the well-settled case law—developed after the *Coutu* decision—that only the Department of Labor has jurisdiction to resolve disputes arising out of the labor standards provisions of the contract. As part of the post-*Coutu* 1982 final rule, the Department enacted a provision at 29 CFR 5.5(a)(9) that requires a disputes clause with that jurisdictional limitation to be included in all DBRA-covered contracts. *See* 47 FR 23660–61 (final rule addressing comments received on the proposal). The labor standards disputes clause creates an exception to the Contract Disputes Act of 1974 and effectively bars the Court of Federal Claims from deciding substantive matters related to the Davis-Bacon Act and Related Acts. *See, e.g., Emerald Maint., Inc.* v. *United States,* 925 F.2d 1425, 1428–29 (Fed. Cir. 1991). Under the Department's current operation-of-law proposal, the disputes clause at § 5.5(a)(9) would continue to be effective even when it has been omitted from a contract because the Department's proposal applies the operation-of-law principle to all of the required contract clauses in § 5.5(a)—including § 5.5(a)(9). As a result, under the proposal, disputes regarding DBRA coverage or other related matters would continue to be heard only through the Department's administrative process prior to any judicial review, and there is no reason to believe that the implementation of the operation-of-law provision would lead to a parallel body of case law in the Court of Federal Claims.

Given all of these continued safeguards, the Department believes it is not necessary to expressly limit the proposed operation-of-law provision to be effective only after an administrative determination. However, in addition to input on the proposed regulatory text at § 5.5(e), the Department also seeks input from commenters regarding the alternative proposal to require such a determination. Under that alternative, the operation-of-law provision would only become effective after a determination by the Administrator or a contracting agency that the contract clauses or wage determination was wrongly omitted.

Regardless of whether the proposed operation-of-law language will be subject to a threshold requirement of an administrative determination, the provision would operate in tandem with the continued requirements that contracting agencies must insert the contract clause in full into any new contracts and into existing contracts by modification where the clause had been wrongly omitted. The Department proposes language to clarify that these parallel provisions are both effective, with proposed language in §§ 1.6(f), 5.5(a)(1)(i), and 5.6(a)(1)(ii) that explains that contracting agencies continue to be required to insert the relevant clauses and wage determinations in full notwithstanding that the clauses and wage determinations are also effective by operation of law. As the clauses and applicable wage determination(s) will still be effective as a matter of law even if omitted from the contract, it will be advisable for contractors to promptly raise any such errors of omission with their contracting agencies. A contractor's failure to raise such issues will not relieve the contractor from any of their obligations under the Davis-Bacon labor standards. *See, e.g., Coleman Construction Co.,* ARB No. 15–002, 2016 WL 4238468, at *6 & n.40 (June 8, 2016) (holding that ''[t]he law is clear that, if a contract subject to Davis-Bacon lacks the wage determination, it is the employer's obligation . . . to get it''); 48 CFR 52.222–52(c).

Similarly, proposed § 5.5(d) also includes a parallel provision that clarifies that the clauses and wage determinations are equally effective if they are incorporated by reference, as a contract that contains a provision expressly incorporating the clauses and the applicable wage determination by reference may be tantamount to insertion in full under the FAR. *See* 48 CFR 52.107, 52.252–2. In addition, independent of the FAR, the terms of a document appropriately incorporated by reference into a contract effectively bind the parties to that contract. *See* 11 Williston on Contracts section 30:25

[117] In *Blue & Gold,* the National Park Service failed to include the SCA contract clauses in a contract that the Department of Labor later concluded was covered by the Act. The Federal Circuit denied the bid protest from a the losing bidder because ''a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.'' 492 F.3d at 1313.

(4th ed.) (''Interpretation of several connected writings'').

These various proposed parallel regulatory provisions are consistent and work together. They require the best practice of physical insertion or modification of contract documents (or, where warranted, incorporation by reference), so as to provide effective notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives. At the same time, they create a safety net to ensure that where any mistakes are made in initial determinations, the prevailing wage required by statute will still be paid to the laborers and mechanics on covered projects.

(2) § 1.6(f) Post-Award Correction of Wage Determinations

In addition to the operation-of-law language at § 5.5(e), the Department proposes to make several changes to the current regulation at § 1.6(f) that contains the post-award procedure requiring contracting agencies to incorporate an omitted wage determination. First, as discussed above in section III.B.1.vi. of this NPRM (Section 1.6 Use and effectiveness of wage determinations), the Department proposes adding titles for each subsection in § 1.6 in order to improve readability of the section as a whole. The proposed title for § 1.6(f) is ''Post-award determinations and procedures.'' The Department also proposes dividing § 1.6(f) into multiple subsections to improve the organization and readability of the important rules it articulates.

At the beginning of the section, the Department proposes a new § 1.6(f)(1), which explains generally that if a contract subject to the labor standards provisions of the Acts referenced by § 5.1 is entered into without the correct wage determination(s), the relevant agency must incorporate the correct wage determination into the contract or require its incorporation. The Department proposes to add language to § 1.6(f)(1) expressly providing for an agency to incorporate the correct wage determination post-award ''upon its own initiative'' as well as upon the request of the Administrator. The current version of § 1.6(f) explicitly provides only for a determination by the Administrator that a correction must be made. Some contracting agencies had interpreted the existing language as precluding an action by a contracting agency alone—without action by the Administrator—to modify an existing contract to incorporate a correct wage determination. The Department now proposes the new language to clarify that the contracting agency can take such action alone. Where a contracting agency does intend to take such an action, proposed language at § 1.6(f)(3)(iii) would require it to notify the Administrator of the proposed action.

In the proposed reorganization of § 1.6(f), the Department would locate the discussion of the Administrator's determination that a correction is necessary in a new § 1.6(f)(2). The only change to the language of that subsection is not substantive. The current text of § 1.6(f) refers to the action that the Administrator may take as an action to ''issue a wage determination.'' However, in the majority of cases, where a wage determination was not included in the contract, the proper action by the Administrator will not be to issue a new or updated wage determination, as that term is used in § 1.6(c), but to identify the appropriate existing wage determination that applies to the contract. Thus, to eliminate any confusion, the Department proposes to amend the language in this subsection to describe the Administrator's action as ''requir[ing] the agency to incorporate'' the appropriate wage determination. To the extent that, in an exceptional case, the Department would need to ''issue'' a new project wage determination to be incorporated into the contract, the proposed new language would require the contracting agency to incorporate or require the incorporation of that newly issued wage determination.

The Department also proposes to amend the language in § 1.6(f) that describes the potential corrective actions that an agency may take. In a nonsubstantive change, the Department proposes to refer to the wage determinations that must be newly incorporated as ''correct'' wage determinations instead of ''valid'' wage determinations. This is because the major problem addressed in § 1.6(f)—in addition to the failure to include any wage determination at all—is the use of the wrong wage determinations. Even while wrong for one contract, a wage determination may be valid if used on a different contract to which it properly applies. It is therefore more precise to describe a misused wage determination as incorrect rather than invalid. The proposed amendment would also add to the reference in the current regulation at § 1.6(f) to ''supplemental agreements'' or ''change orders'' as the methods for modifying contracts post-award to incorporate valid wage determinations. The Department, in a new § 1.6(f)(3), would instruct that agencies make such modifications additionally through the exercise of ''any other authority that may be needed.'' This language parallels the Department's regulation at 29 CFR 4.5 for similar circumstances under the SCA.

The Department also proposes to make several changes to § 1.6(f) to clarify that the requirements apply equally to projects carried out with Federal financial assistance as they do to DBA projects. The proposed initial paragraph at § 1.6(f)(1) contains new language that states expressly that where an agency is providing Federal financial assistance, ''the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the correct wage determination(s) into its contracts.'' Similarly, the reference to agencies' responsibilities in proposed new § 1.6(f)(3) requires an agency to terminate and resolicit the contract or to ''ensure'' the incorporation (in the alternative to ''incorporating'' the correct wage determination itself)—in recognition that this language applies equally to direct procurement where the agency is a party to a DBA-covered contract and Related Acts where the agency must ensure that the relevant State or local agency incorporates the corrected wage determination into the covered contract. Finally, the Department also proposes to amend the requirement that the incorporation should be ''in accordance with applicable procurement law'' to instead reference ''applicable law.'' This change is intended to recognize that the requirements in § 1.6 apply also to projects executed with Federal financial assistance under the Related Acts, for which the Federal or State agency's authority may not be subject to Federal procurement law. None of these proposed changes represent substantive changes, as the Department has historically applied § 1.6(f) equally to both DBA and Related Act projects. *See, e.g., City of Ellsworth,* ARB No. 14–042, at *6–8.

In the new § 1.6(f)(3)(iv), the Department proposes to include the requirements from the existing regulations that contractors must be compensated for any change and that the incorporation must be retroactive to the beginning of the construction. That retroactivity requirement, however, is amended to include the qualification that the Administrator may direct otherwise. As noted above, the Administrator may make determinations of non-retroactivity on a case-by-case basis. In addition, consistent with the SCA regulation on post-award incorporation of wage determinations at

29 CFR 4.5(c), the Department proposes including language in a new § 1.6(f)(3)(ii) to require that incorporation of the correct wage determination be accomplished within 30 days of the Administrator's request, unless the agency has obtained an extension.

The Department also proposes to include new language at § 1.6(f)(3)(v), applying to Related Acts, instructing that the agency must suspend further payments or guarantees if the recipient refuses to incorporate the specified wage determination and that the agency must promptly refer the dispute to the Administrator for further proceedings under § 5.13. This language is a clarification and restatement of the existing enforcement regulation at § 5.6(a)(1), which provides that no such payment or guarantee shall be made ''unless [the agency] ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts.''

In proposed new language at § 1.6(f)(3)(vi), the Department includes additional safeguards for the circumstances in which an agency does not retroactively incorporate the missing clauses or wage determinations and instead seeks to terminate the contract. The proposed language provides that before termination, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism. This language is consistent with the existing FAR provision at 48 CFR 49.112–2(c) that requires contracting officers to ascertain whether there are any outstanding labor violations and withhold sufficient funds if possible before forwarding the final payment voucher. It is also consistent with the language of the template termination settlement agreements at 48 CFR 49.602–1 and 49.603–3 that seek to assure that any termination settlement agreement does not undermine the government's ability to fully satisfy any outstanding contractor liabilities under the DBRA or other labor clauses.

Finally, the Department includes a proposed provision at § 1.6(f)(4) that clarifies that the specific requirements of § 1.6(f) to physically incorporate the correct wage determination operate in addition to the proposed requirement in § 5.5(e) that makes the correct wage determination applicable by operation of law. As discussed above, such amendment and physical incorporation (including incorporation by reference) is necessary in order to provide notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives.

(3) § 5.6(a)(1) Post-Award Incorporation of Contract Clauses

The Department proposes to revise § 5.6(a)(1) to include language expressly providing a procedure for determining that the required contract clauses were wrongly omitted from a contract. As noted above, the Department has historically sought the retroactive incorporation of missing contract clauses by reference to the language regarding wage determinations in § 1.6(f). The Department now proposes to eliminate any confusion by creating a separate procedure at § 5.6(a)(1)(ii) that applies specifically to missing contract clauses in a similar manner as § 1.6(f) continues to apply to missing or incorrect wage determinations.

The Department proposes to revise § 5.6(a)(1) by renumbering the existing regulatory text § 5.6(a)(1)(i), and adding an additional paragraph, (a)(1)(ii), to include the provision clarifying that where a contract is awarded without the incorporation of the required Davis-Bacon labor standards clauses required by § 5.5, the agency must incorporate the clauses—or require their incorporation. This includes circumstances where the agency does not award a contract directly but instead provides funding assistance for such a contract; in such instances, the Federal agency, or other agency where appropriate, must ensure that the recipient or sub-recipient of the Federal assistance incorporates the required labor standards clauses retroactive to the date of contract award, or the start of construction if there is no award. The paragraph contains a similar set of provisions as § 1.6(f), with its proposed amendments—including that the incorporation must be retroactive unless the Administrator directs otherwise; that retroactive incorporation is required by the request of the Administrator or upon the agency's own initiative; that incorporation must take place within 30 days of a request by the Administrator, unless an extension is granted; that the agency must withhold or otherwise obligate sufficient funds to satisfy back wages before any contract termination; and that the contractor should be compensated for any increase in costs resulting from any change required by the paragraph.

The Department also proposes to clarify the application of the current regulation at § 5.6(a)(1), which states that no payment, advance, grant, loan, or guarantee of funds will be approved unless the Federal agency ensures that the funding recipient or sub-recipient has incorporated the required clauses into any contract receiving the funding. Similar to the proposed provision in § 1.6(f)(3)(v), a new proposed provision at § 5.6(a)(1)(ii)(C) would explain that such a required suspension also applies if the funding recipient refuses to retroactively incorporate the required clauses. In such circumstances, the issue must be referred promptly to the Administrator for resolution.

Similar to the proposed provision at § 1.6(f)(4), the Department also proposes a provision at § 5.6(a)(1)(ii)(E) that explains that the physical-incorporation requirements of § 5.6(a)(1)(ii) would operate in tandem with the proposed language at § 5.5(e) making the contract clauses and wage determinations effective by operation of law.

The proposed changes to § 5.6 do not impose any additional requirements on Federal agencies, as the existing regulation at § 5.6 clearly states that the Federal agency is responsible for incorporating the required clauses into its own contracts subject to the Davis-Bacon labor standards and for ensuring the incorporation of the required clauses into contracts subject to the Davis-Bacon labor standards entered into by the Federal agency's funding recipients. Moreover, as noted above, this additional language is analogous to the existing language at 29 CFR 1.6(f) under which the Department historically has requested the incorporation of missing contract clauses.

The proposed changes clarify that the requirement to incorporate the Davis-Bacon labor standards clauses is an ongoing responsibility that does not end upon contract award, and the changes expressly state the Department's longstanding practice of requiring the relevant agency to retroactively incorporate, or ensure retroactive incorporation of, the required clauses in such circumstances. As discussed above, such clarification is warranted because agencies occasionally have expressed confusion about—and even questioned whether they possess—the authority to incorporate, or ensure the incorporation of, the required contract clauses after a contract has been awarded or construction has started.

The Department's proposal similarly makes clear that while agencies must retroactively incorporate the required clauses upon the request of the Administrator, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made. The proposed changes also eliminate any confusion of the recipients of Federal funding as to the extent of the Federal funding agency's authority to require such

retroactive incorporation in federally funded contracts subject to the Davis-Bacon labor standards. Finally, the proposed changes do not alter the provisions of 29 CFR 1.6(g), including its provisos.

Retroactive incorporation of the required contract clauses ensures that agencies take every available step to ensure that workers on covered contracts are paid the prevailing wages that Congress intended. The Department welcomes comments on all aspects of this proposal.

xxi. Debarment

In accordance with the Department's goal of updating and modernizing the DBA and Related Act regulations, as well as enhancing the implementation of Reorganization Plan No. 14 of 1950, the Department proposes a number of revisions to the debarment regulations that are intended both to promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify the debarment standards and procedures for the regulated community, adjudicators, investigators, and other stakeholders.

The regulations implementing the DBA and the Related Acts currently reflect different standards for debarment. Since 1935, the DBA has mandated 3-year debarment ''of persons . . . found to have *disregarded their obligations to employees and subcontractors.*'' 40 U.S.C. 3144(b)(1) and (b)(2) (emphasis added); *see also* 29 CFR 5.12(a)(1) and (2) (setting forth the DBA's ''disregard of obligations'' standard). Although the Related Acts themselves do not contain debarment provisions, since 1951, their implementing regulations have imposed a heightened standard for debarment for violations under the Related Acts, providing that ''any contractor or subcontractor . . . found . . . to be in *aggravated or willful violation of the labor standards provisions*'' of any DBRA will be debarred ''for a period *not to exceed* 3 years.'' 29 CFR 5.12(a)(1) (emphasis added). The Department proposes to harmonize the DBA and the Related Act debarment-related regulations by applying the longstanding DBA debarment standard and related provisions to the Related Acts as well. Specifically, in order to create a uniform set of substantive and procedural requirements for debarment under the DBA and the Related Acts, the Department proposes five changes to the Related Act debarment regulations so that they mirror the provisions governing DBA debarment.

First, the Department proposes to adopt the DBA statutory debarment standard—disregard of obligations to employees or subcontractors—for *all* debarment cases and to eliminate the Related Acts' regulatory ''aggravated or willful'' debarment standard. Second, the Department proposes to adopt the DBA's mandatory 3-year debarment period for Related Act cases and to eliminate the process under the Related Acts regulations for early removal from the ineligible list (also known as the debarment list [118]). Third, the Department proposes to expressly permit debarment of ''responsible officers'' under the Related Acts. Fourth, the Department proposes to clarify that under the Related Acts as under the DBA, entities in which debarred entities or individuals have an ''interest'' may be debarred. Related Acts regulations currently require a ''substantial interest.'' Finally, the Department proposes to make the scope of debarment under the Related Acts consistent with the scope of debarment under the DBA by providing, in accordance with the current scope of debarment under the DBA, that Related Acts debarred persons and firms may not receive ''any contract or subcontract of the United States or the District of Columbia,'' as well as ''any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.'' *See* 29 CFR 5.12(a)(1) and (2).

(A) Relevant Legal Authority

The 1935 amendments to the DBA gave the Secretary authority to enforce—not just set—prevailing wages, including through the remedy of debarment. *See Coutu,* 450 U.S. at 758 & n.3, 759, 776; *see also* S. Rep. No. 74–332, pt. 3, at 11, 14–15 (1935). Since then, the DBA has required 3-year debarment of persons or firms that have been found to ''have disregarded their obligations to employees and subcontractors.'' 40 U.S.C. 3144(b) (formerly 40 U.S.C. 276a–2 and known as section 3(a) of the DBA). The DBA also mandates debarment of entities in which debarred persons or firms have an ''interest.'' 40 U.S.C. 3144(b)(2).

Approximately 15 years later, the Truman Administration developed and Congress accepted Reorganization Plan No. 14 of 1950, a comprehensive plan to improve Davis-Bacon enforcement and administration. The Reorganization Plan provided that ''[i]n order to assure coordination of administration and consistency of enforcement'' of the DBRA by the agencies who are responsible for administering them, the Secretary of Labor was empowered to ''prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies.'' Reorganization Plan No. 14 of 1950, 5 U.S.C. app. 1. In transmitting the Reorganization Plan to Congress, President Truman observed that ''the principal objective of the plan is more effective enforcement of labor standards'' with ''more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.'' *Id.* (1950 Special Message to Congress).

Shortly after Reorganization Plan No. 14 of 1950 was adopted, the Department promulgated regulations adding ''a new Part 5,'' effective July 1, 1951. 16 FR 4430, 4430. These regulations added the ''aggravated or willful'' debarment standard for the Related Acts. *Id.* at 4431. The preamble to that final rule explained that adding the new part 5 was to comply with Reorganization Plan No. 14 of 1950's directive to prescribe standards, regulations, and procedures ''to assure coordination of administration and consistency of enforcement.'' *Id.* at 4430. Since then, the two debarment standards—disregard of obligations in DBA cases and willful or aggravated violations in Related Acts cases—have co-existed, but with challenges along the way that the Department seeks to resolve through this proposal.

(B) Proposed Regulatory Revisions

(1) Debarment Standard

a. Proposed Change to Debarment Standard

As noted previously, the DBA generally requires the payment of prevailing wages to laborers and mechanics working on contracts with the Federal Government or the District of Columbia for the construction of public buildings and public works. 40 U.S.C. 3142(a). In addition, Congress has included DBA prevailing wage provisions in numerous Related Acts under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods. The same contract clauses are incorporated into DBA—and Related Act—covered contracts, and the laws apply the same labor standards protections (including the obligation to pay prevailing wages) to laborers and mechanics without regard to whether they are performing work on a project subject to the DBA or one of the Related Acts. Indeed, not only are some projects subject to the requirements of both the

[118] There are several terms referring to the same list (*e.g.,* ineligible list, debarment list, debarred bidders list) and the terms for this list may continue to change over time.

DBA and one of the Related Acts due to the nature and source of Federal funding, but also the great majority of DBA-covered projects are also subject to CWHSSA, one of the Related Acts.

Against this backdrop, there is no apparent need for a different level of culpability for Related Acts debarment than for DBA debarment. The sanction for failing to compensate covered workers in accordance with applicable prevailing wage requirements should not turn on the source or form of Federal funding. Nor is there any principled reason that it should be easier for prime contractors, subcontractors, and their responsible officials to avoid debarment in Related Acts cases. Accordingly, the Department proposes to revise the governing regulations so that conduct that warrants debarment on DBA construction projects would also warrant debarment on Related Acts projects. This proposal fits within the Department's well-established authority to adopt regulations governing debarment of Related Acts contractors. *See, e.g., Janik Paving & Constr.,* 828 F.2d at 91; *Copper Plumbing & Heating Co.* v. *Campbell,* 290 F.2d 368, 372–73 (D.C. Cir. 1961).

The potential benefits of adopting a single, uniform debarment standard outweigh any benefits of retaining the existing dual-standard framework. Other than debarment, contractors who violate the DBA and Related Acts run the risk only of having to pay back wages, often long after violations occurred. Even if these violations are discovered or disclosed through an investigation or other compliance action, contractors that violate the DBA or Related Acts can benefit from the use of workers' wages, an advantage which can allow such contractors to underbid more law-abiding contractors. If the violations never come to light, such contractors pocket wages that belong to workers. Strengthening the remedy of debarment encourages such unprincipled contractors to comply with Davis-Bacon prevailing wage requirements by expanding the reach of this remedy when they do not. *Facchiano Constr. Co.* v. *U.S. Dep't of Labor,* 987 F.2d 206, 214 (3d Cir. 1993) (observing that debarment ''may in fact 'be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of noncompliance' '' (quoting *Janik Paving & Constr.,* 828 F.2d at 91)).

In proposing a unitary debarment standard, the Department intends that well-established case law applying the DBA ''disregard of obligations'' debarment standard would now also apply to Related Acts debarment determinations. Under this standard, as a 2016 ARB decision explained, ''DBA violations do not, by themselves, constitute a disregard of an employer's obligations,'' and, to support debarment, ''evidence must establish a level of culpability beyond negligence'' and involve some degree of intent. *Interstate Rock Prods., Inc.,* ARB No. 15–024, 2016 WL 5868562, at *4 (Sept. 27, 2016) (footnotes omitted). For example, the underpayment of prevailing wages, coupled with the falsification of certified payrolls, constitute a disregard of a contractor's obligations sufficient to establish the requisite level of ''intent'' under the DBA debarment provisions. *See id.* Bad faith and gross negligence regarding compliance have also been found to constitute a disregard of DBA obligations. *See id.*[119] The Department's proposal to apply the DBA ''disregard of obligations'' standard as the sole debarment standard would maintain safeguards for law-abiding contractors and responsible officers by retaining the bedrock principle that DBA violations, by themselves, generally do not constitute a sufficient predicate for debarment. Moreover, the determination of whether debarment is warranted will continue to be based on a consideration of the particular facts found in each investigation and to include the same procedures and review process that are currently in place to determine whether debarment is to be pursued.

For these reasons and those discussed in more detail below, the Department proposes to harmonize debarment standards by reorganizing § 5.12. As proposed, paragraph (a)(1) sets forth the disregard of obligations debarment standard, which would apply to both DBA and Related Acts violations. The proposed changes accordingly remove the ''willful or aggravated'' language from § 5.12, with conforming changes proposed in 29 CFR 5.6(b) and 5.7(a). Proposed paragraph (a)(2) combines the parts of current §§ 5.12(a)(1) and (a)(2) concerning the different procedures for effectuating debarment under the DBA and Related Acts.

b. Impacts of Proposed Debarment Standard Change

Because behavior that is willful or aggravated is also a disregard of obligations, in many instances the proposed harmonization of the debarment standards would apply to conduct that under the current regulations would already be debarrable under both the DBA and Related Acts. For example, falsification of certified payrolls to simulate compliance with Davis-Bacon labor standards has long warranted debarment under both the DBA and Related Acts. *See, e.g., R.J. Sanders, Inc.,* WAB No. 90–25, 1991 WL 494734, at *1–2 (Jan. 31, 1991) (DBA); *Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *11 (Related Acts). Kickbacks also warrant debarment under the DBA and Related Acts. *See, e.g., Killeen Elec. Co., Inc.,* WAB No. 87–49, 1991 WL 494685, at *5–6 (DBA and Related Act). In fact, any violation that meets the ''willful or aggravated'' standard would necessarily also be a disregard of obligations.

Under the proposed revisions, the subset of violations that would only have been debarrable under the DBA disregard of obligations standard now will be potentially subject to debarment under *both* the DBA and Related Acts. The ARB recently discussed one example of this type of violation, stating that intentional disregard of obligations ''may . . . include acts that are not willful attempts to avoid the requirements of the DBA'' since contractors may not avoid debarment ''by asserting that they did not intentionally violate the DBA because they were unaware of the Act's requirements.'' *Interstate Rock Prods.,* ARB No. 15–024, 2016 WL 5868562, at *4 (citations omitted). Similarly, ''failures to set up adequate procedures to ensure that their employees' labor was properly classified,'' which might not have been found to be willful or aggravated Related Act violations, were debarrable under the DBA disregard of obligations standard. *Id.* at *8. Under the Department's proposed revisions to § 5.12, these types of violations could now result in debarment in Related Acts as well as DBA cases. Additionally, under the disregard of obligations standard, prime contractors and upper-tier subcontractors may be debarred if they fail to flow down the required contract clauses into their lower-tier subcontracts as required by § 5.5(a)(6), or if they otherwise fail to ensure that their subcontractors are in compliance with the Davis-Bacon labor standards provisions. *See* 29 CFR 5.5(a)(6)–(a)(7). *See Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *10 (affirming debarment under DBA of upper-tier subcontractor and its principals because of subcontractor's ''abdication from—and, thus, its disregard of—its

[119] For the same reason, except in unusual circumstances, it would generally not be appropriate to debar a contractor for violations in circumstances where the contracting agency omitted the contract clause and the clause was subsequently incorporated retroactively or found to be effective by operation of law.

obligations to employees of . . . its own lower-tier subcontractor'').

c. Benefits of Proposed Debarment Standard Change

i. Improved Compliance and Enforcement

Applying the DBA's disregard of obligations debarment standard in a uniform, consistent manner would advance the purpose of the DBA, '' 'a minimum wage law designed for the benefit of construction workers.' '' *Abhe & Svoboda, Inc.* v. *Chao,* 508 F.3d 1052, 1055 (D.C. Cir. 2007) (quoting *Binghamton Const. Co.,* 347 U.S. at 178). Both the DBA statutory and the Related Acts regulatory debarment sanctions are intended to foster compliance with labor standards. *Interstate Rock Products,* ARB No. 15–024, 2016 WL 5868562, at *8 (''Debarment has consistently been found to be a remedial rather than punitive measure so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act.'' (citations omitted)); *Howell Constr., Inc.,* WAB No. 93–12, 1994 WL 269361, at *7 (May 31, 1994). Using the disregard of obligations debarment standard for all DBA and DBRA work would enhance enforcement of and compliance with Davis-Bacon labor standards in multiple ways.

First, it would better enlist the regulated community in Davis-Bacon enforcement by increasing their incentive to comply with DBA standards. *See, e.g., Facchiano Constr.,* 987 F.2d at 214 (''Both § 5.12(a)(1) and § 5.12(a)(2) are designed to ensure the cooperation of the employer, largely through self-enforcement.''); *Brite Maint. Corp.,* WAB No. 87–07, 1989 WL 407462, at *2 (May 12, 1989) (debarment is a ''preventive tool to discourage violation[s]'').

Second, applying the disregard of obligations standard to Related Act cases will serve the important public policy of holding contractors' responsible officials accountable for non-compliance in a more consistent manner, regardless of whether they are performing on a Federal or federally funded project. Responsible officials currently may be debarred under both the DBA and the Related Acts. *See, e.g., P.B.M.C., Inc.,* WAB No. 87–57, 1991 WL 494688, at *7 (Feb. 8, 1991) (stating that ''Board precedent does not permit a responsible official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm'' in Related Act case); *P.J. Stella Constr. Corp.,* WAB No. 80–13, 1984 WL 161738, at *3 (Mar. 1, 1984) (affirming DBA debarment recommendation because ''an employer cannot take cover behind actions of his inexperienced agents or representatives or the employer's own inexperience in fulfilling the requirements of government construction contracts''); *see also Howell Constr., Inc.,* WAB No. 93–12, 1994 WL 269361, at *7 (DBA case) (debarment could not foster compliance if ''corporate officials . . . are permitted to delegate . . . responsibilities . . . , [and] to delegate away any and all accountability for any wrong doing''). Applying a unitary debarment standard would further incentivize compliance by all contractors and responsible officers.

ii. Greater Consistency and Clarity

The Department also believes that applying the DBA debarment and debarment-related standards to all Related Act prevailing wage cases would eliminate confusion, and attendant litigation, that have resulted from erroneous and inconsistent application of the two different standards. The incorrect debarment standard has been applied in various cases over the years, continuing to the present, notwithstanding the ARB's repeated clarification. *See, e.g., J.D. Eckman, Inc.,* ARB No. 2017–0023, 2019 WL 3780904, at *3 (July 9, 2019) (ALJ applied inapplicable DBA standard rather than applicable aggravated or willful standard; legal error of ALJ required remand for consideration of debarment under the correct standard); *Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *9–11 (noting that the ALJ had applied the wrong debarment standard but concluding that the ALJ's ''conflat[ion of the] two different legal standards'' was harmless error under the circumstances). Most recently, the ARB vacated and remanded an ALJ's decision to debar a subcontractor and its principal under the DBA, noting that, even though the Department had not argued that the DBA applied, the ALJ had applied the incorrect standard because ''the contract was for a construction project of a non-[F]ederal building that was funded by the U.S. Government but did not include the United States as a party.'' *Jamek Eng'g Servs., Inc.,* ARB No. 2020–0043, 2021 WL 2935807, at *8 (June 23, 2021).

Additionally, the ''aggravated or willful'' Related Acts standard has been interpreted inconsistently over the past decades. In some cases, the ARB has required actual knowledge of violations, while in others it has applied (or at least recited with approval) a less stringent standard that encompasses intentional disregard or plain indifference to the statutory requirements but does not require actual knowledge of the violations. *Compare J.D. Eckman, Inc.,* ARB No. 2017–0023, 2019 WL 3780904, at *3 (requiring actual knowledge or awareness of the violation) *and A. Vento Constr.,* WAB No. 87–51, 1990 WL 484312, at *3 (Oct. 17, 1990) (aggravated or willful violations are ''intentional, deliberate, knowing violations of the [Related Acts'] labor standards provisions'') *with Fontaine Bros., Inc.,* ARB No. 96–162, 1997 WL 578333, at *3 (Sept. 16, 1997) (stating in Related Act case that ''mere inadvertent or negligent conduct would not warrant debarment, [but] conduct which evidences an intent to evade or a purposeful lack of attention to, a statutory responsibility does'' and that ''[b]lissful ignorance is no defense to debarment''); *see also Pythagoras Gen. Cont. Corp.,* ARB Nos. 08–107, 09–007, 2011 WL 1247207, at *12 (''[A] 'willful' violation encompasses intentional disregard or plain indifference to the statutory requirements.''), *aff'd sub. nom. on other grounds Pythagoras Gen. Cont. Corp.* v. *U.S. Dept. of Labor,* 926 F. Supp. 2d 490 (S.D.N.Y. 2013).

The Department believes that a single debarment standard would provide consistency for the regulated community. Under the proposed single ''disregard of obligations'' debarment standard, purposeful inattention and gross negligence with regard to Davis-Bacon labor standards obligations—as well as actual knowledge of or participation in violations—could warrant debarment. The Department would continue to carefully consider all of the facts involved in determining whether a particular contractor's actions meet the proposed single standard.

(2) Length of Debarment Period

The Department also proposes to revise § 5.12 (*see* proposed § 5.12(a)(1) and (2)) to make 3-year debarment mandatory under both the DBA and Related Acts and to eliminate the regulatory provision permitting early removal from the debarment list under the Related Acts.

As noted above, since 1935, the DBA has mandated a 3-year debarment of contractors whose conduct has met the relevant standard. In 1964, the Department added two regulatory provisions that permit Related Acts debarment for less than 3 years as well as early removal from the debarment list. According to the final rule preamble, the Department added these provisions ''to improve the debarment

provisions under Reorganization Plan No. 14 of 1950 by providing for a flexible period of debarment up to three years and by providing for removal from the debarred bidders list upon a demonstration of current responsibility.'' 29 FR 95.

The Department's experience over the nearly 60 years since then has shown that those Related Act regulatory provisions that differ from the DBA standard have not improved the debarment process for any of its participants. Rather, they have added another element of confusion and inconsistency to the administration and enforcement of the DBA and Related Acts. For example, contractors and subcontractors have been confused about which provision applies. *See, e.g., Bob's Constr. Co., Inc.,* WAB No. 87–25, 1989 WL 407467, at *1 (May 11, 1989) (stating that ''[t]he [DBA] does not provide for less than a 3-year debarment'' in response to contractor's argument that ''if the Board cannot reverse the [ALJ's DBA] debarment order, it should consider reducing the 3-year debarment.'').

Requiring a uniform 3-year debarment period would reduce confusion. Although the regulations currently provide for an exception to 3-year debarment, debarment in Related Acts cases is usually, but not always, for 3 years. At times, the WAB has treated a 3-year debarment period as presumptive and therefore has reversed ALJ decisions imposing debarment for fewer than 3 years. *See, e.g., Brite Maint. Corp.,* WAB No. 87–07, at *1, *3 (imposing a 3-year debarment instead of the 2-year debarment ordered by the ALJ); *Early & Sons, Inc.,* WAB No. 86–25, at *1–2 (same); *Warren E. Manter Co., Inc.,* WAB No. 84–20, 1985 WL 167228, at *2–3 (June 21, 1985) (same). Under current case law, ''aggravated or willful'' violations of the Related Acts labor standards provisions warrant a three-year debarment period ''*absent extraordinary circumstances*.'' *A. Vento Constr.,* WAB No. 87–51, 1990 WL 484312, at *6 (emphasis added). ALJs have grappled with what constitutes ''extraordinary circumstances,'' and when to consider the factors outlined in the DBRA early removal process. *Id.; see also* current 29 CFR 5.12(a)(1) and (c).[120] The Department believes that setting a uniform 3-year debarment period would provide clarity and promote consistency.

Further, the Department has concluded that in instances—usually decades ago—when debarment for a period of less than 3 years was warranted, it has not improved the debarment process or compliance. *See, e.g., Rust Constr. Co., Inc.,* WAB No. 87–15, 1987 WL 247054, at *2 (Oct. 2, 1987) (1-year debarment), *aff'd sub nom. Rust Constr. Co., Inc.* v. *Martin,* 779 F. Supp. 1030, 1031–32 (E.D. Mo. 1992) (affirming WAB's imposition of 1-year debarment instead of no debarment, noting ''plaintiffs could have easily been debarred for three years.''); *Progressive Design & Build Inc.,* WAB No. 87–31, 1990 WL 484308, at *3 (Feb. 21, 1990) (18-month debarment); *Morris Excavating Co., Inc.,* WAB No. 86–27, 1987 WL 247046, at *1 (Feb. 4, 1987) (6-month, instead of no, debarment).

For the above reasons, the Department proposes to modify the period of Related Acts debarment to mirror the DBA's mandatory 3-year debarment when contractors are found to have disregarded their obligations to workers or subcontractors.

The Department also proposes to eliminate the provision at 29 CFR 5.12(c) that allows for Related Acts contractors and subcontractors the possibility of early removal from the debarment list. Just as Related Acts debarment for fewer than 3 years has rarely been permitted, early removal from the debarment list has seldom been requested, and has been granted even less often. The Department's experience has shown that the possibility of early removal from the debarment list has not improved the debarment process. Likewise, the ARB and WAB do not appear to have addressed early removal for decades. At that time, the ARB and WAB affirmed denials of early removal requests. *See Atlantic Elec. Servs., AES, Inc.,* ARB No. 96–191, 1997 WL 303981, at *1–2 (May 28, 1997); *Fred A. Nemann,* WAB No. 94–08, 1994 WL 574114, at *1, 3 (June 27, 1994). Around the same time, early removal was affirmed on the merits in only one case. *See IBEW Loc. No. 103,* ARB No. 96–123, 1996 WL 663205, at *4–6 (Nov. 12, 1996). Additionally, the early-removal provision has caused confusion among judges and the regulated community concerning the proper debarment standard. For example, an ALJ erroneously relied on the regulation for early relief from Related Acts debarment in recommending that a DBA contractor not be debarred. *Jen-Beck Assocs., Inc.,* WAB No. 87–02, 1987 WL 247051, at *1–2 (July 20, 1987) (remanding case to ALJ for a decision ''in accordance with the proper standard for debarment for violations of the [DBA]''). Accordingly, the Department proposes to amend § 5.12 by deleting paragraph (c) and renumbering the remaining paragraph to accommodate this revision.

(3) Debarment of Responsible Officers

The Department also proposes to revise 29 CFR 5.12 to expressly state that responsible officers of both DBA and Related Acts contractors and subcontractors may be debarred if they disregard obligations to workers or subcontractors. The purpose of debarring individuals along with the entities in which they are, for example, owners, officers, or managers is to close a loophole where such individuals could otherwise continue to receive Davis-Bacon contracts by forming or controlling another entity that was not debarred. The current regulations mention debarment of responsible officers only in the paragraph addressing the DBA debarment standard. *See* 29 CFR 5.12(a)(2). But it is well-settled that they can be debarred under both the DBA and Related Acts. *See Facchiano Constr. Co.,* 987 F.2d at 213–14 (noting that debarment of responsible officers is ''reasonable in furthering the remedial goals of the Davis-Bacon Act and Related Acts'' and that there is ''no rational reason for including debarment of responsible officers in one regulation, but not the other''); *Hugo Reforestation, Inc.,* ARB No. 99–003, 2001 WL 487727, at *12 (Apr. 30, 2001) (CWHSSA; citing Related Acts cases); *see also Coleman Constr. Co.,* ARB No. 15–002, 2016 WL 4238468, at *12. Thus, by expressly stating that responsible officers may be debarred under both the DBA and Related Acts, this proposed revision is consistent with current law. The Department intends that Related Acts debarment of individuals will continue to be interpreted in the same way as debarment of DBA responsible officers has been interpreted.

(4) Debarment of Other Entities

The Department proposes another revision so that the Related Acts regulations mirror the DBA regulations not only in practice, but also in letter. Specifically, the Department proposes to revise 29 CFR 5.12(a)(1) (with conforming changes in 5.12 and elsewhere in part 5) to state that ''any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer *has*

[120] *See* 29 CFR 5.12(a)(1) (''shall be ineligible for a period *not to exceed 3 years* (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list'' (emphasis added)); 29 CFR 5.12(c) (''Any person or firm debarred under paragraph (a)(1) of this section may in writing request removal from the debarment list *after six months* from the date of publication by the Comptroller General of such person or firm's name on the ineligible list.'' (emphasis added)).

an interest'' must be debarred under the Related Acts, as well as the DBA. The DBA states that ''No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have *an interest* . . .'' 40 U.S.C. 3144(b)(2) (emphasis added); *see also* 29 CFR 5.12(a)(2). In contrast, the current regulations for Related Acts require debarment of ''any firm, corporation, partnership, or association in which such contractor or subcontractor has a *substantial interest.*'' 29 CFR 5.12(a)(1) (emphasis added); *see also* 29 CFR 5.12(b)(1), (d).

The 1982 final rule preamble for these provisions indicates that the determination of ''interest'' (DBA) and ''substantial interest'' (Related Acts) are intended to be the same: ''In both cases, the intent is to prohibit debarred persons or firms from evading the ineligibility sanctions by using another legal entity to obtain Government contracts.'' 47 FR 23658, 23661, *implemented by* 48 FR 19540. It is ''not intended to prohibit bidding by a potential contractor where a debarred person or firm holds only a nominal interest in the potential contractor's firm'' and ''[d]ecisions as to whether 'an interest' exists will be made on a case-by-case basis considering all relevant factors.'' 47 FR 23658, 23661. The Department now proposes to eliminate any confusion by requiring the DBA ''interest'' standard to be the standard for both DBA and Related Acts debarment.

(5) Debarment Scope

The Department proposes to revise the scope of Related Acts debarment so that it mirrors the scope of DBA debarment set out in current 29 CFR 5.12(a)(1). Currently, under the Related Acts, contractors are not generally debarred from being awarded any contracts or subcontracts of the United States or the District of Columbia, but rather are only barred from being awarded contracts subject to Davis-Bacon prevailing wage standards. As proposed in revised § 5.12(a)(1), in Related Acts as well as DBA cases, any debarred contractor, subcontractor, or responsible officer would be barred for 3 years from ''[being] awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.''

The Department believes that there is no reasoned basis to prohibit debarred contractors or subcontractors whose violations have warranted debarment for Related Acts violations from receiving Related Acts contracts or subcontracts, but to permit them to continue to be awarded direct DBA contracts during the Related Acts debarment period. The proposed changes to § 5.12(a)(1) would eliminate this anomalous situation, and apply debarment consistently to contractors, subcontractors, and their responsible officers who have disregarded their obligations to workers or subcontractors, regardless of the source of Federal funding or assistance for the work.

xxii. Employment Relationship Not Required

The Department proposes a few changes to reinforce the well-established principle that Davis-Bacon labor standards requirements apply even when there is no employment relationship between a contractor and worker.

The DBA states that ''the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.'' 40 U.S.C. 3142(c)(1). The Department has interpreted this coverage to include ''[a]ll laborers and mechanics employed or working upon the site of the work,'' § 5.5(a)(1)(i), and the definitions of ''employed'' in parts 3 and 5 similarly make it clear that the term includes all workers on the project and extends beyond the traditional common-law employment relationship. *See* §§ 3.2(e) (''Every person paid by a contractor or subcontractor in any manner for his labor . . . is *employed* and receiving *wages,* regardless of any contractual relationship alleged to exist between him and the real employer.'' (emphasis in original)); 5.2(o) (''Every person performing the duties of a laborer or mechanic [on DBRA work] is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person.'' (emphasis in original)); *cf.* 41 U.S.C. 6701(3)(B) (defining ''service employee'' under the Service Contract Act to ''include[ ] an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor''); 29 CFR 4.155 (providing that whether a person is a ''service employee'' does not depend on any alleged contractual relationship).

The ARB and its predecessors have reached similar conclusions. *See Star Brite Constr. Co., Inc.,* ARB No. 98–113, 2000 WL 960260, at *5 (June 30, 2000) (''the fact that the workers [of a subcontractor] were engaged in construction of the . . . project triggered their coverage under the prevailing wage provisions of the [DBA]; lack of a traditional employee/employer relationship between [the prime contractor] and these workers did not absolve [the prime contractor] from the responsibility to insure that they were compensated in accordance with the requirements of the [DBA].''); *Labor Servs., Inc.,* WAB No. 90–14, 1991 WL 494728, at *2 (May 24, 1991) (stating that the predecessor to section 3142(c) '' 'applies a functional rather than a formalistic test to determine coverage: If someone works on a project covered by the Act and performs tasks contemplated by the Act, that person is covered by the Act, regardless of any label or lack thereof,' '' and requiring a contractor to pay DBA prevailing wages to workers labeled as ''subcontractors''). This broad scope of covered workers also extends to CWHSSA, the Copeland Act, and other Related Acts. *See* 40 U.S.C. 3703(e) (Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145—the authority for the 29 CFR parts 3 and 5 regulations— apply to CWHSSA); 29 CFR 3.2(e); *see also, e.g., Ray Wilson Co.,* ARB No. 02–086, 2004 WL 384729, at *6 (finding workers met the DBA's ''functional [rather than formalistic] test of employment'' and affirming ALJ's order of prevailing wages and overtime due workers of second-tier subcontractor); *Joseph Morton Co.,* WAB No. 80–15, 1984 WL 161739, at *2–3 (July 23, 1984) (rejecting contractor's argument that workers were subcontractors not subject to DBA requirements and affirming ALJ finding that contractor owed prevailing wage and overtime back wages on contract subject to DBA and CWHSSA); *cf. Charles Igwe,* ARB No. 07–120, 2009 WL 4324725, at *3–5 (Nov. 25, 2009) (rejecting contractors' claim that workers were independent contractors not subject to SCA wage requirements, and affirming finding that contractors ''violated both the SCA and the CWHSSA by failing to pay required wages, overtime, fringe benefits, and holiday pay, and failing to keep proper records'').

The Department proposes a few specific changes to the regulations in recognition of this principle. First, the Department proposes to amend §§ 1.2 and 3.2 to include a definition of ''employed'' that is substantively

identical to the definition in § 5.2. This change would clarify that the DBA's expansive scope of ''employment'' also applies in the context of wage surveys and determinations under part 1 and certified payrolls under part 3. Second, references to employment (*e.g.,* employee, employed, employing, etc.) in § 5.5(a)(3) and (c), as well as elsewhere in the regulations, have been revised to refer instead to ''workers,'' ''laborers and mechanics,'' or ''work.'' Notwithstanding the broad scope of employment reflected in the existing and proposed definitions and in case law, the Department believes that this language, particularly in the contract clauses themselves, will clarify this principle and eliminate ambiguity. Consistent with the above, however, to the extent that the words ''employee,'' ''employed,'' or ''employment'' are used in this preamble or in the regulations, the Department intends that those words be interpreted expansively to *not* limit coverage to workers in an employment relationship. Finally, the Department proposes to clarify in the definitions of ''employed'' in parts 1, 3, and 5 that the broad definition applies equally to ''public building[s] or public work[s]'' and to ''building[s] or work[s] financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise.''

xxiii. Withholding

The DBA, CWHSSA, and the regulations at 29 CFR part 5 authorize withholding from the contractor accrued payments or advances equal to the amount of unpaid wages due laborers and mechanics under the DBRA. *See* 40 U.S.C. 3142(c)(3), 3144(a)(1) (DBA withholding), 3702(d), 3703(b)(2) (CWHSSA withholding); 29 CFR 5.5(a)(2) and (b)(3) and 5.9. Withholding helps to realize the goal of protecting workers by ensuring that money is available to pay them for the work they performed but for which they were undercompensated. Withholding plays an important role in the statutory schemes to ensure payment of prevailing wages and overtime to laborers and mechanics on Federal and federally assisted construction projects. The regulations currently require, among other things, that upon a request from the Department, contracting agencies must withhold so much of the contract funds as may be considered necessary to pay the full amount of wages required by the contract, and in the case of CWHSSA, liquidated damages. *See* 29 CFR 5.5(a)(2) and (b)(3) and 5.9. The Department proposes a number of regulatory revisions to reinforce the current withholding provisions.

(A) Cross-Withholding

Cross-withholding is currently permitted and is a procedure through which agencies withhold contract monies due a contractor from contracts other than those on which the alleged violations occurred. Prior to the 1981–1982 rulemaking, Federal agencies generally refrained from cross-withholding for DBRA liabilities because neither the DBA nor the CWHSSA regulations specifically provided for it. In 1982, however, the Department amended the contract clauses to specifically provide for cross-withholding. *See* 47 FR 23658, 23659–60 [121] (cross-withholding permitted as stated in § 5.5(a)(2) and (b)(3)); *Group Dir., Claims Grp./GGD,* B–225091 et al., 1987 WL 101454, at *2 (Comp. Gen. Feb. 20, 1987) (the Department's 1983 Davis-Bacon regulatory revisions, *e.g.,* § 5.5(a)(2), ''now provide that the contractor must consent to cross-withholding by an explicit clause in the contract'').

The Department proposes additional amendments to the cross-withholding contract clause language at § 5.5(a)(2) and (b)(3) to strengthen the Department's ability to cross-withhold when contractors use single-purpose entities, joint ventures or partnerships, or other similar vehicles to bid on and enter into DBRA-covered contracts. As noted above with reference to the proposed definition of prime contractor, the interposition of another entity between the agency and the general contractor is not a new phenomenon. In general, however, the use of single-purpose limited liability company (LLC) entities and similar joint ventures and teaming agreements in government contracting has been increasing in recent decades. *See, e.g.,* John W. Chierichella & Anne Bluth Perry, Fed. Publ'ns LLC, Teaming Agreements and Advanced Subcontracting Issues, TAASI GLASS–CLE A at *1–6 (2007); A. Paul Ingrao, Joint Ventures: Their Use in Federal Government Contracting, 20 Pub. Cont. L.J. 399 (1991).

In response to this increase in the use of such single-purpose legal entities or arrangements, Federal agencies have often required special provisions to assure that liability among joint venturers will be joint and several. *See, e.g.,* Ingrao, *supra,* at 402–03 (''Joint and several liability special provisions vary with each procuring agency and range from a single statement to complex provisions regarding joint and several liability to the government or third parties.''). While the corporate form may be a way for joint venturers to attempt to insulate themselves from liability, commentators have noted that this ''advantage will rarely be available in a Government contracts context, because the Government will customarily demand financial and performance guarantees from the parent companies as a condition of its 'responsibility' determination.'' Chierichella & Perry, *supra,* at *15–16.

Without amendment to the existing regulations, however, the Government is not able to effectively demand similar guarantees to secure performance of Davis-Bacon prevailing wage requirements. Unless the cross-withholding regulations are amended, the core DBRA remedy of cross-withholding may be of limited effectiveness as to joint ventures and other similar contracting vehicles such as single-purpose LLCs. This enforcement gap exists because, as a general matter, cross-withholding (referred to as ''offset'' under the common law) is not available unless there is a ''mutuality of debts'' in that the creditor and debtor involved are exactly the same person or legal entity. *See R.P. Newsom,* 39 Comp. Gen. 438, 439 (1959). That general rule, however, can be waived by agreement of the parties. *See Lila Hannebrink,* 48 Comp. Gen. 365, 365 (1968) (allowing cross-withholding against a joint venture for debt of an individual joint venturer on a prior contract, where all parties agreed).

The structure of the Davis-Bacon Act, with its implementation in part through the mechanism of contract clauses, provides both the opportunity and the responsibility of the Government to ensure—by contract—that the use of the corporate form does not interfere with Congress's mandate that workers be paid the required prevailing wage and that withholding ensures the payment of any back wages owed. It is a cardinal rule of law that ''the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.'' *Anderson* v. *Abbott,* 321 U.S. 349, 363 (1944). This principle is generally applied to allow, in appropriate circumstances, for corporate forms to be disregarded by ''piercing of corporate veil.'' [122] However, where a

[121] The May 28, 1982 final rule was implemented in part, including §§ 5.5(a)(2) and 5.5(b)(3), in 1983. 48 FR 19540, 19540, 19545–47 (Apr. 29, 1983).

[122] The Department has long applied corporate veil-piercing principles under the DBRA. *See, e.g., Thomas J. Clements, Inc.,* ALJ No. 82–DBA–27, Continued

policy is enacted by contract, it is inefficient and unnecessary to rely on post hoc veil-piercing to assure that the legislative policy is enacted. The Government can instead, by contract, assure that the use of single-purpose entities, subsidiaries, or joint ventures interposed as nominal ''prime contractors'' does not inhibit the application of the Congressional mandate to assure back wages are recovered through withholding.[123]

Accordingly, the Department proposes amending the withholding contract clauses at § 5.5(a)(2) and (b)(3) to ensure that any entity that directly enters into a contract covered by the DBRA must agree to cross-withholding against it to cover any violations of specified affiliates under *other* covered contracts entered into by those affiliates. The covered affiliates are those entities included within the proposed definition of prime contractor in § 5.2: Controlling shareholders or members, joint venturers or partners, and contractors (*e.g.,* general contractors) that have been delegated significant construction and/or compliance responsibilities. Thus, for example, if a general contractor secures two prime contracts for two Related Act-covered housing projects through separate single-purpose entities that it controls, the new cross-withholding language would allow the Department to seek cross-withholding on either contract even though the contracts are nominally with separate legal entities. Or, if a general contractor is delegated all of the construction and compliance duties on a first contract held by an unrelated developer-owner, but the general contractor itself holds a prime contract on a separate second contract, the Department could seek cross-withholding from the general contractor on the second contract, which it holds directly, to remedy violations on the first contract.

The Department also proposes to add language to § 5.5(a)(2) and (b)(3) to clarify that the Government may pursue cross-withholding regardless of whether the contract on which withholding is sought was awarded by, or received Federal assistance from, the same agency that awarded or assisted the prime contract on which the violations necessitating the withholding occurred. This revision is in accordance with the Department's longstanding policy, the current language of the withholding clauses, and case law on the use of setoff procedures in other contexts dating to 1946. *See, e.g., United States* v. *Maxwell,* 157 F.3d 1099, 1102 (7th Cir. 1998) (''[T]he [F]ederal [G]overnment is considered to be a single-entity that is entitled to set off one agency's debt to a party against that party's debt to another agency.''); *Cherry Cotton Mills* v. *United States,* 327 U.S. 536, 539 (1946) (same). However, because the current Davis-Bacon regulatory language does not explicitly state that funds may be withheld from contracts awarded by other agencies, some agencies have questioned whether cross-withholding is appropriate in such circumstances. This proposed addition would expressly dispel any such uncertainty or confusion. Conforming edits have also been proposed for § 5.9.

The Department also proposes certain non-substantive changes to streamline the withholding clauses. The Department proposes to include in the withholding clause at § 5.5(a)(2)(i) similar language as in the CWHSSA withholding clause at § 5.5(b)(3) authorizing withholding necessary ''to satisfy the liabilities . . . for the full amount of wages . . .and monetary relief'' of the contractor or subcontractor under the contract—instead of the specific language currently in § 5.5(a)(2) that re-states the lists of the types of covered employees already listed in § 5.5(a)(1)(i). The Department also proposes using the same term ''so much of the accrued payments or advances'' in both § 5.5(a)(2) and (b)(3), instead of simply ''sums'' as currently written in § 5.5(b)(3). Finally, the Department also proposes to adopt in § 5.5(b)(3) the use of the term ''considered,'' as used in § 5.5(a)(2), instead of ''determined'' as currently used in § 5.5(b)(3), to refer to the determination of the amount of funds to withhold, as this mechanism applies in the same manner under both clauses.

Conforming edits for each of the above changes to the withholding clauses at § 5.5(a)(2) and (b)(3) have also been proposed for the explanatory section at § 5.9. In addition, the Department proposes clarifying in a new paragraph (c) of § 5.9 that cross-withholding from a contract held by a different legal entity is not appropriate unless the withholding provisions in that entity's contract were incorporated in full or by reference. Absent exceptional circumstances, cross-withholding would not be permitted from a contract held by a different legal entity where the labor standards were incorporated only by operation of law into that contract.

(B) Suspension of Funds for Recordkeeping Violations

The Department also proposes to add language clarifying that, as proposed in § 5.5(a)(3)(iv), funds may be suspended when a contractor has refused to submit certified payroll or provide the required records as set forth at § 5.5(a)(3).

(C) The Department's Priority To Withheld Funds

The Department proposes revising §§ 5.5(a)(2) and (b)(3) and 5.9 to codify the Department's longstanding position that, consistent with the DBRA's remedial purpose to ensure that prevailing wages are fully paid to covered workers, the Department has priority to funds withheld (including funds that have been cross-withheld) for violations of Davis-Bacon prevailing wage requirements and CWHSSA overtime requirements. *See also* PWRB,[124] DBA/DBRA/CWHSSA Withholding and Disbursement, at 4. In order to ensure that underpaid workers receive the monies to which they are entitled, contract funds that are withheld to reimburse workers owed Davis-Bacon or CWHSSA wages, or both, must be reserved for that purpose and may not be used or set aside for other purposes until such time as the prevailing wage and overtime issues are resolved.

Affording the Department first priority to withheld funds, above competing claims, ''effectuate[s] the plain purpose of these Federal labor standards laws . . . [to] insure that every laborer and mechanic is paid the wages and fringe benefits to which [the DBA and DBRA] entitle them.'' *Quincy Hous. Auth. LaClair Corp.,* WAB No. 87–32, 1989 WL 407468, at *3 (Feb. 17, 1989) (holding that ''the Department of Labor has priority rights to all funds remaining to be paid on a [F]ederal or federally assisted contract, to the extent necessary to pay laborers and mechanics employed by contractors and subcontractors under such contract the full amount of wages required by [F]ederal labor standards laws and the contract . . .''). The proposed withholding priority serves an

1984 WL 161753, at *9 (June 14, 1984) (recognizing, in the context of a Davis-Bacon Act enforcement action, that a court may ''pierce the corporation veil where failure to do so will produce an unjust result''), *aff'd,* WAB No. 84–12, 1985 WL 167223, at *1 (Jan. 25, 1985) (adopting ALJ's decision as the Wage Appeals Board's own decision); *Griffin* v. *Sec'y of Labor,* ARB Nos. 00–032, 00–033, 2003 WL 21269140, at *8, n.2 (May 30, 2003) (various contractors and their common owner, who ''made all decisions regarding operations of all of the companies,'' were one another's ''alter egos'' in Act debarment action).

[123] *Cf.* Robert W. Hamilton, The Corporate Entity, 49 Tex. L. Rev. 979, 984 (1971) (noting the difference in application of ''piercing the veil'' concepts in contract law because ''the creditor more or less assumed the risk of loss when he dealt with a 'shell'; if he was concerned, he should have insisted that some solvent third person guarantee the performance by the corporation'').

[124] *See* note 14, *supra.*

important public policy of providing restitution for work that laborers and mechanics have already performed, but for which they were not paid the full DBA or DBRA wages they were owed in the first place.

Specifically, the Department proposes to set forth expressly that it has priority to funds withheld for DBA, CWHSSA, and other Related Act wage underpayments over competing claims to such withheld funds by:

(1) A contractor's surety(ies), including without limitation performance bond sureties, and payment bond sureties;

(2) A contracting agency for its reprocurement costs;

(3) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(4) A contractor's assignee(s);

(5) A contractor's successor(s); or

(6) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

To the extent that a contractor did not have rights to funds withheld for Davis-Bacon wage underpayments, nor do their sureties, assignees, successors, creditors (*e.g.,* the U.S. Internal Revenue Service), or bankruptcy estates have greater rights than the contractor. *See, e.g., Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861, at *7–9 (DOL priority to DBA withheld funds where surety ''ha[d] not satisfied all of the bonded [and defaulted prime] contractor's obligations, including the obligation to ensure the payment of prevailing wages''); *Unity Bank & Trust Co.* v. *United States,* 5 Cl. Ct. 380, 384 (1984) (assignees acquire no greater rights than their assignors); *Richard T. D'Ambrosia,* 55 Comp. Gen. 744, 746 (1976) (IRS tax levy cannot attach to money withheld for DBA underpayments in which contractor has no interest).

Withheld funds always should, for example, be used to satisfy DBA and DBRA wage claims before any reprocurement costs (*e.g.,* following a contractor's default or termination from all or part of the covered work) are collected by the Government. *See* WHD Opinion Letter DBRA–132 (May 8, 1985). The Department has explained that ''[t]o hold otherwise . . . would be inequitable and contrary to public policy since the affected employees already have performed work from which the Government has received the benefit and that to give contracting agency reprocurement claims priority in such instances would essentially require the employees to unfairly pay for the breach of contract between their employer and the Government.'' *Id.; see also* PWRB, DBA/DBRA/CWHSSA Withholding and Disbursement, at 4.[125] This rationale applies with equal force in support of the Department's priority to withheld funds over the other types of competing claims listed in this proposed regulation.

The Department's rights to withheld funds for unpaid earnings also are superior to performance and payment bond sureties of a DBA or DBRA contractor. *See Westchester Fire Ins. Co.* v. *United States,* 52 Fed. Cl. 567, 581–82 (2002) (surety did not acquire rights that contractor itself did not have); *Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861 at *7–9 (ARB found that Administrator's claim to withheld contract funds for DBA wages took priority over performance (and payment) bond surety's claim); *see also Quincy Hous. Auth. LaClair Corp.,* WAB No. 87–32, 1989 WL 407468, at *3. The Department can withhold unaccrued funds such as advances until ''sufficient funds are withheld to compensate employees for the wages to which they are entitled'' under the DBA. *Liberty Mut. Ins. Co.,* ARB No. 00–018, 2003 WL 21499861, at *6; *see also* 29 CFR 5.9.

Similarly, the Department has priority over assignees (*e.g.,* assignees under the Assignment Claims Act, *see* 31 U.S.C. 3727, 41 U.S.C. 6305) to DBRA withheld funds. For example, in *Unity Bank & Trust Co.,* 5 Cl. Ct. at 383, the employees' claim to withheld funds for a subcontractor's DBA wage underpayments had priority over a claim to those funds by the assignee—a bank that had lent money to the subcontractor to finance the work.

Nor are funds withheld pursuant to the DBRA for prevailing wage underpayments property of a contractor's (debtor's) bankruptcy estate. *See In re Quinta Contractors, Inc.,* 34 B.R. 129 (Bankr. M.D. Pa. 1983); *cf. Pearlman* v. *Reliance Ins. Co.,* 371 U.S. 132, 135–36 (1962) (concluding, in a case under the Miller Act, that ''the Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors''). When a contractor has violated its contract with the government—as well as the DBA or DBRA—by failing to pay required wages and fringe benefits, it has not earned its contractual payment. Therefore, withheld funds are not property of the contractor-debtor's bankruptcy estate. *Cf. Professional Tech. Servs., Inc.* v. *IRS,* No. 87–780C(2), 1987 WL 47833, at *2 (E.D. Mo. Oct. 15, 1987) (when DOL finds [an SCA] violation and issues a withholding letter, that act ''extinguishe[s]'' whatever property right the debtor (contractor) might otherwise have had to the withheld funds, subject to administrative review if the contractor chooses to pursue it); *In re Frank Mossa Trucking, Inc.,* 65 B.R. 715, 7–18 (Bankr. D. Mass. 1985) (pre-petition and post-petition SCA withholding was not property of the contractor-debtor's bankruptcy estate).

Various Comptroller General decisions further underscore these principles. *See, e.g., Carlson Plumbing & Heating,* B–216549, 1984 WL 47039 (Comp. Gen. Dec. 5, 1984) (DBA and CWHSSA withholding has first priority over IRS tax levy, payment bond surety, and trustee in bankruptcy); *Watervliet Arsenal,* B–214905, 1984 WL 44226, at *2 (Comp. Gen. May 15, 1984) (DBA and CWHSSA wage claims for the benefit of unpaid workers had first priority to retained contract funds, over IRS tax claim and claim of payment bond surety), *aff'd sub nom on reconsideration Int'l Fidelity Ins. Co.,* B–214905, 1984 WL 46318 (Comp. Gen. July 10, 1984); *Forest Serv. Request for Advance Decision,* B–211539, 1983 WL 27408, at *1 (Comp. Gen. Sept. 26, 1983) (DOL's withholding claim for unpaid DBA wages prevailed over claims of payment bond surety and trustee in bankruptcy).

The Department proposes codifying its position that DBRA withholding has priority over claims under the Prompt Payment Act, 31 U.S.C. 3901–3907. The basis for this proposed provision is that a contractor's right to prompt payment does not have priority over legitimate claims—such as withholding—arising from the contractor's failure to fully satisfy its obligations under the contract. *See, e.g.,* 31 U.S.C. 3905(a) (concerning requirement that payments to prime contractors be for performance by such contractor that conforms to the specifications, terms, and conditions of its contract).

The Department welcomes comments on whether the listed priorities should be effectuated by different language in the contract clause, such as an agreement between the parties that a contractor forfeits any legal or equitable interest in withheld payments once it commits violations, subject to procedural requirements that allow the contractor to contest the violations.

xxiv. Subpart C—Severability

The Department proposes to add a new subpart C, titled ''Severability'', which would contain a new § 5.40, also titled ''Severability.'' The proposed severability provision explains that each provision is capable of operating independently from one another, and

[125] *See* note 14, *supra.*

that if any provision of part 5 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intends that the remaining provisions remain in effect.

4. Non-Substantive Changes

xxv. Plain Language

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner. The Department has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885). The Department requests comment on the proposed rule with respect to clarity and effectiveness of the language used.

xxvi. Other Changes

The Department proposes to make non-substantive revisions throughout the regulations to address typographical and grammatical errors and to remove or update outdated or incorrect regulatory and statutory cross-references. The Department also proposes to adopt more inclusive language, including terminology that is gender-neutral, in the proposed regulations. These changes are consistent with general practice for Federal government publications; for example, guidance from the Office of the Federal Register advises agencies to avoid using gender-specific job titles (*e.g.,* ''foremen'').[126] These non-substantive revisions do not alter the substantive requirements of the regulations.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

This rulemaking would affect existing information collection requirements previously approved under OMB control number 1235–0008 (Davis-Bacon Certified Payroll) and OMB control number 1235–0023 (Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts/Contract Work Hours and Safety Standards Act). As required by the PRA, the Department has submitted information collection revisions to OMB for review to reflect changes that will result from the proposed rule.

Summary: This rulemaking proposes to amend regulations issued under the Davis-Bacon and Related Acts that set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects. The Department proposes to add two new recordkeeping requirements (telephone number and email address) to the collection under 1235–0008; however, it does not propose that such data be added to the certified weekly payroll submission. The Department proposes to add paragraph (a)(3)(iii) to 29 CFR 5.5, which will require all contractors, subcontractors, and recipients of Federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed. These related documents include contractor and subcontractor bids and proposals, amendments, modifications, and extensions to contracts, subcontracts, and agreements. The Department notes that it is a normal business practice to keep such documents and does not expect an increase in burden associated with this requirement. The Department requests public comment on its assumption that contractors and subcontractors already maintain these records as a matter of good business practice. Further, the Department adds proposed regulatory citations to the collection under 1235–0023, however there is no change in burden.

Purpose and use: This proposed rule continues the already existing requirements that contractors and subcontractors must certify their payrolls by attesting that persons performing work on DBRA covered contracts have received the proper payment of wages and fringe benefits. Contracting officials and WHD personnel use the records and certified payrolls to verify contractors pay the required rates for work performed.

Additionally, the Department reviews a proposed conformance action report to determine the appropriateness of a conformance action. Upon completion of review, the Department approves, modifies, or disapproves a conformance request and issues a determination. The Department also reviews requests for approval of unfunded fringe benefit plans to determine the propriety of the plans.

WHD obtains PRA clearance under control number 1235–0008 for an information collection covering the Davis-Bacon Certified Payroll and certain proposed new recordkeeping requirements. An Information Collection Request has been submitted to revise the approval to incorporate the regulatory citations in this proposed rule applicable to the proposed rule and adjust burden estimates to reflect a slight increase in burden associated with the proposed new recordkeeping requirements.

WHD obtains PRA clearance under OMB control number 1235–0023 for an information collection related to reporting requirements related to Conformance Reports and Unfunded Fringe Benefit Plans. This Information Collection Request is being submitted as the proposed rule proposes to revise the location within the regulatory text of certain requirements. An Information Collection Request has been submitted to OMB to revise the approval to incorporate the regulatory citations in this proposed rule.

Information and technology: There is no particular order or form of records prescribed by the proposed regulations. A respondent may meet the requirements of this proposed rule using paper or electronic means.

Public comments: The Department seeks comments on its analysis that this NPRM creates a slight increase in paperwork burden associated with ICR 1235–0008 and no increase in burden to ICR 1235–0023. Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to the NPRM as a whole (*e.g.,* through the *www.regulations.gov* website), including as part of a comment responding to the broader NPRM. While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the full copy of the supporting statements by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by calling the number listed in the **ADDRESSES** section of this preamble. Alternatively, a copy of the ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated

[126] See Office of the Federal Register, Drafting Legal Documents: Principles of Clear Writing § 18, available at *https://www.archives.gov/Federal-register/write/legal-docs/clear-writing.html.*

total burden may be obtained free of charge from the *RegInfo.gov* website on the day following publication of this notice or by visiting *http://www.reginfo.gov/public/do/PRAMain* website. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for WHD, New Executive Office Building, Room 10235, Washington, DC 20503. The OMB will consider all written comments that the agency receives during the comment period of this proposed rule. As previously indicated, written comments directed to the Department may be submitted during the comment period of this proposed rule.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are 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;
- Enhance the quality, utility, and clarity of the information to be collected; 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.

Total burden for the subject information collections, including the burdens that will be unaffected by this proposed rule and any changes are summarized as follows:

Type of review: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Davis-Bacon Certified Payroll.

OMB Control Number: 1235–0008.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 154,500 (0 from this rulemaking).

Estimated number of responses: 9,194,616 (1,200,000 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 7,464,975 (3,333 burden hours due to this NPRM).

Capital/Start-up costs: $0 ($0 from this rulemaking).

Title: Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act.

OMB Control Number: 1235–0023.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 8,518 (0 from this rulemaking).

Estimated number of responses: 8,518 (0 from this rulemaking).

Frequency of response: on occasion.

Estimated annual burden hours: 2,143 (0 from this rulemaking).

Estimated annual burden costs: 0.

V. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[127] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) create 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 the Executive Order. OIRA has determined that this proposed rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and is economically significant. Although the Department has only quantified costs of $12.6 million in Year 1, there are multiple components of the rule that could not be quantified due to data limitations, so it is possible that the aggregate effect of the rule is larger.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

1. Background and Need for Rulemaking

In order to provide greater clarity and enhance their usefulness in the modern economy, the Department proposes to update and modernize the regulations that implement the Davis-Bacon and Related Acts. The Davis-Bacon Act (DBA), enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. *See* 40 U.S.C. 3142. The law applies to workers on contracts awarded directly by Federal agencies and the District of Columbia that are in excess of $2,000 and for the construction, alteration, or repair of public buildings or public works. Congress subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as Related Acts) under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods.

The Department seeks to address a number of outstanding challenges in the program while also providing greater clarity in the DBA and Related Acts (collectively, the DBRA) regulations and enhancing their usefulness in the modern economy. In this rulemaking, the Department proposes to update and modernize the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. Among other proposals as discussed more fully earlier in this preamble, the Department proposes:

- To return to the definition of ''prevailing wage'' in § 1.2 that it used

[127] *See* 58 FR 51735, 51741 (Oct. 4, 1993).

from 1935 to 1983.[128] Currently, a single wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise a weighted average is used. The Department proposes to return instead to the ''three-step'' method in effect before 1983. Under that method (also known as the 30-percent rule), in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if was paid to at least 30 percent of such workers. Only if no single wage rate is paid to at least 30 percent of workers in a classification will an average rate be used.

- To revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index. The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing wage rates in the area.
- To expressly give the Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied.
- To return to a prior policy made during the 1981–1982 rulemaking related to the delineation of wage survey data submitted for ''metropolitan'' or ''rural'' counties in § 1.7(b). Through this change, the Department seeks to more accurately reflect modern labor force realities, to allow more wage rates to be determined at smaller levels of geographical aggregation, and to increase the sufficiency of data at the statewide level.
- To include provisions to reduce the need for the use of ''conformances'' where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome for contracting agencies, contractors, and the Department.
- To strengthen enforcement, including by making effective by operation of law contract clauses or wage determinations that were wrongly omitted from contracts, and by codifying the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers also work on private projects.
- To clarify and strengthen the scope of coverage under the DBRA, including by revising the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards, and to clarify that the regulatory definitions of ''building or work'' and ''public building or public work'' can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

2. Summary of Affected Contractors, Workers, Costs, Transfers, and Benefits

The Department evaluates the impacts of two components of this proposed rule in this regulatory impact analysis:

- The return to the ''three-step'' method for determining the prevailing wage and
- The provision of a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index.

This proposed rule predominantly affects firms that hold federally funded or assisted construction contracts because of its impact on prevailing wage and fringe benefit rate determinations. The Department identified a range of potentially affected firms. The more narrowly defined population (those actively holding DBRA-covered contracts) includes 113,900 firms. The broader population (including those bidding on contracts but without active contracts, or those considering bidding in the future) includes 154,800 firms. Only a subset of potentially affected firms will be substantively affected and fewer may experience a change in payroll costs because some firms already pay above the prevailing wage rates that may result from this proposal. The Department estimated there are 1.2 million workers on DBRA covered contracts and therefore potentially affected by this proposed rule. Some of these workers will not be affected because they work in occupations not covered by DBRA or, if they are covered by DBRA, workers may not be affected by the prevailing wage updates of this proposed rule because they may already earn above the updated prevailing wage and fringe benefit rates.

The Department estimated both regulatory familiarization costs and implementation costs for affected firms. Year 1 costs are estimated to total $12.6 million. Average annualized costs across the first 10 years are estimated to be $3.9 million (using a 7 percent discount rate). The transfer analysis discussed in Section IV.D. draws on two illustrative analyses conducted by the Department. However, the Department does not definitively quantify annual transfer payments due to data limitations and uncertainty. Similarly, benefits are discussed qualitatively due to data limitations and uncertainty. See Table 1 for a summary of affected contractor firms, workers, and costs.

TABLE 1—SUMMARY OF AFFECTED CONTRACTOR FIRMS, WORKERS, AND COSTS

[2020 dollars]

	Year 1	Future years		Average annualized value	
		Year 2	Year 10	3% real rate	7% real rate
Firms: Narrow Definition[a]	154,500	154,500	154,500		
Firms: Broad Definition[b]	192,400	192,400	192,400		
Potentially Affected Workers (millions)	1.2	1.2	1.2		
Direct employer costs (million)	$12.6	$2.5	$2.5	$3.7	$3.9
Regulatory familiarization	$10.1	$0.0	$0.0	1.2	1.4
Implementation	$2.5	$2.5	$2.5	2.5	2.5

[a] Firms actively holding DBRA-covered contracts.
[b] Firms who may be bidding on DBA contracts or considering bidding in the future.

[128] The 1981–1982 rulemaking went into effect April 29, 1983. 48 FR 19532.

B. Number of Potentially Affected Contractor Firms and Workers

1. Number of Potentially Affected Contractor Firms

The Department identified a range of potentially affected firms. This includes both firms impacted by the DBA and firms impacted by the Related Acts. The more narrowly defined population (firms actively holding DBRA-covered contracts) includes 154,500 firms: 61,200 Impacted by DBA and 93,300 impacted by the Related Acts (Table 2). The broader population (including those bidding on DBA contracts but without active contracts, or those considering bidding in the future) includes 192,400 firms: 99,100 Impacted by DBA and 93,300 impacted by the Related Acts. Additionally, only a subset of these firms will experience a change in payroll costs. Those firms that already pay above the new wage determination rates calculated under the 30-percent rule will not be substantively affected. Because there is no readily usable source of data on the earnings of workers of these affected firms, the Department cannot definitively identify the number of firms that will experience changes in payroll costs due to changes in prevailing wage rates.

i. Firms Currently Holding DBA Contracts

USASpending.gov—the official source for spending data for the U.S. Government—contains Government award data from the Federal Procurement Data System Next Generation (FPDS–NG), which is the system of record for Federal procurement data. The Department used these data to identify the number of firms that currently hold DBA contracts. Although more recent data are available, the Department used data from 2019 to avoid any shifts in the data associated with the COVID–19 pandemic in 2020. Any long-run impacts of COVID–19 are speculative because this is an unprecedented situation, so using data from 2019 may be the best approximation the Department has for future impacts. The pandemic could cause structural changes to the economy, resulting in shifts in industry employment and wages. The Department welcomes comments and data on how the COVID–19 pandemic has impacted firms and workers on DBRA contracts, as well as the impact on construction and other affected industries as a whole.

The Department identified firms working on DBRA contracts as contracts with an assigned NAICS code of 23 or if the ''Construction Wage Rate Requirements'' element is ''Y,'' meaning that the contracting agency flagged that the contract is covered by DBRA.[129] [130] The Department also excluded (1) contracts for financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S. because DBA coverage is limited to the 50 states, the District of Columbia, and the U.S. territories.[131]

In 2019, there were 14,000 unique prime contractors with active construction contracts in USASpending. However, subcontractors are also impacted by this proposed rule. The Department examined 5 years of USASpending data (2015 through 2019) and identified 47,200 unique subcontractors who did not hold contracts as primes in 2019. The Department used 5 years of data for the count of subcontractors to compensate for lower-tier subcontractors that may not be included in *USASpending.gov*. In total, the Department estimates 61,200 firms currently hold DBA contracts and are potentially affected by this rulemaking under the narrow definition; however, to the extent that any of these firms already pay above the prevailing wage rates as determined under this proposed rule they will not actually be impacted by the rule.

ii. All Potentially Affected Contractors (DBA Only)

The Department also cast a wider net to identify other potentially affected contractors, both those directly affected (*i.e.,* holding contracts) and those that plan to bid on DBA-covered contracts in the future. To determine the number of these firms, the Department identified construction firms registered in the General Services Administration's (GSA) System for Award Management (SAM) since all entities bidding on Federal procurement contracts or grants must register in SAM. The Department believes that firms registered in SAM represent those that may be affected if the proposed rulemaking impacts their decision to bid on contracts or their competitiveness in the bidding process. However, it is possible that some firms that are not already registered in SAM could decide to bid on DBA-covered contracts after this proposed rulemaking; these firms are not included in the Department's estimate. The proposed rule could also impact them if they are awarded a future contract.

Using May 2021 SAM data, the Department identified 51,900 registered firms with construction listed as the primary NAICS code.[132] The Department excluded firms with expired registrations, firms only applying for grants,[133] government entities (such as city or county governments),[134] foreign organizations, and companies that only sell products and do not provide services. SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, the Department is unable to determine the number of subcontractors that are not in the SAM database. Therefore, the Department added the subcontractors identified in USASpending to this estimate. Adding these 47,200 firms identified in USASpending to the number of firms in SAM, results in 99,100 potentially affected firms.

iii. Firms Impacted by the Related Acts

USASpending does not adequately capture all work performed under the Related Acts. Additionally, there is not a central database, such as SAM, where contractors working on Related Acts contracts must register. Therefore, the Department used a different methodology to estimate the number of firms impacted by the Related Acts. The Department estimated 883,900 workers work on Related Acts contracts (see section V.B.2.iii.), then divided that number by the average number of workers per firm (9.5) in the

[129] The North American Industry Classification System (NAICS) is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a sequence of codes ranging from 2 digits (most aggregated level) to 6 digits (most granular level). *https://www.census.gov/naics/.*

[130] The Department acknowledges that there may be affected firms that fall under other NAICS codes and for which the contracting agency did not flag in the FPDS–NG system that the contract is covered by DBRA. Including these additional NAICS codes could result in an overestimate because they would only be affected by this proposed rule if Davis-Bacon covered construction occurs. The data does not allow the Department to determine this.

[131] The DBA only applies in the 50 states and the District of Columbia and does not apply in the territories. However, some Related Acts provided Federal funding of construction in the territories that, by virtue of the Related Act, is subject to DBA prevailing wage requirements. For example, the DBA does not apply in Guam, but a Related Act provides that base realignment construction in Guam is subject to DBA requirements.

[132] Data released in monthly files. Available at: *https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf.*

[133] Entities registering in SAM are asked if they wish to bid on contracts. If the firm answers ''yes,'' then they are included as ''All Awards'' in the ''Purpose of Registration'' column in the SAM data. The Department included only firms with a value of ''Z2,'' which denotes ''All Awards.''

[134] The Department believes that there may be certain limited circumstances in which State and local governments may be contractors, but believes that this number would be minimal and including government entities would result in an inappropriate overestimation.

construction industry.[135] This results in 93,300 firms. Some of these firms likely also perform work on DBA contracts. However, because the Department has no information on the size of this overlap, the Department has assumed all are unique firms. The Department welcomes comments and data on the number of firms working on Related Acts contracts.

TABLE 2—RANGE OF NUMBER OF POTENTIALLY AFFECTED FIRMS

Source	Number
Total Count (Davis-Bacon and Related Acts)	
Narrow definition [a]	154,500
Broad definition [b]	192,400
DBA (Narrow Definition)	
Total	61,200
Prime contractors from USASpending	14,000
Subcontractors from USASpending	47,200
DBA (Broad Definition)	
Total	99,100
SAM	51,900
Subcontractors from USASpending	47,200
Related Acts	
Total	93,300
Related Acts workers	883,900
Employees per firm (SUSB)	9.5

[a] Firms actively holding DBRA-covered contracts.
[b] Firms who may be bidding on DBA contracts or considering bidding in the future.

2. Number of Potentially Affected Workers

There are no readily available government data on the number of workers working on DBA contracts; therefore, to estimate the number of these workers, the Department employed the approach used in the 2021 final rule, ''Increasing the Minimum Wage for Federal Contractors,'' which implements Executive Order 14026.[136] That methodology is based on the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements, which contained an updated version of the methodology used in the 2014 rulemaking for Executive Order 13658.[137] Using this methodology, the Department estimated the number of workers who work on DBRA contracts, representing the number of ''potentially affected workers,'' is 1.2 million potentially affected workers. Some of these workers will not be affected because while they work on DBRA-covered contracts they are not in occupations covered by the DBRA prevailing wage determinations (*e.g.,* laborers or mechanics).

The Department estimated the number of potentially affected workers in three parts. First, the Department estimated employees and self-employed workers working on DBA contracts in the 50 States and the District of Columbia. Second, the Department estimated the number of workers and self-employed DBRA workers in the U.S. territories. Third, the Department estimated the number of potentially affected workers working on contracts covered by Davis-Bacon Related Acts.

i. Workers on DBA Contracts in the 50 States and the District of Columbia

DBA contract employees were estimated by calculating the ratio of Federal contracting expenditures to total output in NAICS 23: Construction. Total output is the market value of the goods and services produced by an industry. This ratio is then applied to total private employment in that industry (Table 3).

$$Potentially\ Affected\ Employees = \frac{Expenditures}{Total\ Output} \times Employment$$

The Department used Federal contracting expenditures from *USASpending.gov* data excluding (1) financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S.

To determine the share of all output associated with Federal Government contracts, the Department divided contracting expenditures by gross output in NAICS 23.[138] This results in an estimated 3.27 percent of output in

[135] 2018 Statistics of U.S. Businesses (SUSB). U.S., NAICS sectors, larger employment sizes up to 20,000+. *https://www.census.gov/data/tables/2018/econ/susb/2018-susb-annual.html.*

[136] *See* 86 FR 38816, 38816–38898.

[137] *See* 81 FR 9591, 9591–9671 and 79 FR 60634–60733.

[138] Bureau of Economic Analysis. (2020). Table 8. Gross Output by Industry Group. *https://www.bea.gov/news/2020/gross-domestic-product-industry-fourth-quarter-and-year-2019.* ''Gross output of an industry is the market value of the goods and services produced by an industry, including commodity taxes. The components of gross output include sales or receipts and other operating income, commodity taxes, plus inventory change. Gross output differs from value added, which measures the contribution of the industry's labor and capital to its gross output.''

the construction industry covered by Federal Government contracts (Table 3). The Department then multiplied the ratio of covered-to-gross output by private sector employment in the construction industry (9.1 million) to estimate the share of employees working on covered contracts. The Department's private sector employment number is primarily comprised of construction industry employment from the May 2019 Occupational Employment and Wage Statistics (OEWS), formerly the Occupational Employment Statistics.[139] However, the OEWS excludes unincorporated self-employed workers, so the Department supplemented OEWS data with data from the 2019 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) to include unincorporated self-employed in the estimate of workers.

According to this methodology, the Department estimated there are 297,900 workers on DBA covered contracts in the 50 States and the District of Columbia. However, these laws only apply to wages for mechanics and laborers, so some of these workers would not be affected by these changes to DBA.

This methodology represents the number of year-round-equivalent potentially affected workers who work exclusively on DBA contracts. Thus, when the Department refers to potentially affected employees in this analysis, the Department is referring to this conceptual number of people working exclusively on covered contracts. The total number of potentially affected mechanics and laborers will likely exceed this number because affected workers likely do not work exclusively on DBA contracts.

ii. Workers on DBRA Contracts in the U.S. Territories

The methodology to estimate potentially affected workers in the U.S. territories is similar to the methodology above for the 50 States and the District of Columbia. The primary difference is that data on gross output in the territories are not available, and so the Department had to make some additional assumptions. The Department approximated gross output in the territories by calculating the ratio of gross output to Gross Domestic Product (GDP) for the U.S. (1.8), then multiplying that ratio by GDP in each territory to estimate total gross output.[140] To limit gross output to the construction industry, the Department multiplied it by the share of the territory's payroll in NAICS 23. For example, the Department estimated that Puerto Rico's gross output in the construction industry totaled $3.6 billion.[141]

The rest of the methodology follows the methodology for the 50 States and the District of Columbia. To determine the share of all output associated with Government contracts, the Department divided contract expenditures by gross output. Federal contracting expenditures from USASpending.gov data show that the Government spent $993.3 million on construction contracts in 2019 in American Samoa, the Commonwealth of the Northern Mariana Islands Guam, Puerto Rico, and the U.S. Virgin Islands. The Department then multiplied the ratio of covered contract spending to gross output by private sector employment to estimate the number of workers working on covered contracts (6,100).[142]

iii. Workers on Related Acts Contracts

This proposed rulemaking will also impact workers on DBRA-covered contracts in the 50 States and the District of Columbia. Data are not available on the number of workers covered by the Related Acts. Additionally, neither USASpending nor any other database fully captures this population.[143] Therefore, the Department used a different approach to estimate the number of potentially affected workers for DBRA contracts.

The Department identified that the total State and local government construction spending as reported by the Census Bureau was $318 billion in 2019.[144] The Department then applied adjustment factors to adjust for the share of State and local expenditures that are covered by the Related Acts. Data on the share of State and local expenditures covered by the Related Acts are not available, therefore the Department used rough approximations. The Department requests comments and data on the appropriate adjustment factors. The Department assumed half of the total State and local government construction expenditures are subject to a DBRA, resulting in estimated expenditures of $158 billion. To this, the Department added $3 billion to represent U.S. Department of Housing and Urban Development (HUD) backed mortgage insurance for private construction projects.[145]

As was done for DBA, the Department divided contracting expenditures by gross output, and multiplied that ratio by the estimate of private sector employment used above to estimate the share of workers working on Related Acts-covered contracts (883,900).

TABLE 3—NUMBER OF POTENTIALLY AFFECTED WORKERS

	Private output (billions) [a]	Contracting output (millions) [b]	Share output from covered contracting	Private-sector workers (1,000s) [c]	Workers DBRA contracts (1,000s) [d]
DBA, excl. territories	$1,662	$54,400	3.27%	9,100	297.9
DBRA, territories	5	993	([e])	35	6.1
Related Acts	1,667	161,297	9.68%	9,135	883.9

[139] Bureau of Labor Statistics. OEWS. May 2019. Available at: *http://www.bls.gov/oes/.*

[140] GDP limited to personal consumption expenditures and gross private domestic investment.

[141] In Puerto Rico, personal consumption expenditures plus gross private domestic investment equaled $71.2 billion. Therefore, Puerto Rico gross output was calculated as $71.2 billion × 1.8 × 2.7 percent.

[142] For the U.S. territories, the unincorporated self-employed are excluded because CPS data are not available on the number of unincorporated self-employed workers in U.S. territories.

[143] USASpending includes information on grants, assistance, and loans provided by the Federal government. However, this does not include all covered projects, it does not capture the full value of the project because it is just the Federal share (*i.e.,* excludes spending by State and local governments or private institutions that are also subject to DBRA labor standards because of the Federal share on the project), and it cannot easily be restricted to construction projects because there is no NAICS or product service code (PSC) variable.

[144] Census Bureau. Annual Value of Public Construction Put in Place 2009–2020. Available at: *https://www.census.gov/construction/c30/historical_data.html.*

[145] Estimate based on personal communications with the Office of Labor Standards Enforcement and Economic Opportunity at HUD.

TABLE 3—NUMBER OF POTENTIALLY AFFECTED WORKERS—Continued

	Private output (billions) [a]	Contracting output (millions) [b]	Share output from covered contracting	Private-sector workers (1,000s) [c]	Workers DBRA contracts (1,000s) [d]
Total	.....	216,700	.....	.....	1,188.0

[a] Bureau of Economic Analysis, NIPA Tables, Gross output. 2019. For territories, gross output estimated by multiplying (1) total GDP for the territory by the ratio of total gross output to total GDP for the U.S. and (2) the share of national gross output in the construction industry.
[b] For DBA, and DBRA in the territories, data from *USASpending.gov* for contracting expenditures for covered contracts in 2019. For Related Acts, data from Census Bureau on value of State and local government construction put in place, adjusted for coverage ratios. The Census data includes some data for territories but may be underestimated.
[c] OEWS May 2019. For non-territories, also includes unincorporated self-employed workers from the 2019 CPS MORG.
[d] Assumes share of expenditures on contracting is same as share of employment. Assumes workers work exclusively, year-round on DBRA covered contracts.
[e] Varies by U.S. Territory.

3. Demographics of the Construction Industry

In order to provide information on the types of workers that may be affected by this rule, the Department presents demographic characteristics of production workers in the construction industry. For purposes of this demographic analysis only, the Department is defining the construction industry as workers in the following occupations:

- Construction and extraction occupations
- Installation, maintenance, and repair occupations
- Production occupations
- Transportation and material moving occupations

The Department notes that the demographic characteristics of workers on DBRA projects may differ from the general construction industry; however, data on the demographics of workers on DBRA projects is unavailable. Demographics of the general workforce are also presented for comparison. The Department welcomes comments and data on how the demographics of workers on DBRA projects would differ from the demographics of workers in the construction industry as a whole. Tabulated numbers are based on 2019 CPS data for consistency with the rest of the analysis and to avoid potential impacts of COVID–19. Additional information on the demographics of workers in the construction industry can be found in *The Construction Chart Book: The U.S. Construction Industry and Its Workers.*[146]

The vast majority of workers in the construction industry are men, 97 percent (Table 4), which is significantly higher than the general workforce where 53 percent are men. Workers in construction are also significantly more likely to be Hispanic than the general workforce; 38 percent of construction workers are Hispanic, compared with 18 percent of the workforce. Lastly, while many construction workers may have completed registered apprenticeship programs 84 percent of workers in the construction industry have a high school diploma or less, compared with 54 percent of the general workforce.

TABLE 4—DEMOGRAPHICS OF WORKERS IN THE CONSTRUCTION INDUSTRY

	Production workers in construction	Total workforce (%)
By Region		
Northeast	16.4	17.9
Midwest	16.4	21.9
South	41.7	36.9
West	25.5	23.3
By Sex		
Male	97.1	53.4
Female	2.9	46.6
By Race		
White only	87.1	77.2
Black only	7.5	12.4
All others	5.4	10.4
By Ethnicity		
Hispanic	38.0	18.1
Not Hispanic	62.0	81.9

[146] Dong, Xiuwen, Xuanwen Wang, Rebecca Katz, Gavin West, and Bruce Lippy. *The Construction Chart Book: The U.S. Construction Industry and Its Workers,* 6th ed. Silver Spring: CPWR-The Center for Construction Research and Training, 2018, 18. *https://www.cpwr.com/wp-content/uploads/publications/The_6th_Edition_Construction_eChart_Book.pdf.*

TABLE 4—DEMOGRAPHICS OF WORKERS IN THE CONSTRUCTION INDUSTRY—Continued

	Production workers in construction	Total workforce (%)
By Race and Ethnicity		
White only, Not Hispanic	52.2	61.1
Black only, Not Hispanic	6.2	11.6
By Age		
16–25	15.2	16.7
26–55	71.6	64.2
56+	13.3	19.1
By Education		
No degree	23.0	8.9
High school diploma	60.6	45.3
Associate's degree	9.3	10.7
Bachelor's degree or advanced	7.2	35.1

Note: CPS data for 2019.

The Department has also presented some demographic data on Registered Apprentices, as they are the pipeline for future construction workers. These demographics come from Federal Workload data, which covers the 25 states administered by the U.S. Department of Labor's Office of Apprenticeship and national registered apprenticeship programs.[147] Note that this data includes apprenticeships for other industries beyond construction, but 68 percent of the active apprentices are in the construction industry, so the Department believes this data could be representative of that industry. Of the active apprentices in this data set, 9.1 percent are female and 90.9 percent are male. The data show that 58.4 percent of active apprentices are White, 10.5 percent are Black or African American, 2.4 percent are American Indian or Alaska Native, 1.5 percent are Asian, and 0.8 percent are Native Hawaiian or Other Pacific Islander. The data also show that 23.6 percent of active apprentices are Hispanic.

C. Costs of the Proposed Rule

This section quantifies direct employer costs associated with the proposed rule. The Department considered employer costs associated with both (a) the return to the ''three-step'' method for determining the prevailing wage (*i.e.,* the change from a 50 percent threshold to a 30 percent threshold) and (b) the incorporation of a mechanism to periodically update certain non-collectively bargained prevailing wage rates. Costs presented are combined for both provisions. However, the Department believes most of the costs will be associated with the second provision, as will be discussed below. The Department estimated both regulatory familiarization costs and implementation costs. Year 1 costs are estimated to total $12.6 million. Average annualized costs across the first 10 years of implementation are estimated to be $3.9 million (using a 7 percent discount rate). Transfers resulting from these provisions are discussed in section V.D.

1. Regulatory Familiarization Costs

The proposed rule will impose direct costs on some covered contractors who will review the regulations to understand how the prevailing wage determination methodology will change and how certain non-collectively bargained rates will be periodically updated. However, the Department believes these time costs will be small. Firms are simply required to pay no less than the prevailing wage and fringe benefit rates set forth in the wage determinations applicable to their covered contracts; they do not need to familiarize themselves with the methodology used to develop those prevailing wage rates in order to comply with them. Costs associated with ensuring compliance are included as implementation costs.

For this analysis, the Department has included all firms who either hold DBA or Related Acts contracts or who are considering bidding on work (192,400 firms). However, this may be an overestimate, because firms who are registered in SAM might not bid on a DBA contract, and therefore may not review these regulations. The Department assumes that, on average, 1 hour of a human resources staff member's time will be spent reviewing the rulemaking. Some firms will spend more time reviewing the rule, but others will spend less or no time reviewing the rule. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of $52.65 per hour.[148] Therefore, the Department has estimated regulatory familiarization costs to be $10.1 million ($52.65 per hour × 1.0 hour × 192,400 contractors) (Table 5). The Department has included all regulatory familiarization costs in Year 1. New entrants will not incur any additional regulatory familiarization costs attributable to this rule; had this rule not been proposed, they still would have incurred the costs of regulatory familiarization with existing provisions. Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are $1.4 million.

2. Implementation Costs

Firms will incur costs associated with implementing updated prevailing wage rates. When preparing a bid on a DBRA-covered contract, the contractor must review the wage determination identified by the contracting agency as appropriate for the work and determine the wage rates applicable for each occupation or classification to perform work on the contract. Once that contract

[147] FY2019 Data and Statistics, U.S. Department of Labor, Office of Apprenticeship. *https://www.dol.gov/agencies/eta/apprenticeship/about/statistics/2019.*

[148] This includes the median base wage of $32.30 from the 2020 OEWS plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

is signed, the specified prevailing wages generally remain in effect through the life of that contract.[149]

The proposed periodic adjustment rule will generally affect the frequency with which prevailing wage rates are updated through both the provision to update old, outmoded rates, and moving forward, the provision to periodically update rates when that does not occur through the survey process (see section V.D.). Implementation costs may be incurred by affected firms through the need to update compensation rates in their relevant payroll systems. Currently, only a fraction of prevailing wages can be expected to change each year. Because the Department intends to update older rates to more accurately represent wages and benefits being paid in the construction industry, and, moving forward, more published wage rates will change more frequently than in the past, firms will spend more time updating prevailing wage rates for contractual purposes than they have in the past.

To estimate the additional cost attributable to the need to update out-of-date rates, it is necessary to estimate the number of firms that need to update rates each year and the additional time these firms will spend implementing the new wage and fringe benefit rates due to this provision. The Department estimates that on average new wage rates are published from 7.8 surveys per year.[150] These surveys may cover an entire State or a subset of counties, and multiple construction types or a single type of construction. For simplicity, the Department assumed that each survey impacts all contractors in the State, all construction types, and all classes of laborers and mechanics covered by DBRA. Under these assumptions, the Department assumed that each year 15.6 percent of firms with DBRA contracts, roughly 24,100 firms ($0.156 \times 154{,}500$ firms), might already be affected by changes in prevailing wage rates in any given year and thus will not incur additional implementation costs attributable to the rule.[151]

Additionally, there may be some firms that already update prevailing wage rates periodically to reflect CBA increases. These firms generally will not incur any additional implementation costs because of this rule. The Department lacks specific data on how many firms fall into this category, but used information on the share of rates that are collectively bargained under the current method to help refine the estimate of firms with implementation costs. According to section V.D., 24 percent of rates are CBA rates under the current method, meaning 37,080 firms ($0.24 \times 154{,}500$) might already be affected by changes in prevailing wages in any given year. Combining this number with the 24,100 firms calculated above, 61,180 firms in total would not incur additional implementation costs with this rule. The Department welcomes comments and data on what is the appropriate share of firms who already update wage rates due to CBA increases.

Therefore, 93,320 firms (154,500 firms − 61,180 firms) are assumed to not update prevailing wage information in any given year because prevailing wage rates were unchanged in their areas of operation, and would therefore incur implementation costs. Under the proposed provisions, the Department intends to first update certain outdated non-collectively bargained rates [152] (currently designated as ''SU'' rates) up to their current value to better track wages and benefits being paid in the construction industry over a staggered period. Then, in the future, the Department intends to update non-collectively bargained rates afterward as needed, and not more frequently than every 3 years. Therefore, all firms that intend to bid on future contracts may need to update relevant prevailing wage rates and thus incur implementation costs. The Department therefore assumes that these 93,230 firms may be expected to incur additional costs updating rates each year. The Department acknowledges that this estimate of firms may be an overestimate, because this proposed rule states that rates will be updated no more frequently than every 3 years. In each year, only a fraction of firms will have to update their prevailing wage rates, but the Department has included all firms in the estimate so as to not underestimate costs.

The Department estimated it will take a half hour on average for firms to adjust their wage rates each year for purposes of bidding on DBRA contracts. The Department believes that this average estimated time is appropriate because some firms will spend no time on implementation costs. Only a subset of firms will experience a change in payroll costs, because those firms that already pay above the new wage determination rates calculated under the 30-percent rule will not need to incur any implementation costs.

Implementation time will be incurred by human resource workers (or a similarly compensated employee) who will implement the changes. As with previous costs, these workers earn a loaded hourly wage of $52.65. Therefore, total Year 1 implementation costs were estimated to equal $2.5 million ($52.65 \times 0.5$ hour $\times$ 93,320 firms). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is $2.5 million. The Department welcomes comments on exactly how long it will take firms to adjust their wage rates each year.

TABLE 5—SUMMARY OF COSTS

[2020 dollars]

Variable	Total	Regulatory familiarization costs	Implementation costs
Year 1 Costs			
Potentially affected firms		192,400	93,320
Hours per firm		1	0.5
Loaded wage rate [a]		$52.65	$52.65

[149] With the exception of certain significant changes; see section III.B.1.vi.(B).

[150] The Department used the number of surveys started between 2002 (first year with data readily available) and 2019 (last year prior to COVID–19) to estimate that 7.8 surveys are started annually. This is a proxy for the number of surveys published on average in a year.

[151] The Department divided 7.8 surveys per year by 50 states. The District of Columbia and the territories were excluded from the denominator because these tend to be surveyed less often (with the exception of Guam which is surveyed regularly due to Related Act funding).

[152] The ''SU'' designation currently is used on general wage determinations when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails.

TABLE 5—SUMMARY OF COSTS—Continued

[2020 dollars]

Variable	Total	Regulatory familiarization costs	Implementation costs
Cost ($1,000s)	$12,600	$10,100	$2,500
Years 2–10 ($1,000s)			
Annual cost	$2,500	$0	$2,500
Average Annualized Costs ($1,000s)			
3% discount rate	$3,700	$1,200	$2,500
7% discount rate	$3,900	$1,400	$2,500

[a] 2020 OEWS median wage for Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) of $32.30 multiplied by 1.63: The ratio of loaded wage to unloaded wage from the 2020 ECEC (46 percent) plus 17 percent for overhead.

3. Other Provisions Not Analyzed

For certain provisions contained in this proposal, the Department expects that any impacts of the provision would be negligible, as discussed below. The Department welcomes comments with data to help analyze these provisions.

The Department proposes that prevailing wage rates set by State and local governments may be adopted as Davis-Bacon prevailing wage rates under specified conditions. Specifically, the Department proposes that the Administrator may adopt such a rate if the Administrator determines that: (1) The State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties; (2) the wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately; (3) the State or local government classifies laborers and mechanics in a manner that is recognized within the field of construction; and (4) the State or local government's criteria for setting prevailing wage rates are substantially similar to those the Administrator uses in making wage determinations. These conditions are intended to provide WHD with the flexibility to adopt State and local rates where appropriate while also ensuring that adoption of such rates is consistent with the statutory requirements of the Davis-Bacon Act. These conditions are also intended to ensure that arbitrary distinctions are not created between jurisdictions where WHD makes wage determinations using its own surveys and jurisdictions where WHD adopts State or local prevailing wage rates.

The Department does not possess sufficient data to conduct an analysis comparing prevailing wage rates set by State and local governments nationwide to those established by the Administrator. However, by definition, any adopted State or local prevailing wage must be set using criteria that are substantially similar to those used by the Administrator, so the resulting wage rates are likely to be similar to those which would have been established by the Administrator. The proposed change would also allow WHD to have more current rates in places where wage surveys are out-of-date, and to avoid WHD duplicating wage survey work that states and localities are already doing. The Department believes that this proposal could result in cost savings, which are discussed further in section V.E.

The Department also proposes to eliminate the across-the-board restriction on mixing rural and metropolitan county data to allow for a more flexible case-by-case approach to using such data. Under this proposal, if sufficient data were not available to determine a prevailing wage in a county, the Department would be permitted to use data from surrounding counties whether those counties may be designated overall as rural or metropolitan. While sufficient data for analyzing the impact of this proposal are not available, the Department believes this proposal will improve the quality and accuracy of wage determinations by including data from counties that likely share and reflect the same labor market conditions when appropriate.

The proposal to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process is expected to ease the burden on contracting entities, both public and private, by improving the timeliness of information about conformed wage rates. For classifications for which conformance requests are regularly submitted, the Administrator would be authorized to list the classification on the wage determination along with wage and fringe benefit rates that bear a ''reasonable relationship'' to the wage and fringe benefit rates contained in the wage determination, in the same manner that such classifications and rates are currently conformed by WHD pursuant to current § 5.5(a)(1)(ii)(A)(3). In other words, for a classification for which conformance requests are regularly submitted, WHD would be expressly authorized to essentially ''pre-approve'' certain conformed classifications and wage rates, thereby providing contracting agencies, contractors and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications, reducing uncertainty and costly delays in determining wage rates for the classifications.

For example, suppose the Department was not able to publish a prevailing wage rate for carpenters on a building wage determination for a county due to insufficient data. Currently, every contractor in that county working on a Davis-Bacon building project that needed a carpenter would have to submit a conformance request for each of their building projects in that county. Moreover, because conformances cannot be submitted until after contract award, those same contractors would have a certain degree of uncertainty in their bidding procedure, as they would not know the exact rate that they would have to pay to their carpenters. This proposal would eliminate that requirement for classifications where conformance requests are common. While the Department does not have information on how much administrative time and money is spent on these tasks, for the commonly-requested classifications, this proposal

could make things more streamlined and efficient for the contractors.

There are a few places in the NPRM where the Department is proposing to add language that clarifies existing policies. For example, the Department proposes to add language to the definitions of ''building or work'' and ''public building or public work'' to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Also, the Department proposes to add language regarding the ''material suppliers'' exemption. Although this language is just a clarification of existing guidelines and not a change in policy, the Department understands that contracting agencies may have differed in their implementation of Davis-Bacon labor standards. In these cases, there may be firms who are newly applying Davis-Bacon labor standards because of the clarifications in this rule. This could result in additional rule familiarization and implementation costs for these firms, and transfers to workers in the form of higher in wages if the contractors are currently paying below the prevailing wage.

The Department does not have data to estimate to what extent contracting agencies have not been implementing Davis-Bacon labor standards but welcomes comments and data to help inform an estimate of the impact of these provisions. Specifically, the Department welcomes comments from commercial building owners who lease space to the Federal Government on how this provision would affect costs and the wages paid to workers.

Other proposed provisions are also likely to have no significant economic impact, such as the proposed clarification of the ''material supplier'' exception in § 5.2, and the proposal regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered.

D. Transfer Payments

1. The Return to the ''Three-Step'' Method for Determining the Prevailing Wage

i. Overview

The proposed revision to the definition of prevailing wage (*i.e.,* the return to the ''three-step process'') may lead to income transfers to or from workers. Under the ''three-step process'' when a wage rate is not paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Thus, under this proposal fewer future wage determinations will be established based on a weighted average. Consequently, some future wage determinations may be different than they otherwise would as a result of this proposed provision. The Department is not able to quantify the impact of this proposed change because it will apply to surveys yet to be conducted, covering classifications and projects in locations not yet determined. Nonetheless in an effort to illustrate the potential impact, the Department conducted a retrospective analysis that considers the impact of the 30-percent rule had it been used to set the wage determinations for a few occupations in recent years.

Specifically, to demonstrate the impact of this provision, the Department compiled data for seven select classifications from 19 surveys across 17 states from 2015 to 2018 (see Appendix A).[153] This sample of rates covers all four construction types, and includes metro and rural counties, and a variety of geographic regions. The seven select key classifications considered are as follows:

- Building and residential construction: Bricklayers, common laborers, plumbers, and roofers.
- Heavy and highway construction: Common laborers, cement masons, and electricians.

In total, the sample is comprised of 3,097 county-classification observations. Because this sample only covers seven out of the many occupations covered by DBRA and all classification-county observations are weighted equally in the analysis, the Department believes the results need to be interpreted with care and cannot be extrapolated to definitively quantify the overall impact of the 30-percent rule. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this proposed provision.

The Department began its retrospective analysis by applying the current prevailing wage setting protocols (see Appendix B) to this sample of wage data to calculate the current prevailing wage and fringe benefit rates.[154] The Department then applied the proposed 30-percent rule to the same sample of wage data.[155] Then the Department compared the wage rates determined by the proposed protocol with current wage determinations. Results are reported at the county level (*i.e.,* one observation represents one classification in one county).

The results differ depending on how heavily unionized the construction industry is in the states analyzed (and thus how many union rates are submitted in response to surveys). In Connecticut, for example, the Department found that estimated rates were little changed because the construction industry in Connecticut is highly unionized and union rates prevail under both the 30 percent and the 50 percent threshold. Conversely, in Florida, which is less unionized, there is more variation in how wage rates would change. For Florida, calculated prevailing wage rates generally changed from an average rate (*e.g.,* insufficient identical rates to determine a single prevailing rate under the current protocol) to a non-collectively bargained single prevailing rate. Depending on the classification and county, the prevailing hourly wage rate may have increased or decreased because of the change in methodology.

Results may also differ by construction type. In particular, changes to highway prevailing wages may differ from changes in other construction types because they frequently rely on certified payroll. Thus, many of the wages used to calculate the prevailing wage reflect prevailing wages at the time of the survey.

ii. Results

Table 6 compares the share of counties with calculated wage determinations by ''publication rule'' (*i.e.,* the rule under which the wage rate was or would be published): (1) An average rate, (2) a collectively bargained

[153] Data were obtained from the Automated Survey Data System (ASDS), the data system used by the Department to compile and process WD–10 submissions. Out of the 21 surveys that occurred during this time period and met sufficiency standards, these 19 surveys are all of the ones with usable data for this analysis.

[154] The Department chose to calculate prevailing wages under the current and proposed definitions to ensure comparability between the methods. The Department compared calculated current rates to the published wage determinations to verify the accuracy of its method. The calculated current rates generally match the wage and the fringe benefit rates within a few cents. However, there are a few instances that do not match, but the Department does not believe these differences bias the comparisons to the calculated proposed 30 percent prevailing definition.

[155] This model, while useful for this illustrative analysis, may not be relevant for future surveys. The methodology assumes that the level of participation by firms in WHD's wage survey process would be the same if the standard were 30 percent and is mostly reflective of states with lower union densities.

single prevailing rate, and (3) a non-collectively bargained single prevailing rate. Fringe benefit rate results also include the number of counties where the majority of workers received zero fringe benefits. It also shows the change in the number of rates in each publication rule category.

For the surveys analyzed, the majority of current county wage rates were based on averages (1,954 ÷ 3,097 = 63 percent), about 25 percent were a single prevailing collectively bargained rate, and 12 percent were a single prevailing non-collectively bargained rate. Using the 30 percent requirement for a single prevailing rate, the number of county wage rates that would be based on averages decreased to 31 percent (948 ÷ 3,097). The percentage of rates that would be based on a single wage rate increased for both non-collectively bargained and collectively bargained rates, although more wage rates would be based on non-collectively bargained rates than collectively bargained rates.

For fringe benefit rates, fringe benefits do not prevail for a similar percent in both scenarios, (*i.e.,* ''no fringes''): 50 percent of current rates, 48 percent of proposed ''three-step process'' rates. The share determined as average rates decreased from 22 percent to 10 percent. The prevalence of single prevailing fringe benefit rates increased for both non-collectively bargained and collectively bargained rates, with slightly more becoming collectively bargained rates than non-collectively bargained rates.

The total number of counties will differ by classification based on the State, applicable survey area (*e.g.,* statewide, metro only), and whether the data submitted for the classification met sufficiency requirements.

TABLE 6—PREVALENCE OF CALCULATED PREVAILING WAGES BY PUBLICATION RULE

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Elec-tricians	Total
Count	949	504	545	379	360	360	3,097
Current Hourly Rate							
Average	82%	57%	55%	42%	68%	53%	63%
Single Prevailing—Union	12%	40%	23%	39%	4%	44%	25%
Single Prevailing—Non-Union	6%	3%	22%	19%	28%	4%	12%
Proposed ''Three-Step Process'' Hourly Rate[a]							
Average	47%	22%	26%	18%	40%	11%	31%
Single Prevailing—Union	21%	46%	25%	45%	7%	80%	34%
Single Prevailing—Non-Union	32%	31%	49%	37%	53%	9%	36%
Change for Hourly Rate (Percentage Points)							
Average	−35	−35	−29	−23	−28	−42	−32
Single Prevailing—Union	9	7	2	5	3	36	9
Single Prevailing—Non-Union	26	28	27	18	25	5	23
Current Fringe Benefit Rate							
Average	23%	27%	12%	13%	9%	48%	22%
Single Prevailing—Union	14%	41%	23%	39%	4%	44%	25%
Single Prevailing—Non-Union	4%	5%	3%	2%	2%	0%	3%
No fringes	59%	27%	62%	46%	85%	8%	50%
Proposed ''Three-Step Process'' Fringe Benefit Rate[a]							
Average	13%	13%	9%	6%	5%	13%	10%
Single Prevailing—Union	21%	47%	25%	46%	7%	80%	34%
Single Prevailing—Non-Union	9%	13%	4%	2%	3%	7%	7%
No fringes	57%	27%	62%	46%	85%	0%	48%
Change for Fringe Benefit Rate (Percentage Points)							
Average	−11	−14	−3	−7	−4	−35	−11
Single Prevailing—Union	7	6	2	7	3	36	9
Single Prevailing—Non-Union	6	8	1	0	1	7	4
No fringes	−2	0	0	0	0	−8	−2

[a] Using a threshold of 30 percent of employees' wage or fringe benefit rates being identical.

Table 7 summarizes the difference in calculated prevailing wage rates using the proposed three-step process compared to the current process. The results highlighted in Table 7 show both average changes across all observations and average changes when limited to those classification-county observations where rates are different (about 32 percent of all observations in the sample). Notably, all classification-counties are weighted equally in the calculations. On average:

- Across all observations, the average hourly rate increases by only one cent. Across affected classification-counties, the calculated hourly rate increases by 4 cents on average. However, there is significant variation. The calculated hourly rate may increase by as much as $7.80 or decrease by as much as $5.78.
- Across all observations, the average hourly fringe benefit rate increases by 19 cents. Across affected classification-counties, the calculated hourly fringe benefit rate increases by $1.42 on average (with a range from -$6.17 to $11.16).

Based on this demonstration of the impact of changing from the current to the proposed definition of ''prevailing,'' some published wage rates and fringe benefit rates may increase and others may decrease. In the sample considered, wage rates changed very little on average but fringe benefit rates increased on average. As discussed above, the Department believes that these results need to be interpreted with

care and cannot be extrapolated to definitively quantify the overall impact of the 30-percent rule. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this proposed provision.

TABLE 7—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF ''PREVAILING''

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
Hourly Rate							
Total	949	504	545	379	360	360	3,097
Number changed	330	175	160	89	101	150	1,005
Percent changed	35%	35%	29%	23%	28%	42%	32%
Average (non-zero)	$0.37	$1.10	−$1.06	$0.44	−$1.35	$0.94	$0.04
Average (all)	$0.13	$0.38	−$0.31	$0.10	−$0.38	$0.39	$0.01
Maximum	$7.80	$7.07	$4.40	$1.02	$2.54	$4.14	$7.80
Minimum	−$3.93	−$4.23	−$2.51	−$0.95	−$5.78	−$4.74	−$5.78
Fringe Benefit Rate							
Total	949	504	545	379	360	360	3,097
Number changed	137	69	17	26	14	184	447
Percent changed	14%	14%	3%	7%	4%	51%	14%
Average (non-zero)	$2.10	$2.14	−$1.67	$1.21	$0.74	$2.11	$1.42
Average (all)	$0.30	$0.29	−$0.05	$0.08	$0.03	$1.08	$0.19
Max	$9.42	$11.16	$1.42	$2.19	$6.00	$4.61	$11.16
Min	−$4.82	−$1.35	−$4.61	−$0.17	−$6.17	−$0.86	−$6.17

2. Adjusting Out-of-Date Prevailing Wage and Fringe Benefit Rates

Updating old Davis-Bacon prevailing wage and fringe benefit rates will increase the minimum required hourly compensation required to be paid to workers on Davis-Bacon projects. This would result in transfers of income to workers on Davis-Bacon projects who are currently being paid only the required minimum hourly rate. Because the Federal Government generally pays for increases to the prevailing wage through higher contract bids, an increase in the prevailing wage will transfer income from the Federal Government to the worker. This transfer will be reflected in increased costs paid by the Federal Government for construction.

However, to estimate a transfer estimate, many assumptions need to be made with little or no supporting evidence. For example, the Department would need to determine if workers really are being paid the prevailing wage rate; some published rates are so outdated that it is highly likely effective labor market rates exceed the published rates, and the published prevailing wage rates are functionally irrelevant. In addition, the Department would need to predict which Davis-Bacon projects would occur each year, in which counties these projects will occur, and the number of hours of work required from each class of laborer and mechanic. Because of many uncertainties, the Department instead characterizes the number and size of the changes in published Davis-Bacon hourly rates and fringe benefits rather than formally estimating the income change to those potentially affected by the proposal to update rates.

To provide an illustrative analysis, the Department used the entire set of wage and fringe benefit rates on Wage Determinations (WDs) as of May 2019 to demonstrate the potential changes in Davis-Bacon wage and fringe benefit rates resulting from updating old rates to 2021 values using the Bureau of Labor Statistics' (BLS) Employment Cost Index (ECI).[156] For this demonstration, the Department considered the impact of updating rates for key classification wage and fringe benefit rates published prior to 2019 that were based on weighted averages, which comprises 172,088 wage and fringe benefit rates lines in 3,997 WDs.[157] The Department has focused on wage and fringe benefit rates prior to 2019 because these are the universe of key classification rates that may be more than 3 years old by the time a final rule is issued, and the proposal calls for updating non-collectively-bargained wage rates that are more than 3 years old.

After dropping hourly wages greater than $100 and wage rates that were less than $7.25 but were updated to $7.25, 159,545 wage rates were updated for this analysis.[158] To update these wage rates, the Department used the BLS' ECI, which measures the change over time in the cost of labor total compensation.[159] The Department believes that the ECI for private industry workers, total compensation, ''construction, and extraction, farming, fishing, and forestry'' occupations, not seasonally adjusted is the most appropriate index. However, the index for this group is only available starting in 2001. Thus, for updating wages and fringe benefits from 1979 through 2000, the Department determined the ECI for private industry workers in the goods-producing industries was the most appropriate series to use that was available back to 1979.[160]

To consider potential transfers to workers due to changes in wages, the full increase in the hourly rate would only occur if workers on DBRA projects are currently paid the original published rates.[161] However, due to market conditions in some areas, workers may be receiving more than the published

[156] At the time of the analysis, ECI was only available for the first two quarters of 2021. Thus, the wage and fringe benefit rates were updated to values representative of the first half of 2021.

[157] In each type of construction covered by the Davis-Bacon and Related Acts, some classifications are called ''key'' because most projects require these workers. Building construction currently has 16 key classifications, residential construction has 12 key classifications and heavy and highway construction each have the same eight key classifications. A line reflects a wage rate (or fringe benefit rate) for a key classification by construction type in a specific geographic area. For example, a line could reflect a plumber in building construction in Fulton County, GA.

[158] The 54 wage rates greater than $100 were day or shift rates. The remaining 12,489 rates excluded were less than $7.25 prior to July 24, 2009, but were published from surveys conducted before the establishment of DOL's Automated Survey Data System (ASDS) in 2002. The Department no longer has records of the original published wage rates in these cases.

[159] Available at: *https://www.bls.gov/ect/.*

[160] Continuous Occupational and Industry Series, Table 5. *https://www.bls.gov/web/eci/eci-continuous-dollar.txt.*

[161] The hourly wage rate increase would only occur when the next contract goes into effect and a new WD with an updated wage rate is incorporated into the contract.

rate. While completely comparable data on wages paid to workers on DBRA projects in specific classifications and counties are not readily available and usable for this analysis, the BLS's Occupational Employment and Wage Statistics (OEWS) data provide a general estimate of wages paid to certain categories of workers performing construction and construction-related duties. Although the OEWS data can be informative for this illustrative analysis, it is not a representative data set of professional construction workers performing work on DBRA projects. To estimate the approximate median 2021 wage rates, the Department used the median hourly wage rate for each key classification in the construction industry in the State 2020 OEWS data, then approximated a 2021 value using ECI.[162]

To provide an example of transfers, the Department compared the ECI-updated Davis-Bacon wage rates to the applicable median hourly rate in the OEWS data.[163] Using the OEWS as a general measure of the market conditions for construction worker wages in a given State, the Department assumed that an updated Davis-Bacon wage rate below the median OEWS rates would likely not lead to any income transfers to construction workers because most workers are likely already paid more than the updated Davis-Bacon rate. After removing the 99,111 updated Davis-Bacon wage rates that were less than the OEWS median, there remained 60,434 updated Davis-Bacon wage rates that may result in transfers to workers. However, the Department notes that some of the updated Davis-Bacon rates may be lower because they are a wage rate for a rural county, and the OEWS data represents the statewide median.

Further investigating the ECI-updated Davis-Bacon wage rates that were substantially above the OEWS median wage rate, the Department found that 24,044 of the originally published Davis-Bacon wage rates were already higher than the OEWS median. For at least some of these wage rates, the comparison to the OEWS median may not be appropriate because such Davis-Bacon wage rates are for work in specialty construction. For example, most of the prevailing wage rates published specifically for a 2014 WD for Iowa Heavy Construction River Work exceed the 2021 OEWS median rates for the same classifications in Iowa.[164] This may be an indication that comparing Davis-Bacon rates for this type of construction to a more general measure of wages may not be appropriate because workers are generally paid more for this type of specialty construction than for more other types of construction work measured by the OEWS data.

Therefore, to measure possible transfers per hour to workers on Davis-Bacon projects due to the updating of wage rates, the Department began by taking the lesser of:

- The difference between the updated wage rate and the OEWS median wage rate.
- The difference between the updated and originally published wage rates.

The second difference accounts for the 24,044 Davis-Bacon wage rates that were higher than the 2021 OEWS median rate even before they were updated because otherwise the Department would overestimate the potential hourly wage transfer.

The Department also examined an additional adjustment for DBA wage rates because they are also subject to Executive Order 13658: Establishing a Minimum Wage for Contractors, which sets the minimum wage paid to workers on Federal contracts at $11.25 in 2022.[165] Thus, the Department analyzed an additional restriction that the maximum possible hourly transfer to workers on Davis-Bacon projects cannot exceed the difference between the updated wage rate and $11.25.

However, the added restriction has no impact on estimated transfers because any updated wage rates that were less than $11.25 were also less than the OEWS median wage rate. Thus, the maximum possible hourly transfers attributable to updated Davis-Bacon wage rates are identical for construction projects covered by the Davis-Bacon Act and by the Related Acts.

Table 8 provides the summary statistics of the per hour transfers to workers that may occur due to updating old Davis-Bacon wage rates. Among the wage rates considered in this demonstration, there are 60,434 wage rates updates that may result in transfers to workers. On average, the maximum hourly transfer is $3.92.

TABLE 8—DISTRIBUTION OF POTENTIAL PER-HOUR TRANSFERS DUE TO UPDATED RATES

Coverage	Number of rates	Mean	Median	Standard deviation
Wages				
Davis-Bacon Related Acts	60,434	$3.92	$3.11	$3.92
Davis-Bacon Act	60,434	3.92	3.11	3.92
Fringe Benefits				
Davis-Bacon and Related Acts	75,495	1.43	1.02	1.58
Total Compensation				
Davis-Bacon and Related Acts	94,547	3.65	2.13	4.62

Of the 172,088 pre-2019 SU key classification wage and fringe benefit rates, 75,495 were non-zero, and thus would be updated, possibly resulting in some transfers to workers (Table 8). On

[162] Because the May 2021 OEWS data are not yet available, the Department used the ECI for private industry workers, wages and salaries, ''construction, and extraction, farming, fishing, and forestry'' occupations, not seasonally adjusted, applied to the May 2020 OEWS estimates to approximate the median wage rates for May 2021.

[163] The Department used OEWS data for certain occupations matching key classifications in the construction industry by State. May 2020, Sectors 21, 22, & 23: Mining, Utilities, and Construction. *https://www.bls.gov/oes/special.requests/oes_research_2020_sec_21-22-23.xlsx.*

[164] WD IA20190002.

[165] The Department also ran an analysis using the minimum wage of $15.00 as proposed by Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors.'' The results were similar.

average, these non-zero fringe benefits would increase by $1.43 per hour.

Adding the required Davis-Bacon wage and fringe benefit rates together measures the required total compensation rate on DBRA projects. Due to updating old rates, 94,547 Davis-Bacon total compensation hourly rates would increase by $3.65 on average.[166]

The Department conducted these two demonstrations to provide an indication of the possible changes to Davis-Bacon wage rates and fringe benefit rates attributable to the proposed provision revising the definition of ''prevailing,'' and the provision to update out-of-date SU rates using the ECI (only one of which would affect a location-occupation pair at a particular time). Both provisions may lead to higher hourly payments, while the former also has the potential to lead to lower hourly payments.

However, because accurate data to measure the current county-level labor conditions for specific construction classifications are not available, it is unclear if an increase or decrease in Davis-Bacon minimum required rates will impact what workers earn on DBRA projects. Furthermore, even if some of these rate changes do lead to different rates paid to workers on DBRA projects, data are not available to estimate how large transfers might be. To do so would require detailed information on what federally funded construction contracts will be issued, the types of projects funded, where the projects will occur (specific county or counties), the value of the projects, and the labor mix needed to complete the project. Due to these many uncertainties in calculating a transfer estimate, the Department instead tried to characterize what changes in rates might occur as a result of the rulemaking.

E. Cost Savings

This proposed rule could lead to cost savings for both contractors and the Federal Government, because the clarifications made in the rule would reduce ambiguity and increase efficiency, which could reduce the amount of time necessary to comply with the rule. For example, as discussed in section V.C.3, the proposal to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process will increase certainty and reduce administrative burden for contracting entities. It would reduce the number of compliance requests needed, which could save time for the contractors, contracting agencies, and the Department. Additionally, the proposal which permits the Administrator to adopt prevailing wage rates set by State and local governments could result in cost savings for the Department, because it avoids WHD duplicating wage survey work that states and localities are already doing. It could also result in cost savings in the form of time savings for contractors, as they will only have one wage determination that they will have to reference.

Additionally, the Department is providing clarifications throughout the rule, which will make clear which contract workers are covered by DBRA. For example, the Department is clarifying provisions related to the site of work, demolition and removal workers, and truck drivers and their assistants, among others. These clarifications will make it clear to both contractors and contract workers who is covered, and therefore could help reduce legal disputes between the two, resulting in cost savings.

Because the Department does not have information on how much additional time contractors and the Federal Government currently spend complying with this rule due to lack of clarity, these cost savings are discussed qualitatively. However, the Department welcomes any comments and data that could inform a quantitative analysis of these cost savings.

F. Benefits

Among the multiple proposals discussed above, the Department recognizes that the proposal to update the definition of prevailing wage using the ''30 percent rule'' could have various impacts on wage rates. The effect of this proposal on actual wages paid is uncertain for the reasons discussed in Section V.D.1. However, the Department's proposal to update out-of-date wage rates using the ECI would result in higher prevailing wage rates due to the increases in employer costs over time. Any DBRA-covered workers that were not already being paid above these higher wage rates would receive a raise when these updated rates were implemented. These higher wages could lead to benefits such as improved government services, increased productivity, and reduced turnover, which are all discussed here qualitatively. The magnitude of these wage increases could influence the magnitude of these benefits.

The Department notes that the literature cited in this section sometimes does not directly consider changes in the DBRA prevailing wages. Additionally, much of the literature is based on voluntary changes made by firms. However, the Department has presented the information here because the general findings may still be applicable in this context. The Department welcomes comments and data on the benefits of this proposed rulemaking.

1. Improved Government Services

For workers who are paid higher wage rates as a result of this proposed rulemaking, the Department expects that the quality of construction could improve. Higher wages can be associated with a higher number of bidders for Government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman, 2006).[167] In a study on the impact of bid competition on final outcomes of State Department of Transportation (DOT) construction projects, Delaney (2018) demonstrated that each additional bidder reduces final project cost overruns by 2.2 percent and increases the likelihood of achieving a high-quality bid by 4.9 times.[168]

2. Increased Productivity

For workers whose wages increase as a result of the Department's proposal to update out-of-date wage rates, these increases could result in increased productivity. Increased productivity could occur through numerous channels, such as employee morale, level of effort, and reduced absenteeism. A strand of economic research, commonly referred to as ''efficiency wage'' theory, considers how an increase in compensation may be met with greater productivity.[169] Efficiency wages may elicit greater effort on the

[166] The average increase in total compensation is less than the average wage increase because more wage and fringe benefit lines are included for total compensation.

[167] Thompson, J. and J. Chapman. (2006). ''The Economic Impact of Local Living Wages,'' Economic Policy Institute, Briefing Paper #170, 2006.

[168] Delaney, J. (2018). The Effect of Competition on Bid Quality and Final Results on State DOT Projects. *https://www.proquest.com/openview/33655a0e4c7b8a6d25d30775d350b8ad/1?pq-origsite=gscholar&cbl=18750.*

[169] Akerlof, G.A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics,* 97(4), 543–569.

part of workers, making them more effective on the job.[170]

Allen (1984) estimates the ratio of the marginal product of union and non-union labor.[171] He finds that union workers are 17 to 22 percent more productive than non-union members. Although it is unclear whether this entire productivity difference is attributable to higher wages, it is likely a large contributing factor. The Construction Labor Research Council (2004) compared the costs to build a mile of highway in higher wage and lower wage states using data reported to the Federal Highway Administration from 1994 to 2002.[172] They found that in higher wage states, 32 percent fewer labor hours are needed to complete a mile of highway than in lower wage states, despite hourly wage rates being 69 percent higher in those states. While this increased worker productivity could be due in part to other factors such as greater worker experience or more investment in capital equipment in higher wage states, the higher wages likely contribute.

Conversely, Vedder (1999) compared output per worker across states with and without prevailing wage laws.[173] Data on construction workers is from the Department of Labor and data on construction contracts is from the Department of Commerce. A worker in a prevailing wage law State produced $63,116 of value in 1997 while a worker from a non-prevailing wage law State produced $65,754. Based on this simple comparison, workers are more productive without prevailing wage laws. However, this is a somewhat basic comparison in that it does not control for other differences between states that may influence productivity (for example, the amount of capital used or other State regulations).

Studies on absenteeism have demonstrated that there is a negative effect on firm productivity as absentee rates increase.[174] Zhang et al., in their study of linked employer-employee data in Canada, found that a 1 percent decline in the attendance rate reduces productivity by 0.44 percent.[175] Allen (1983) similarly noted that a 10-percentage point increase in absenteeism corresponds to a decrease of 1.6 percent in productivity.[176] Hanna et al. (2005) find that while absenteeism rates of between 0 and 5 percent among contractors on electrical construction projects lead to no loss of productivity, absenteeism rates of between 6 and 10 percent can spark a 24.4 percent drop in productivity.[177]

Fairris et al. (2005) demonstrated that as a worker's wage increases there is a reduction in unscheduled absenteeism.[178] They attribute this effect to workers standing to lose more if forced to look for new employment and an increase in pay paralleling an increase in access to paid time off. Pfeifer's (2010) study of German companies provides similar results, indicating a reduction in absenteeism if workers experience an overall increase in pay.[179] Conversely, Dionne and Dostie (2007) attribute a decrease in absenteeism to mechanisms other than an increase in worker pay, specifically scheduling that provides both the option to work-at-home and for fewer compressed work weeks.[180] However, the relevance of such policies in the context of construction is unclear. The Department believes both the connection between prevailing wages and absenteeism, and the connection between absenteeism and productivity are well enough established that this is a feasible benefit of the proposed rule.

3. Reduced Turnover

Little evidence is available on the impact of prevailing wage laws and turnover, but an increase in the minimum wage has been shown to decrease both turnover rates and the rate of worker separation (Dube, Lester and Reich, 2011; Liu, Hyclak and Regmi, 2015; Jardim et al., 2018).[181] This decrease in turnover and worker separation can lead to an increase in the profits of firms, as the hiring process can be both expensive and time consuming. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.[182] Fairris et al. (2005) [183] found the cost reduction due to lower turnover rates ranges from $137 to $638 for each worker. Although the impacts cited here are not limited to government construction contracting, because data specific to government contracting and turnover are not available, the Department believes that a reduction in turnover could be observed among those workers on DBRA contracts whose wages increase following this proposed rule. The potential reduction in turnover is a function of several variables: The current wage, the change in the wage rate, hours worked on covered contracts, and the turnover rate. Therefore, the Department has not quantified the impacts of potential reduction in reduction in turnover.

VI. Initial Regulatory Flexibility Act (IRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of

[170] Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

[171] Allen, S.G. (1984). Unionized Construction Workers are More Productive. *The Quarterly Journal of Economics,* 251–174.

[172] The Construction Labor Research Council (2004). The Impact of Wages on Highway Construction Costs. *http://niabuild.org/WageStudybooklet.pdf.*

[173] Vedder, R. (1999). Michigan's Prevailing Wage Law and Its Effects on Government Spending and Construction Employment. Midland, Michigan: Mackinac Center for Public Policy.

[174] Allen, S.G. (1983). How Much Does Absenteeism Cost? *Journal of Human Resources, 18*(3), 379–393. *https://www.jstor.org/stable/145207?seq=1.*

[175] Zhang, W., Sun, H., Woodcock, S., & Anis, A. (2013). Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data. *Health Economics Review, 7*(3). *https://healtheconomicsreview.biomedcentral.com/articles/10.1186/s13561-016-0138-y.*

[176] Allen, S.G. (1983). How Much Does Absenteeism Cost? *Journal of Human Resources, 18*(3), 379–393. *https://www.jstor.org/stable/145207?seq=1.*

[177] Hanna, A., Menches, C., Sullivan, K., & Sargent, J. (2005) Factors Affecting Absenteeism in Electrical Construction. Journal of Construction Engineering and Management 131(11). *https://ascelibrary.org/doi/abs/10.1061/(ASCE)0733-9364(2005)131:11(1212).*

[178] Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses. LAANE. *https://laane.org/downloads/Examinig_the_Evidence.pdf.*

[179] Pfeifer, C. (2010). Impact of Wages and Job Levels on Worker Absenteeism. International Journal of Manpower 31(1), 59–72. *https://doi.org/10.1108/01437721011031694.*

[180] Dionne, G., & Dostie, B. (2007). New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data. Industrial and Labor Relations Review 61(1), 108–120. *https://journals.sagepub.com/doi/abs/10.1177/001979390706100106.*

[181] Dube, A., Lester, T.W., & Reich, M. (2011). *Do Frictions Matter in the Labor Market? Accessions, Separations, and Minimum Wage Effects. (Discussion Paper No. 5811).* IZA. *https://www.iza.org/publications/dp/5811/do-frictions-matter-in-the-labor-market-accessions-separations-and-minimum-wage-effects.*

Liu, S., Hyclak, T. J., & Regmi, K. (2015). Impact of the Minimum Wage on Youth Labor Markets. *Labour 29*(4). doi: 10.1111/labr.12071.

Jardim, E., Long, M.C., Plotnick, R., van Inwegen, E., Vigdor, J., & Wething, H. (2018, October). *Minimum Wage Increases and Individual Employment Trajectories* (Working paper No. 25182). NBER. doi:10.3386/w25182.

[182] Boushey, H. and Glynn, S. (2012). There are Significant Business Costs to Replacing Employees. Center for American Progress. Available at: *http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.*

[183] Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses.* LAANE. *https://laane.org/downloads/Examinig_the_Evidence.pdf.*

their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604.

A. Why the Department Is Considering Action

In order to provide greater clarity and enhance their usefulness in the modern economy, the Department proposes to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the Davis-Bacon Act and the Davis-Bacon Related Acts (collectively, the DBRA). The Department has not undertaken a comprehensive revision of the DBRA regulations since 1982. Since that time, Congress has expanded the reach of the DBRA regulations significantly, adding numerous new Related Act statutes to which they apply. The Davis-Bacon Act (DBA) and now 71 active Related Acts collectively apply to an estimated tens of billions of dollars in Federal and federally assisted construction spending per year and provide minimum wage rates for hundreds of thousands of U.S. construction workers. The Department expects these numbers to continue to grow as Congress seeks to address the significant infrastructure needs in the country, including, in particular, energy and transportation infrastructure necessary to address climate change. These regulations will provide additional clarity that will be helpful given the increased number of construction projects subject to Davis-Bacon requirements, due to the substantial increases in federally funded construction provided for in legislation such as the Infrastructure Investment and Jobs Act.

In addition to expanding coverage of the prevailing wage rate requirements of the DBA, the Federal contracting system itself has undergone significant changes since 1982. Federal agencies have increased spending through the use of interagency Federal schedules. Contractors have increased their use of single-purpose entities such as joint ventures and teaming agreements. Off-site construction of significant components of public buildings and works has also increased. The regulations need to be updated to assure their continued effectiveness in the face of changes such as these.

B. Objectives of and Legal Basis for the Proposed Rule

In this NPRM, the Department seeks to address a number of outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. Specifically, the Department proposes to return to the definition of ''prevailing wage'' that was used from 1935 to 1983 to address the overuse of average rates and ensure that prevailing wages reflect actual wages paid to workers in the local community. The Department also proposes to periodically update non-collectively bargained prevailing wage rates to address out-of-date wage rates. The Department proposes to give WHD broader authority to adopt State or local wage determinations as the Federal prevailing wage where certain specified criteria are satisfied, to issue supplemental rates for key classifications where there is insufficient survey data, to modernize the scope of work to include energy infrastructure and the site of work to include prefabricated buildings, to ensure that DBRA requirements protect workers by operation of law, and to strengthen enforcement including debarment and anti-retaliation. See Section III.B. for a full discussion of the Department's proposed changes to these regulations.

Congress has delegated authority to the Department to issue prevailing wage determinations and prescribe rules and regulations for contractors and subcontractors on DBRA-covered construction projects.[184] *See* 40 U.S.C. 3142, 3145. It has also directed the Department, through Reorganization Plan No. 14 of 1950, to ''prescribe appropriate standards, regulations and procedures'' to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 5 U.S.C. app. 1, effective May 24, 1950, 15 FR 3176, 64 Stat. 1267. These regulations, which have been updated and revised periodically over time, are primarily located in parts 1, 3, and 5 of title 29 of the Code of Federal Regulations.

C. Estimating the Number of Small Businesses Affected by the Rulemaking

As discussed in section V.B., the Department identified a range of firms potentially affected by this rulemaking. This includes both firms impacted by the Davis-Bacon Act and firms impacted by the Related Acts. The more narrowly defined population includes firms actively holding Davis-Bacon contracts and firms affected by the Related Acts. The broader population includes those bidding on Davis-Bacon and Related Acts contracts but without active contracts, or those considering bidding in the future. As described in section V.B., the total number of potentially affected firms ranges from 154,500 to 192,400. This includes firms that pay at or above the new wage determination rates and thus will not be substantially affected. The Department does not have data to identify the number of firms that will experience changes in payroll costs.

To identify the number of small firms, the Department began with the total population of firms and identified some of these firms as small based on several methods.

- For prime contractors in USASpending, the Department used the variable ''Contracting Officer's Determination of Business Size.'' [185]
- For subcontractors from USASpending, the Department identified those with ''small'' or ''SBA'' in the ''Subawardee Business Types'' variable.[186]
- For SAM data, the Department used the small business determination in the data, in variable ''NAICS Code String.'' This is flagged separately for each NAICS reported for the firm; therefore, the Department classified a company as a small business if SAM identified it as a small business in any 6-digit NAICS beginning with 23.

This results in an estimated number of potentially affected small businesses ranging from 103,600 to 135,200.

[184] The DBA and the Related Acts apply to both prime contracts and subcontracts of any tier thereunder. In this NPRM, as in the regulations themselves, where the terms ''contracts'' or ''contractors'' are used, they are intended to include reference both prime contracts and contractors and subcontracts and subcontractors of any tier.

[185] The description of this variable in the *USAspending.gov* Data Dictionary is: ''The Contracting Officer's determination of whether the selected contractor meets the small business size standard for award to a small business for the NAICS code that is applicable to the contract.'' The Data Dictionary is available at: *https://www.usaspending.gov/data-dictionary.*

[186] The description of this variable in the *USAspending.gov* Data Dictionary is: ''Comma separated list representing sub-contractor business types pulled from Federal Procurement Data System—Next Generation (FPDS–NG) or the System for Award Management (SAM).''

TABLE 9—RANGE OF NUMBER OF POTENTIALLY AFFECTED SMALL FIRMS

Source	Small
Total Count (Davis-Bacon and Related Acts)	
Narrow definition	103,600
Broad definition	135,200
DBA (Narrow Definition)	
Total	26,700
Prime contractors from USASpending	11,200
Subcontractors from USASpending [a]	15,500
DBA (Broad Definition)	
Total	58,300
SAM	42,800
Subcontractors from USASpending [a]	15,500
Related Acts	
Total	77,000

[a] Determination based on inclusion of ''small'' or ''SBA'' in the business types.

The Department estimated in section V.B. that 1.2 million employees are potentially affected by the rulemaking. That methodology does not include a variation to identify only workers employed by small firms. The Department therefore assumed that the share of contracting expenditures attributed to small businesses is the best approximation of the share of employment in small businesses. In USASpending, expenditures are available for by firm size. For example, in 2019, $55.4 billion was spent on DBA covered contracts (see section V.B.2.) and of that, $19.8 billion (36 percent) was awarded to small business prime contractors.[187] Data on expenditures by firm size are unavailable for the Related Acts (Table 10). Therefore, the Department assumed the same percentage applies to such expenditures as for Davis-Bacon contracts. In total, an estimated 424,800 workers are employed by potentially affected small businesses.

TABLE 10—NUMBER OF POTENTIALLY AFFECTED WORKERS IN SMALL COVERED CONTRACTING FIRMS

	Total workers (thousands)	Percent of expenditures in small contracting firms [a]	Workers in small businesses (thousands)
DBA, excl. territories	297.9	35.7%	106.4
DBA, territories	6.1	38.2%	2.3
Related Acts [b]	883.9	35.8%	316.0
Total	1,188.0		424.8

[a] Source: *USASpending.gov*. Percentage of contracting expenditures for covered contracts in small businesses in 2019.
[b] Because data on expenditures by firm size are unavailable for Related Acts. The Department assumed the same percentage applied as for Davis-Bacon.

In several places in the NPRM, the Department is proposing to add or revise language to clarify existing policies rather than to substantively change them. For example, the Department proposes to add language to the definitions of ''building or work'' and ''public building or public work'' to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Also, the Department proposes to add language clarifying the applicability of the ''material supplier'' exemption to coverage, the applicability of the DBRA to truck drivers and flaggers, and the extent to which demolition activities are covered by the DBRA. However, the Department acknowledges that some contracting agencies may not have been applying Davis-Bacon in accordance with those policies. Where this was the case, the clarity provided by this proposed rule could lead to expanded application of the Davis-Bacon labor standards, which could lead to more small firms being required to comply with Davis-Bacon labor standards. Additionally, the Department's proposes to revise the definition of ''site of the work'' to further encompass certain construction of significant portions of a building or work at secondary worksites, which could clarify and strengthen the scope of coverage under DBA, which would also lead to more small firms being required to comply with Davis-Bacon labor standards. The Department does not have data to determine how many of these small firms exist and welcomes data and information on the extent to which small firms would newly be applying

[187] If subcontractors are more likely to be small businesses than prime contractors, then this methodology may underestimate the number of workers who are employed by small businesses.

Davis-Bacon and what potential compliance costs they could incur.

D. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

Many of the proposals in this rule only affect how the prevailing wage rate is calculated. For these proposals there will be no new compliance requirements for small firms, as they will still need to pay the published prevailing wage. The Department is also proposing a number of revisions to existing recordkeeping requirements to better effectuate compliance and enforcement, including revisions to clarify the record retention period and add requirements to maintain worker telephone numbers and email addresses. The Department is proposing to clarify language used to better distinguish the records that contractors must make and maintain (regular payrolls and other basic records) from the payroll documents that contractors must submit weekly to contracting agencies (certified payrolls). The Department is also proposing to clarify that electronic signatures and certified payroll submission methods may be used.

E. Calculating the Impact of the Proposed Rule on Small Business Firms

The Department considered employer costs associated with both (a) the change in determining the prevailing wage based on a 30 percent threshold instead of a 50 percent threshold and (b) the incorporation of using the change in the ECI to update certain non-collectively bargained prevailing wage rates. The Department estimated both regulatory familiarization costs and implementation costs. An overview of these costs is explained here but additional details can be found in section V.C. Non-quantified direct employer costs are explained in section V.C.3.

The Department acknowledges that if some wage rates increase due to either of the provisions listed above, there could be an increase in payroll costs for some small firms. Due to data limitations and uncertainty, the Department did not quantify payroll costs (*i.e.,* transfers). The change in the definition of prevailing wage will only be applied to wage data received through future surveys, for geographic areas and classifications that have not yet been identified. Both this provision and the updating of out-of-date rates will not have any impact if firms are already paying at or above the new prevailing wage rate because of labor market forces. Please see section V.D. for a more thorough discussion of these potential payroll costs, including an illustrative example of the potential impact of the proposed rule on prevailing wage rates.

The Department welcomes comments and data on whether small firms would incur increased payroll costs following this rule, and the extent to which firms are paying above the out-of-date prevailing wage rates.

Year 1 direct employer costs for small businesses are estimated to total $8.7 million. Average annualized costs across the first 10 years are estimated to be $2.6 million (using a 7 percent discount rate). On a per firm basis, direct employer costs are estimated to be $78.97 in Year 1.

The proposed rule will impose direct costs on some covered contractors who will review the regulations to understand how the prevailing wage setting methodology will change. However, the Department believes these regulatory familiarization costs will be small because firms are not required to understand how the prevailing wage rates are set in order to comply with DBRA requirements, they are just required to pay the prevailing wage rates. The Department included all small potentially affected firms (135,200 firms). The Department assumed that on average, 1 hour of a human resources staff member's time will be spent reviewing the rulemaking. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of $52.65 per hour.[188] Therefore, the Department has estimated regulatory familiarization costs to be $7.1 million ($52.65 per hour × 1.0 hour × 135,200 contractors) (Table 11). The Department has included all regulatory familiarization costs in Year 1. New entrants will not incur any additional regulatory familiarization costs attributable to this rule. Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are $1.0 million.

TABLE 11—DIRECT EMPLOYER COSTS TO SMALL BUSINESSES

[2020 dollars]

Variable	Total	Regulatory familiarization costs	Implementation costs
Year 1 Costs:	.....	.....	.....
Potentially affected firms	.....	135,200	62,574
Hours per firm	.....	1	0.5
Loaded wage rate	.....	$52.65	$52.65
Cost ($1,000s)	$8,700	$7,100	$1,600
Years 2–10 ($1,000s):	.....	.....	.....
Annual cost	$1,600	$0	$1,600
Average Annualized Costs ($1,000s):	.....	.....	.....
3% discount rate	$2,400	$835	$1,600
7% discount rate	$2,600	$1,000	$1,600

When firms update prevailing wage rates, they can incur costs associated with adjusting payrolls, adjusting contracts, and communicating this information to employees (if applicable). This proposed rule would generally affect the frequency with which prevailing wage rates are updated through the provision to update old, outmoded rates, and moving forward, to periodically update rates when that does not occur through the survey process. Currently, only a fraction of prevailing wages can be expected to change each year. Because the

[188] This includes the median base wage of $32.30 from the May 2020 OEWS estimates plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee ECEC data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

Department intends to update older rates to more accurately represent wages and benefits being paid in the construction industry, and, moving forward, more published wage rates will change more frequently than in the past, firms may spend more time updating prevailing wage rates for contractual purposes than they have in the past, leading to additional implementation costs than there otherwise would have been. The Department does not believe that there will be additional implementation costs associated with the proposal to update the definition of the prevailing wage (30 percent rule). This proposed change would only apply to new surveys, for which employers would have already had to update wage rates.

To estimate the size of the implementation cost associated with the periodic updates, the Department assumed that each year 39.6 percent of firms are already checking rates due to newly published surveys (section V.C.2.). Multiplying the remaining 60.4 percent by the 103,600 small firms holding DBRA contracts results in 62,574 firms impacted annually (Table 11). The proposed change to update current non-collectively bargained rates will have an implementation cost to firms. The proposed change to update non-collectively bargained rates moving forward will result in ongoing implementation costs. Each time the rate is updated, firms will incur some costs to adjust payroll (if applicable) and communicate the new rates to employees. The Department assumed that this provision would impact all small firms currently holding DBRA contracts (62,574 firms). For the initial increase, the Department estimated this will take approximately 0.5 hours per year for firms to adjust their rates. As with previous costs, implementation time costs are based on a loaded hourly wage of $52.65. Therefore, total Year 1 implementation costs were estimated to equal $1.6 million ($52.65 × 0.5 hour × 62,574 firms). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is $1.6 million.

To determine direct employer costs on a per firm basis, the Department considers only those firms who are fully affected. These are firms who seek to bid on DBRA contracts, and who have new wage rates to incorporate into their bids and, as needed, into their payroll systems. For these firms, the Year 1 costs are estimated as one and a half hours of time (1 hour for regulatory familiarization and 0.5 hours for implementation) valued at $52.65 per hour. This totals $78.97 in Year 1 costs per firm. The Department welcomes comments on all of the cost estimates presented here.

F. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

G. Alternative to the Proposed Rule

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. Accordingly, the Department considered certain regulatory alternatives.

For one alternative, the Department considered requiring all contracting agencies—not just Federal agencies—that use wage determinations under the DBRA to submit an annual report to the Department outlining proposed construction programs for the coming year. The Department concluded, however, that this requirement would be unnecessarily onerous for non-Federal contracting agencies, particularly as major construction projects such as those related to road and water quality infrastructure projects may be dependent upon approved funding or financial assistance from a Federal partner. The Department's proposal to require only Federal agencies to submit these annual reports would be simpler and less burdensome for the regulated community as some Federal agencies have already been submitting these reports pursuant to AAM 144 (Dec. 27, 1985) and AAM 224 (Jan. 17, 2017).

Another alternative that was considered was the use of a different index instead of the Employment Cost Index (ECI) for updating out-of-date non-collectively bargained wage rates. The Department considered proposing to use the Consumer Price Index (CPI) but considers this data source to be a less appropriate index to use because the CPI measures movement of consumer prices as experienced by day-to-day living expenses, unlike the ECI, which measures changes in the costs of labor in particular. The CPI does not track changes in wages or benefits, nor does it reflect the costs of construction workers nationwide.

The Department welcomes comments on these and other alternatives to the proposed rule.

VII. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector. This rulemaking is not expected exceed that threshold. *See* section V. for an assessment of anticipated costs, transfers, and benefits.

VIII. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would 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.

IX. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Appendix A—Surveys Included in the Prevailing Wage Demonstration

Survey year	Pub date	Surveys Included		
		State	Metro/rural	Construction type(s)
2018	12/25/2020	Utah	Metro	Heavy.
2017	12/14/2018	Nevada	Both	Highway.
2017	12/25/2020	New York	Rural	Building.

Survey year	Pub date	Surveys Included		
		State	Metro/rural	Construction type(s)
2017	12/25/2020	North Dakota	Both	Heavy.
2017	2/7/2020	Oklahoma	Metro	Residential.
2017	2/7/2020	Pennsylvania	East Metro	Residential.
2017	1/24/2020	Vermont	Both	Heavy, highway [a].
2016	12/14/2018	Connecticut	Metro [b]	Building.
2016	12/14/2018	New Mexico	Metro	Building and heavy.
2016	9/29/2017	New York	4 metro counties	Building.
2016	2/7/2020	North Carolina	Both	Residential.
2016	12/8/2017	South Carolina	Metro [c]	Residential.
2015	10/6/2017	Alabama	Both [d]	Building and heavy.
2016	2/7/2020	Alabama	Both	Highway.
2015	4/21/2017	Arkansas	Both	Building and heavy.
2015	9/28/2018	Minnesota	Both	Building.
2015	7/28/2017	Mississippi	Both	Building and heavy.
2015	9/29/2017	New Hampshire	Both	Building and heavy.
2014	12/16/2016	Florida	Metro [c]	Building.

[a] Building component not sufficient.
[b] Only one rural county so excluded.
[c] Rural component of survey was not sufficient.
[d] Excludes heavy rural which were not sufficient.

This includes most surveys with published rates that began in 2015 or later. They include all four construction types, metro and rural counties, and a variety of geographic regions. Two surveys were excluded because they did not meet sufficiency standards (2016 Alaska residential and 2015 Maryland highway). A few surveys were excluded due to anomalies that could not be reconciled. These include:

- 2016 Kansas highway
- 2016 Virginia highway

Appendix B: Current DOL Wage Determination Protocols

Sufficiency requirement is: For a classification to have sufficient responses there generally must be data on at least six employees from at least three contractors. Additionally, if data is received for either exactly six employees or exactly three contractors, then no more than 60 percent of the total employees can be employed by any one contractor. Exceptions to these criteria are allowed under limited circumstances. Examples include: Surveys conducted in rural counties, or residential and heavy surveys with limited construction activity, or for highly specialized classifications. In these circumstances, the rule can be three employees and two contractors.

Aggregation: If the classification is not sufficient at the county level, data are aggregated to the group level, supergroup level, and State level (metro or rural), respectively. For building and residential construction, at each level of aggregation (as well as at the county level) WHD first attempts to calculate a prevailing rate using data only for projects not subject to Davis-Bacon labor standards; if such data are insufficient to calculate a prevailing rate, then data for projects subject to Davis-Bacon labor standards is also included.

Majority rate: If more than 50 percent of employees are paid the exact same hourly rate, then that rate prevails. If not, the Department calculates a weighted average. If more than 50 percent are not exactly the same, but 100 percent of the data are union, then a union weighted average is calculated.

Prevailing fringe benefits: Before a fringe benefit is applicable, it must prevail. The first step is to determine if more than 50 percent of the workers in the reported classification receive a fringe benefit. If more than 50 percent of the employees in a single classification are paid any fringe benefits, then fringe benefits prevail. If fringe benefits prevail in a classification and:

- More than 50 percent of the employees receiving fringe benefits are paid the same total fringe benefit rate, then that total fringe benefit rate prevails.
- more than 50 percent of the employees receiving benefits are *not* paid at the same total rate, then the average rate of fringe benefits weighted by the number of workers who received fringe benefits prevails. If more than 50 percent are not paid the same total rate, but 100 percent of the data are union, then a union weighted average is calculated.

However, if 50 percent or less of the employees in a single classification are paid a fringe benefit, then fringe benefits will not prevail, and a fringe benefit rate of $0.00 will be published for that classification.

List of Subjects

29 CFR Part 1

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages.

29 CFR Part 3

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Penalties, Reporting and recordkeeping requirements, Wages.

29 CFR Part 5

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Penalties, Reporting and recordkeeping requirements, Wages.

For reasons stated in the preamble, the Wage and Hour Division, Department of Labor, proposes to amend 29 CFR subtitle A as follows:

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

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

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 40 U.S.C. 3141 *et seq.;* 40 U.S.C. 3145; 40 U.S.C. 3148; and Secretary of Labor's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); and the laws referenced by 29 CFR 5.1.

■ 2. Amend § 1.1 by revising paragraphs (a) and (b) to read as follows:

§ 1.1 Purpose and scope.

(a) The procedural rules in this part apply under the Davis-Bacon Act (946 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*), and any laws now existing or subsequently enacted, which provide for the payment of minimum wages, including fringe benefits, to laborers and mechanics engaged in construction activity under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia, based on determinations by the Secretary of Labor of the wage rates and fringe benefits prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the local areas where such work is to be performed.

(1) A listing of laws requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act is currently found at *www.dol.gov/agencies/whd/government-contracts.*

(2) Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (64 Stat. 1267, as amended; 5 U.S.C. Appendix), except for functions assigned to the Office of Administrative Law Judges (*see* part 6 of this subtitle) and appellate functions assigned to the Administrative Review Board (*see* part 7 of this subtitle) or reserved by the Secretary of Labor (*see* Secretary's Order 01–2020 (Feb. 21, 2020) have been delegated to the Administrator of the Wage and Hour Division and authorized representatives.

(b) The regulations in this part set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits pursuant to the Davis-Bacon Act and any laws now existing or subsequently enacted providing for determinations of such wages by the Secretary of Labor in accordance with the provisions of the Davis-Bacon Act.

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■ 3. Revise § 1.2 to read as follows:

§ 1.2 Definitions.

Administrator. The term ''Administrator'' means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or authorized representative.

Agency. The term ''agency'' means any Federal, State, or local agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards, as defined in § 5.2 of this subtitle.

(1) *Federal agency.* The term ''Federal agency'' means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

Area. The term ''area'' means the city, town, village, county or other civil subdivision of the State in which the work is to be performed.

(1) For highway projects, the area may be State department of transportation highway districts or other similar State subdivisions.

(2) Where a project requires work in multiple counties, the area may include all counties in which the work will be performed.

Department of Labor-approved website for wage determinations (DOL-approved website). The term ''Department of Labor-approved website for wage determinations'' means the government website for both Davis-Bacon Act and Service Contract Act wage determinations. In addition, the DOL-approved website provides compliance assistance information. The term will also apply to any other website or electronic means that the Department of Labor may approve for these purposes.

Employed. Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is employed regardless of any contractual relationship alleged to exist between the contractor and such person.

Prevailing wage. The term ''prevailing wage'' means:

(1) The wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question;

(2) If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be the wage paid to the greatest number, *provided* that such greatest number constitutes at least 30 percent of those employed; or

(3) If no wage rate is paid to 30 percent or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.

Type of construction (or construction type). The term ''type of construction (or construction type)'' means the general category of construction, as established by the Administrator, for the publication of general wage determinations. Types of construction may include, but are not limited to, building, residential, heavy, and highway. As used in this part, the terms ''type of construction'' and ''construction type'' are synonymous and interchangeable.

United States or the District of Columbia. The term ''United States or the District of Columbia'' means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, and any corporation for which all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

■ 4. Revise § 1.3 to read as follows:

§ 1.3 Obtaining and compiling wage rate information.

For the purpose of making wage determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information. In determining the *prevailing wages* at the time of issuance of a wage determination, the Administrator will be guided by the definition of prevailing wage in § 1.2 and will consider the types of information listed in this section.

(a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect the wage rates paid to workers employed in a particular classification in an area, the type or types of construction on which such rate or rates are paid, and whether or not such wage rates were paid on Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements.

(b) The following types of information may be considered in making wage rate determinations:

(1) Statements showing wage rates paid on projects, including the names and addresses of contractors, including subcontractors; the locations, approximate costs, dates of construction and types of projects, as well as whether or not the projects are Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements; and the number of workers employed in each classification on each project and the respective wage rates paid such workers.

(2) Signed collective bargaining agreements, for which the Administrator may request that the parties to agreements submit statements certifying to their scope and application.

(3) Wage rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.

(4) Wage rate data submitted to the Department of Labor by contracting agencies pursuant to § 5.5(a)(1)(iii) of this subtitle.

(5) For Federal-aid highway projects under 23 U.S.C. 113, information obtained from the highway department(s) of the State(s) in which the project is to be performed. For such projects, the Administrator must consult the relevant State highway department and give due regard to the information thus obtained.

(6) Any other information pertinent to the determination of prevailing wage rates.

(c) The Administrator may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from any sources determined to be necessary. All information of the types described in paragraph (b) of this section, pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in light of the definition of *prevailing wage* in § 1.2.

(d) In compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data. Data from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.

(e) In determining the *prevailing wage,* the Administrator may treat variable wage rates paid by a contractor or contractors to employees within the same classification as the same wage where the pay rates are functionally equivalent, as explained by a collective bargaining agreement or written policy otherwise maintained by the contractor.

(f) If the Administrator determines that there is insufficient wage survey data to determine the prevailing wage for a classification for which conformance requests are regularly submitted pursuant to § 5.5(a)(1)(iii) of this subtitle, the Administrator may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that:

(1) The work performed by the classification is not performed by a classification in the wage determination;

(2) The classification is used in the area by the construction industry; and

(3) The wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination.

(g) Under the circumstances described in paragraph (h) of this section, the Administrator may make a wage determination by adopting, with or without modification, one or more prevailing wage rates determined for public construction by State and/or local officials. Provided that the conditions in paragraph (h) are met, the Administrator may do so even if the methods and criteria used by State or local officials differ in some respects from those that the Administrator would otherwise use under the Davis-Bacon Act and the regulations in this part. Such differences may include, but are not limited to, a definition of prevailing wage under a State or local prevailing wage law or regulation that differs from the definition in § 1.2, a geographic area or scope that differs from the standards in § 1.7, and/or the restrictions on data use in paragraph (d) of this section.

(h) The Administrator may adopt a State or local wage rate as described in paragraph (g) of this section if the Administrator, after reviewing the rate and the processes used to derive the rate, determines that:

(1) The State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties;

(2) The wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately;

(3) The State or local government classifies laborers and mechanics in a manner that is recognized within the field of construction; and

(4) The State or local government's criteria for setting prevailing wage rates are substantially similar to those the Administrator uses in making wage determinations under this part. This determination will be based on the totality of the circumstances, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for determining the appropriate geographic area(s).

(i) In order to adopt wage rates of a State or local government entity pursuant to paragraphs (g) and (h) of this section, the Administrator must obtain the wage rates and any relevant supporting documentation and data, from the State or local government entity. Such information may be submitted via email to *dba.statelocalwagerates@dol.gov,* via mail to U.S. Department of Labor, Wage and Hour Division, Branch of Wage Surveys, 200 Constitution Avenue NW, Washington, DC 20210, or through other means directed by the Administrator.

(j) Nothing in paragraphs (g), (h), and (i) of this section precludes the Administrator from otherwise considering State or local prevailing wage rates, consistent with paragraph (b)(3) of this section, or from giving due regard to information obtained from State highway departments, consistent with paragraph (b)(4) of this section, as part of the Administrator's process of making prevailing wage determinations under this part.

■ 5. Revise § 1.4 to read as follows:

§ 1.4 Report of agency construction programs.

At the beginning of each fiscal year, each Federal agency using wage determinations under the Davis-Bacon Act or any of the laws referenced by § 5.1 of this subtitle, must furnish the Administrator with a report that contains a general outline of its proposed construction programs for the upcoming 3 fiscal years. This report must include a list of proposed projects (including those for which options to extend the contract term of an existing construction contract are expected during the period covered by the report): the estimated start date of construction; the anticipated type or types of construction; the estimated cost of construction; the location or locations of construction; and any other project-specific information that the Administrator requests. The report must also include notification of any significant changes to previously reported construction programs, such as the delay or cancellation of previously reported projects. Reports must be

submitted no later than April 10th of each year by email to *DavisBaconFedPlan@dol.gov,* and must include the name, telephone number, and email address of the official responsible for coordinating the submission.

■ 6. Amend § 1.5 by revising paragraphs (a) and (b) and adding a heading to paragraph (c) to read as follows:

§ 1.5 Publication of general wage determinations and procedure for requesting project wage determinations.

(a) *General wage determinations.* A general wage determination contains, among other information, a list of wage and fringe benefit rates determined to be prevailing for various classifications of laborers or mechanics for specified type(s) of construction in a given area. The Department of Labor publishes general wage determinations under the Davis-Bacon Act on the DOL-approved website.

(b) *Project wage determinations.* (1) A project wage determination is specific to a particular project. An agency may request a project wage determination for an individual project under any of the following circumstances:

(i) The project involves work in more than one county and will employ workers who may work in more than one county;

(ii) There is no general wage determination in effect for the relevant area and type(s) of construction for an upcoming project, or

(iii) All or virtually all of the work on a contract will be performed by a classification that is not listed in the general wage determination that would otherwise apply, and contract award (or bid opening, in contracts entered into in sealed bidding procedures) has not yet taken place.

(2) To request a project wage determination, the agency must submit Standard Form (SF) 308, Request for Wage Determination and Response to Request, to the Department of Labor, either by mailing the form to U.S. Department of Labor, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, DC 20210, or by submitting the form through other means directed by the Administrator.

(3) In completing Form SF–308, the agency must include the following information:

(i) A sufficiently detailed description of the work to indicate the type(s) of construction involved, as well as any additional description or separate attachment, if necessary, for identification of the type(s) of work to be performed. If the project involves multiple types of construction, the requesting agency must attach information indicating the expected cost breakdown by type of construction.

(ii) The location (city, county, state, zip code) or locations in which the proposed project is located.

(iii) The classifications needed for the project. The agency must identify only those classifications that will be needed in the performance of the work. Inserting a note such as ''entire schedule'' or ''all applicable classifications'' is not sufficient. Additional classifications needed that are not on the form may be typed in the blank spaces or on a separate list and attached to the form.

(iv) Any other information requested in Form SF–308.

(4) A request for a project wage determination must be accompanied by any pertinent wage information that may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency must also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

(5) The time required for processing requests for project wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing by the Department of Labor will take at least 30 days.

(c) *Processing time.* * * *

■ 7. Revise § 1.6 to read as follows:

§ 1.6 Use and effectiveness of wage determinations.

(a) *Application, Validity, and Expiration of Wage Determinations*—(1) *Application of incorporated wage determinations.* Once a wage determination is incorporated into a contract (or once construction has started when there is no contract award), the wage determination generally applies for the duration of the contract or project, except as specified in this section.

(2) *General wage determinations.* (i) General wage determinations published on the DOL-approved website contain no expiration date. Once issued, a general wage determination remains valid until revised, superseded, or canceled.

(ii) If there is a current general wage determination applicable to a project, an agency may use it without notifying the Administrator, *Provided* that questions concerning its use are referred to the Administrator in accordance with paragraph (b) of this section.

(iii) When a wage determination is revised, superseded, or canceled, it becomes inactive. Inactive wage determinations may be accessed on the DOL-approved website for informational purposes only. Contracting officers may not use such an inactive wage determination in a contract action unless the inactive wage determination is the appropriate wage determination that must be incorporated to give retroactive effect to the post-award incorporation of a contract clause under § 5.6(a)(1)(ii) of this subtitle or a wage determination under paragraph (f) of this section. Under such circumstances, the agency must provide prior notice to the Administrator of its intent to incorporate an inactive wage determination, and may not incorporate it if the Administrator instructs otherwise.

(3) *Project wage determinations.* (i) Project wage determinations initially issued will be effective for 180 calendar days from the date of such determinations. If a project wage determination is not incorporated into a contract (or, if there is no contract award, if construction has not started) in the period of its effectiveness it is void.

(ii) Accordingly, if it appears that a project wage determination may expire between bid opening and contract award (or between initial endorsement under the National Housing Act or the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937, and the start of construction) the agency shall request a new project wage determination sufficiently in advance of the bid opening to assure receipt prior thereto.

(iii) However, when due to unavoidable circumstances a project wage determination expires before award but after bid opening (or before the start of construction, but after initial endorsement under the National Housing Act, or before the start of construction but after the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937), the head of the agency or his or her designee may request the Administrator to extend the expiration date of the project wage determination in the bid specifications instead of issuing a new project wage determination. Such request shall be supported by a written finding, which shall include a brief statement of factual support, that the extension of the expiration date of the project wage determination is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid

serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all of the circumstances, including an examination to determine if the previously issued rates remain prevailing. If the request for extension is denied, the Administrator will proceed to issue a new wage determination for the project.

(b) *Identifying and incorporating appropriate wage determinations.* (1) Contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project and for ensuring that the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and that inapplicable wage determinations are not incorporated. When a contract involves construction in more than one area, and no multi-county project wage determination has been obtained, the solicitation and contract must incorporate the applicable wage determination for each area. When a contract involves more than one type of construction, the solicitation and contract must incorporate the applicable wage determination for each type of construction involved that is anticipated to be substantial. The contracting agency is responsible for designating the specific work to which each incorporated wage determination applies.

(2) The contractor or subcontractor has an affirmative obligation to ensure that its pay practices are in compliance with the Davis-Bacon Act labor standards.

(3) Any question regarding application of wage rate schedules or wage determinations must be referred to the Administrator for resolution. The Administrator should consider any relevant factors when resolving such questions, including, but not limited to, relevant area practice information.

(c) *Revisions to wage determinations.* (1) General and project wage determinations may be revised from time to time to keep them current. A revised wage determination replaces the previous wage determination. ''Revisions,'' as used in this section, refers both to modifications of some or all of the rates in a wage determination, such as periodic updates to reflect current rates, and to instances where a wage determination is re-issued entirely, such as after a new wage survey is conducted. Revisions also include adjustments to non-collectively bargained prevailing wage and fringe benefit rates on general wage determinations, with the adjustments based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data. Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication. Such periodic revisions to wage determinations are distinguished from the circumstances described in paragraphs (d), (e), and (f) of this section.

(2)(i) Whether a revised wage determination is effective with respect to a particular contract or project generally depends on the date on which the revised wage determination is issued. The date on which a revised wage determination is ''issued,'' as used in this section, means the date that a revised general wage determination is published on the DOL-approved website or the date that the contracting agency receives actual written notice of a revised project wage determination.

(ii) If a revised wage determination is issued before contract award (or the start of construction when there is no award), it is effective with respect to the project, except as follows:

(A) For contracts entered into pursuant to sealed bidding procedures, a revised wage determination issued at least 10 calendar days before the opening of bids is effective with respect to the solicitation and contract. If a revised wage determination is issued less than 10 calendar days before the opening of bids, it is effective with respect to the solicitation and contract unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the revision and a report of the finding is inserted in the contract file. A copy of such report must be made available to the Administrator upon request. No such report is required if the revision is issued after bid opening.

(B) In the case of projects assisted under the National Housing Act, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(C) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever occurs first.

(D) If, in the case of a contract entered into pursuant to sealed bidding procedures under paragraph (c)(2)(ii)(A) of this section the contract has not been awarded within 90 days after bid opening, or if, in the case of projects assisted under the National Housing Act or receiving housing assistance payments section 8 of the U.S. Housing Act of 1937 under paragraph (c)(2)(ii)(B) or (C) of this section, construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any revised general wage determination issued prior to award of the contract or the beginning of construction, as appropriate, is effective with respect to that contract unless the head of the agency or the agency head's designee requests and obtains an extension of the 90-day period from the Administrator. Such request must be supported by a written finding, which includes a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(iii) If a revised wage determination is issued after contract award (or after the beginning of construction where there is no contract award), it is not effective with respect to that project, except under the following circumstances:

(A) Where a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

(B) Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. Examples of such contracts include, but are not limited to, indefinite-delivery-indefinite-quantity construction contracts to perform any necessary repairs to a Federal facility over a period of time; long-term operations-and-maintenance contracts

that may include construction, alteration, and/or repair work covered by Davis-Bacon labor standards; or schedule contracts or blanket purchase agreements in which a contractor agrees to provide certain construction work at agreed-upon prices to Federal agencies. These types of contracts often involve a general commitment to perform necessary construction as the need arises, but do not necessarily specify the exact construction to be performed. For the types of contracts described here, the contracting agency must incorporate into the contract the most recent revision(s) of any applicable wage determination(s) on each anniversary date of the contract's award (or each anniversary date of the beginning of construction when there is no award), or another similar anniversary date where the agency has sought and received prior approval from the Department for the alternative date. Such revised wage determination(s) will apply to any construction work that begins or is obligated under such a contract during the 12 months following that anniversary date until such construction work is completed, even if the completion of that work extends beyond the twelve-month period. Where such contracts have task orders, purchase orders, or other similar contract instruments awarded under the master contract, the contracting and ordering agency must include the applicable updated wage determination in such task orders, purchase orders, or other similar contract instrument.

(d) *Corrections for clerical errors.* Upon the Administrator's own initiative or at the request of an agency, the Administrator may correct any wage determination, without regard to paragraph (a) or (c) of this section, whenever the Administrator finds that it contains clerical errors. Such corrections must be included in any solicitations, bidding documents, or ongoing contracts containing the wage determination in question, and such inclusion, and application of the correction(s), must be retroactive to the start of construction if construction has begun.

(e) *Pre-award determinations that a wage determination may not be used.* If, prior to the award of a contract (or the start of construction under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), the Administrator provides written notice that:

(1) The wrong wage determination or the wrong schedule was included in the bidding documents or solicitation; or

(2) A wage determination included in the bidding documents or solicitation was withdrawn by the Department of Labor as a result of a decision by the Administrative Review Board, the wage determination may not be used for the contract, without regard to whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred.

(f) *Post-award determinations and procedures.* (1) If a contract subject to the labor standards provisions of the laws referenced by § 5.1 of this subtitle is entered into without the correct wage determination(s), the agency must, upon the request of the Administrator or upon its own initiative, incorporate the correct wage determination into the contract or require its incorporation. Where the agency is not entering directly into such a contract but instead is providing Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the correct wage determination(s) into its contracts.

(2) The Administrator may require the agency to incorporate a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may require the application of the correct wage determination to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination.

(3) Under any of the circumstances described in paragraphs (f)(1) and (2) of this section, the agency must either terminate and resolicit the contract with the correct wage determination, or incorporate the correct wage determination into the contract (or ensure it is so incorporated) through supplemental agreement, change order, or any other authority that may be needed. The method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:

(i) Unless the Administrator directs otherwise, the incorporation of the correct wage determination(s) must be retroactive to the date of contract award or start of construction if there is no award.

(ii) If incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.

(iii) Before the agency requires incorporation upon its own initiative, it must provide notice to the Administrator of the proposed action.

(iv) The contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination.

(v) If a recipient or sub-recipient of Federal assistance under any of the applicable statutes referenced by § 5.1 of this subtitle refuses to incorporate the wage determination as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required wage determination into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13 of this subtitle.

(vi) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back-wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

(4) Under any of the above circumstances, notwithstanding the requirement to incorporate the correct wage determination(s) within 30 days, the correct wage determination(s) will be effective by operation of law, retroactive to the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), in accordance with § 5.5(e) of this subtitle.

(g) *Approval of Davis-Bacon Related Act Federal funding or assistance after contract award.* If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), as appropriate, and

must be incorporated in the contract specifications retroactively to that date, *Provided* that upon the request of the head of the Federal agency providing the Federal funding or assistance, in individual cases the Administrator may direct incorporation of the wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *Provided further* that the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.

■ 8. Revise § 1.7 to read as follows:

§ 1.7 Scope of consideration.

(a) In making a wage determination, the *area* from which wage data will be drawn will normally be the county unless sufficient current wage data (data on wages paid on current projects or, where necessary, projects under construction no more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.

(b) If sufficient current wage data is not available from projects within the county to make a wage determination, wages paid on similar construction in surrounding counties may be considered.

(c) If sufficient current wage data is not available in surrounding counties, the Administrator may consider wage data from similar construction in comparable counties or groups of counties in the State, and, if necessary, overall statewide data.

(d) If sufficient current statewide wage data is not available, wages paid on projects completed more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.

(e) The use of *helpers* and *apprentices* is permitted in accordance with part 5 of this subtitle.

■ 9. Revise § 1.8 to read as follows:

§ 1.8 Reconsideration by the Administrator.

(a) Any interested party may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination.

(b) Such a request for reconsideration must be in writing, accompanied by a full statement of the interested party's views and any supporting wage data or other pertinent information. Requests must be submitted via email to *dba.reconsideration@dol.gov;* by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210; or through other means directed by the Administrator. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30-day period that additional time is necessary.

(c) If the decision for which reconsideration is sought was made by an authorized representative of the Administrator of the Wage and Hour Division, the interested party seeking reconsideration may request further reconsideration by the Administrator of the Wage and Hour Division. Such a request must be submitted within 30 days from the date the decision is issued; this time may be extended for good cause at the discretion of the Administrator upon a request by the interested party. The procedures in paragraph (b) of this section apply to any such reconsideration requests.

■ 10. Add § 1.10 to read as follows:

§ 1.10 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event the provision is severable from this part and will not affect the remaining provisions.

Appendix A to Part 1—[Removed]

■ 11. Remove appendix A to part 1.

Appendix B to Part 1—[Removed]

■ 12. Remove appendix B to part 1.

PART 3— CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

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

Authority: R.S. 161, 48 Stat. 848, Reorg. Plan No. 14 of 1950, 64 Stat. 1267; 5 U.S.C. 301; 40 U.S.C. 3145; Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 14. Revise § 3.1 to read as follows:

§ 3.1 Purpose and scope.

This part prescribes ''anti-kickback'' regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 3145), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. The part is intended to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the various statutes dealing with federally assisted construction that contain similar minimum wage provisions, including those provisions which are not subject to Reorganization Plan No. 14 of 1950 (*e.g.,* the College Housing Act of 1950, the Federal Water Pollution Control Act, and the Housing Act of 1959), and in the enforcement of the overtime provisions of the Contract Work Hours and Safety Standards Act whenever they are applicable to construction work. The part details the obligation of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered thereby; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

■ 15. Revise § 3.2 to read as follows:

§ 3.2 Definitions.

As used in the regulations in this part:

Affiliated person. The term ''affiliated person'' includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with the contractor or subcontractor as parent, subsidiary, or otherwise, and an officer or agent of such corporation.

Agency. The term ''agency'' means any Federal, State, or local government agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, for a project subject to the Davis-Bacon labor standards, as defined in § 5.2 of this subtitle.

(1) *Federal agency.* The term ''Federal agency'' means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

Building or work. The term ''building or work'' generally includes construction activity of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals; dredging, shoring, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The term ''building or work'' also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.

(1) *Building or work financed in whole or in part by loans or grants from the United States.* The term ''building or work financed in whole or in part by loans or grants from the United States'' includes any building or work for which construction, prosecution, completion, or repair, as defined in this section, payment or part payment is made directly or indirectly from funds provided by loans or grants by a Federal agency. The term includes any building or work for which the Federal assistance granted is in the form of loan guarantees or insurance.

(2) [Reserved]

Construction, prosecution, completion, or repair. The term ''construction, prosecution, completion, or repair'' mean all types of work done on a particular building or work at the site thereof as specified in § 5.2 of this subtitle, including, without limitation, altering, remodeling, painting and decorating, installation on the site of the work of items fabricated off-site, transportation as reflected in § 5.2, demolition as reflected in § 5.2, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, performed by laborers and mechanics at the site.

Employed (and wages). Every person paid by a contractor or subcontractor in any manner for their labor in the construction, prosecution, completion, or repair of a public building or public work or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is employed and receiving *wages,* regardless of any contractual relationship alleged to exist between him and the real employer.

Public building (or public work). The term ''public building (or public work)'' includes a building or work the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the general public regardless of whether title thereof is in a Federal agency. The construction, prosecution, completion, or repair of a portion of a building or work may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by the Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

United States or the District of Columbia. The term ''United States or the District of Columbia'' means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, and any corporation for which all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

■ 16. Revise § 3.3 to read as follows:

§ 3.3 Certified payrolls.

(a) [Reserved]

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, each week must provide a copy of its weekly payroll for all laborers and mechanics engaged on work covered by this part and part 5 of this chapter during the preceding weekly payroll period, accompanied by a statement of compliance certifying the accuracy of the weekly payroll information. This statement must be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and must be on the back of Form WH–347, ''Payroll (For Contractors Optional Use)'' or on any form with identical wording. Copies of WH–347 may be obtained from the contracting or sponsoring agency or from the Wage and Hour Division website at *https://www.dol.gov/agencies/whd/government-contracts/construction/forms* or its successor site. The signature by the contractor, subcontractor, or the authorized officer or employee must be an original handwritten signature or a legally valid electronic signature.

(c) The requirements of this section shall not apply to any contract of $2,000 or less.

(d) Upon a written finding by the head of a Federal agency, the Secretary of Labor may provide reasonable limitations, variations, tolerances, and exemptions from the requirements of this section subject to such conditions as the Secretary of Labor may specify.

■ 17. Revise § 3.4 to read as follows:

§ 3.4 Submission of certified payroll and the preservation and inspection of weekly payroll records.

(a) *Certified payroll.* Each certified payroll required under § 3.3 must be delivered by the contractor or subcontractor, within 7 days after the regular payment date of the payroll period, to a representative at the site of the building or work of the agency contracting for or financing the work, or, if there is no representative of the agency at the site of the building or work, the statement must be delivered by mail or by any other means normally assuring delivery by the contractor or subcontractor, within that 7 day time period, to the agency contracting for or financing the building or work. After the certified payrolls have been reviewed in accordance with the contracting or sponsoring agency's procedures, such certified payrolls must be preserved by the Federal agency for a period of 3 years after all the work on the prime contract is completed and must be produced for inspection, copying, and transcription by the Department of Labor upon request. The certified payrolls must also be transmitted together with a report of any violation, in accordance with applicable procedures prescribed by the United States Department of Labor.

(b) *Recordkeeping.* Each contractor or subcontractor must preserve the regular payroll records for a period of 3 years after all the work has been completed on the prime contract. The regular payroll records must set out accurately and completely the name; Social Security number; last known address, telephone number, and email address of each laborer and mechanic; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof); daily and

weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid. The contractor or subcontractor must make such regular payroll records, as well as copies of the certified payrolls provided to the contracting or sponsoring agency, available at all times for inspection, copying, and transcription by the contracting officer or his authorized representative, and by authorized representatives of the Department of Labor.

■ 18. Revise § 3.5 to read as follows:

§ 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(a) Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes.

(b) Any deduction of sums previously paid to the laborer or mechanic as a bona fide prepayment of wages when such prepayment is made without discount or interest. A *bona fide prepayment of wages* is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(c) Any deduction of amounts required by court process to be paid to another, unless the deduction is in favor of the contractor, subcontractor, or any affiliated person, or when collusion or collaboration exists.

(d) Any deduction constituting a contribution on behalf of the laborer or mechanic employed to funds established by the contractor or representatives of the laborers or mechanics, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries, illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of the laborers or mechanics, their families and dependents: *Provided, however,* That the following standards are met:

(1) The deduction is not otherwise prohibited by law;

(2) It is either:

(i) Voluntarily consented to by the laborer or mechanic in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of or for the continuation of employment; or

(ii) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its laborers or mechanics;

(3) No profit or other benefit is otherwise obtained, directly or indirectly, by the contractor or subcontractor or any affiliated person in the form of commission, dividend, or otherwise; and

(4) The deductions shall serve the convenience and interest of the laborer or mechanic.

(e) Any deduction requested by the laborer or mechanic to enable him or her to repay loans to or to purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes.

(f) Any deduction voluntarily authorized by the laborer or mechanic for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.

(g) Any deduction voluntarily authorized by the laborer or mechanic for the making of contributions to charitable organizations as defined by 26 U.S.C 501(c)(3).

(h) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however,* That a collective bargaining agreement between the contractor or subcontractor and representatives of its laborers or mechanics provides for such deductions and the deductions are not otherwise prohibited by law.

(i) Any deduction not more than for the ''reasonable cost'' of board, lodging, or other facilities meeting the requirements of section 3(m) of the Fair Labor Standards Act of 1938, as amended, and 29 CFR part 531. When such a deduction is made the additional records required under 29 CFR 516.25(a) shall be kept.

(j) Any deduction for the cost of safety equipment of nominal value purchased by the laborer or mechanic as his or her own property for his or her personal protection in his or her work, such as safety shoes, safety glasses, safety gloves, and hard hats, if such equipment is not required by law to be furnished by the contractor, if such deduction does not violate the Fair Labor Standards Act or any other law, if the cost on which the deduction is based does not exceed the actual cost to the contractor where the equipment is purchased from him or her and does not include any direct or indirect monetary return to the contractor where the equipment is purchased from a third person, and if the deduction is either:

(1) Voluntarily consented to by the laborer or mechanic in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or

(2) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its laborers and mechanics.

■ 19. Revise § 3.7 to read as follows:

§ 3.7 Applications for the approval of the Secretary of Labor.

Any application for the making of payroll deductions under § 3.6 shall comply with the requirements prescribed in the following paragraphs of this section:

(a) The application must be in writing and addressed to the Secretary of Labor. The application must be submitted by email to *dbadeductions@dol.gov,* by mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave. NW, Room S–3502, Washington, DC 20210, or by any other means normally assuring delivery.

(b) The application need not identify the contract or contracts under which the work in question is to be performed. Permission will be given for deductions on all current and future contracts of the applicant for a period of 1 year. A renewal of permission to make such payroll deduction will be granted upon the submission of an application which makes reference to the original application, recites the date of the Secretary of Labor's approval of such deductions, states affirmatively that there is continued compliance with the standards set forth in the provisions of § 3.6, and specifies any conditions which have changed in regard to the payroll deductions.

(c) The application must state affirmatively that there is compliance with the standards set forth in the provisions of § 3.6. The affirmation must be accompanied by a full statement of the facts indicating such compliance.

(d) The application must include a description of the proposed deduction, the purpose of the deduction, and the classes of laborers or mechanics from whose wages the proposed deduction would be made.

(e) The application must state the name and business of any third person

to whom any funds obtained from the proposed deductions are to be transmitted and the affiliation of such person, if any, with the applicant.

■ 20. Revise § 3.8 to read as follows:

§ 3.8 Action by the Secretary of Labor upon applications.

The Secretary of Labor will decide whether or not the requested deduction is permissible under provisions of § 3.6; and will notify the applicant in writing of the decision.

■ 21. Revise § 3.11 to read as follows:

§ 3.11 Regulations part of contract.

All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part must expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this subtitle. However, these requirements will be considered to be effective by operation of law, whether or not they are incorporated into such contracts, as set forth in § 5.5(e) of this subtitle.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

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

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 *et seq.;* 40 U.S.C. 3145; 40 U.S.C. 3148; 40 U.S.C. 3701 *et seq.;* and the laws listed in 5.1(a) of this part; Secretary's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at section 701, 129 Stat 584.

■ 23. Revise § 5.1 to read as follows:

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1950 (64 Stat. 1267, as amended, 5 U.S.C. Appendix) and the Copeland Act (48 Stat. 948; 18 U.S.C. 874; 40 U.S.C. 3145) in order to coordinate the administration and enforcement of labor standards provisions contained in the Davis-Bacon Act (946 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*) and its related statutes (''Related Acts'').

(1) A listing of laws requiring Davis-Bacon labor standards provisions is currently found at *www.dol.gov/agencies/whd/government-contracts.*

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determinations and the issuance and use of such wage determinations under the Davis-Bacon Act and its Related Acts.

■ 24. Revise § 5.2 to read as follows:

§ 5.2 Definitions.

Administrator. The term ''Administrator'' means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or authorized representative.

Agency. The term ''agency'' means any Federal, State, or local government agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards, as defined in this section.

(1) *Federal agency.* The term ''Federal agency'' means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

Agency Head. The term ''Agency Head'' means the principal official of an agency and includes those persons duly authorized to act on behalf of the Agency Head.

Apprentice and *helper.* The terms ''apprentice'' and ''helper'' are defined as follows:

(1) ''Apprentice'' means:

(i) A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship; or

(ii) A person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) These provisions do not apply to apprentices and trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(3) A distinct classification of helper will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where:

(i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(ii) The use of such helpers is an established prevailing practice in the area; and

(iii) The helper is not employed as a trainee in an informal training program. A *helper* classification will be added to wage determinations pursuant to § 5.5(a)(1)(iii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Building or work. The term ''building or work'' generally includes construction activities of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The term *building* or *work* also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.

Construction, prosecution, completion, or repair. The term ''construction, prosecution, completion, or repair'' means the following:

(1) These terms include all types of work done—

(i) On a particular building or work at the site of the work, as defined in this section, by laborers and mechanics employed by a contractor or subcontractor, or

(ii) In the construction or development of a project under a development statute.

(2) These terms include, without limitation (except as specified in this definition):

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment, but only if such work is done

(A) On the site of the work, as defined in this section, or

(B) In the construction or development of a project under a *development statute;*

(iv) ''Covered transportation'' is defined as transportation under any of the following circumstances:

(A) Transportation that takes place entirely within a location meeting the definition of ''site of the work'' in this section;

(B) Transportation of portion(s) of the building or work between a ''secondary construction site'' as defined in this section and a ''primary construction site'' as defined in this section;

(C) Transportation between a ''nearby dedicated support site'' as defined in this section and a ''primary construction site'' or ''secondary construction site'' as defined in this section;

(D) ''Onsite activities essential or incidental to offsite transportation''—defined as activities conducted by a truck driver or truck driver's assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as loading, unloading, or waiting for materials to be loaded or unloaded—where the driver or driver's assistant's time spent on the site of the work is not so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded; and

(E) Any transportation and related activities, whether on or off the site of the work, by laborers and mechanics employed in the construction or development of the project under a development statute.

(v) Demolition and/or removal, under any of the following circumstances:

(A) Where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing building or work. Examples of such activities include the removal of asbestos, paint, components, systems, or parts from a facility that will not be demolished; as well as contracts for hazardous waste removal, land recycling, or reclamation that involve substantial earth moving, removal of contaminated soil, re-contouring surfaces, and/or habitat restoration.

(B) Where subsequent construction covered in whole or in part by the labor standards in this part is contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract. In determining whether covered construction is contemplated within the meaning of this provision, relevant factors include, but are not limited to, the existence of engineering or architectural plans or surveys of the site; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; and the disposition of the site after demolition.

(C) Where otherwise required by statute.

(3) Except for transportation that constitutes ''covered transportation'' as defined in this section, construction, prosecution, completion, or repair does not include the transportation of materials or supplies to or from the site of the work.

Contract. The term ''contract'' means any prime contract which is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1 and any subcontract of any tier thereunder, let under the prime contract.

Contracting Officer. The term ''Contracting Officer'' means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of an agency, sponsor, owner, applicant, or other similar entity.

Contractor. The term ''contractor'' means any individual or other legal entity that enters into or is awarded a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1, including any prime contract or subcontract of any tier under a covered prime contract. In addition, the term contractor includes any surety that is completing performance for a defaulted contractor pursuant to a performance bond. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of the labor standards provisions of any of the laws referenced by § 5.1. A State or local government is not regarded as a contractor or subcontractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under development statutes or other statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards. The term ''contractor'' does not include an entity that is a material supplier, except if the entity is performing work under a development statute.

Davis-Bacon labor standards. The term ''Davis-Bacon labor standards'' as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes referenced in § 5.1, and the regulations in parts 1 and 3 of this subtitle and this part.

Development statute. The term ''development statute'' means a statute that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project.

Employed. Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is ''employed'' regardless of any contractual relationship alleged to exist between the contractor and such person.

Laborer or *mechanic.* The term ''laborer or mechanic'' includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term ''laborer'' or ''mechanic'' includes apprentices, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics. Working supervisors who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

Material supplier. The term ''material supplier'' is defined as follows:

(1) A material supplier is an entity meeting all of the following criteria:

(i) Its only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery;

(ii) It also supplies materials, articles, supplies, or equipment to the general public; and

(iii) Its facility manufacturing the materials, articles, supplies, or equipment, if any, is neither established specifically for the contract or project nor located at the site of the work.

(2) If an entity, in addition to being engaged in the activities specified in paragraph (1)(i) of this definition, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier.

Prime contractor. The term ''prime contractor'' means any person or entity that enters into a contract with an agency. For the purposes of the labor standards provisions of any of the laws referenced by § 5.1, the term prime contractor also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (*e.g.,* a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing any construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. For the purposes of the cross-withholding provisions in § 5.5, any such related entities holding different prime contracts are considered to be the same prime contractor.

Public building or *public work.* The term ''public building'' or ''public work'' includes a building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. The construction, prosecution, completion, or repair of a portion of a building or work may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

Secretary. The term ''Secretary'' includes the Secretary of Labor, or authorized representative.

Site of the work. The term ''site of the work'' is defined as follows:

(1) ''Site of the work'' includes all of the following:

(i) The primary construction site(s), defined as the physical place or places where the building or work called for in the contract will remain.

(ii) Any secondary construction site(s), defined as any other site(s) where a significant portion of the building or work is constructed, *provided* that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public. A ''significant portion'' of a building or work means one or more entire portion(s) or module(s) of the building or work, as opposed to smaller prefabricated components, with minimal construction work remaining other than the installation and/or assembly of the portions or modules at the place where the building or work will remain.

(iii) Any nearby dedicated support sites, defined as:

(A) Job headquarters, tool yards, batch plants, borrow pits, and similar facilities that are dedicated exclusively, or nearly so, to performance of the contract or project, *and* adjacent or virtually adjacent to either a primary construction site or a secondary construction site, and

(B) Locations adjacent or virtually adjacent to a primary construction site at which workers perform activities associated with directing vehicular or pedestrian traffic around or away from the primary construction site.

(2) With the exception of locations that are secondary construction sites as defined in paragraph (1)(ii) of this definition, site of the work does not include:

(i) Permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project; or

(ii) Fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a material supplier, which are established by a material supplier for the project before opening of bids and not on the physical place or places where the building or work called for in the contract will remain, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Subcontractor. The term ''subcontractor'' means any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1. The term subcontractor includes subcontractors of any tier, but does not include the ordinary laborers or mechanics to whom a prevailing wage must be paid regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.

United States or the District of Columbia. The term ''United States or the District of Columbia'' means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including non-appropriated fund instrumentalities and any corporation for which all or substantially all of its stock is beneficially owned by the United States or by the foregoing departments, establishments, agencies, or instrumentalities.

Wages. The term ''wages'' means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

Wage determination. The term ''wage determination'' includes the original decision and any subsequent decisions revising, modifying, superseding,

correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of § 1.6 of this subtitle.

■ 25. Amend § 5.5 by:

■ a. Revising paragraphs (a) introductory text and (a)(1) through (4), (6), and (10);

■ b. Adding paragraph (a)(11);

■ c. Revising paragraphs (b)(2) through (4);

■ d. Adding paragraph (b)(5);

■ e. Revising paragraph (c); and

■ f. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 5.5 Contract provisions and related matters.

(a) *Required contract clauses.* The Agency head will cause or require the contracting officer to insert in full in any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the laws referenced by § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, *Provided,* That such modifications are first approved by the Department of Labor):

(1) *Minimum wages*—(i) *Wage rates and fringe benefits.* All laborers and mechanics employed or working upon the site of the work (or otherwise working in construction or development of the project under a development statute), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (part 3 of this subtitle)), the full amount of basic hourly wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. As provided in paragraphs (d) and (e) of this section, the appropriate wage determinations are effective by operation of law even if they have not been attached to the contract. Contributions made or costs reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act (40 U.S.C. 3141(2)(B)) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(v) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill, except as provided in paragraph (a)(4) of this section. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided,* That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (a)(1)(iii) of this section) and the Davis-Bacon poster (WH–1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii) *Frequently recurring classifications.* (A) In addition to wage and fringe benefit rates that have been determined to be prevailing under the procedures set forth in part 1 of this subtitle, a wage determination may contain, pursuant to § 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to paragraph (a)(1)(iii) of this section, provided that:

(*1*) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined;

(*2*) The classification is used in the area by the construction industry; and

(*3*) The wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.

(B) The Administrator will establish wage rates for such classifications in accordance with paragraph (a)(1)(iii)(A)(*3*) of this section. Work performed in such a classification must be paid at no less than the wage and fringe benefit rate listed on the wage determination for such classification.

(iii) *Conformance.* (A) The contracting officer must require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract be classified in conformance with the wage determination. Conformance of an additional classification and wage rate and fringe benefits is appropriate only when the following criteria have been met:

(*1*) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is used in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination.

(C) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken will be sent by the contracting officer by email to *DBAconformance@dol.gov.* The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.

(D) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer will, by email to *DBAconformance@dol.gov,* refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within

the 30–day period that additional time is necessary.

(E) The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division under paragraphs (a)(1)(iii)(C) and (D) of this section. The contractor must furnish a written copy of such determination to each affected worker or it must be posted as a part of the wage determination. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph (a)(1)(iii)(C) or (D) must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iv) *Fringe benefits not expressed as an hourly rate.* Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor may either pay the benefit as stated in the wage determination or may pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(v) *Unfunded plans.* If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided,* That the Secretary of Labor has found, upon the written request of the contractor, in accordance with the criteria set forth in § 5.28, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(vi) *Interest.* In the event of a failure to pay all or part of the wages required by the contract, the contractor will be required to pay interest on any underpayment of wages.

(2) *Withholding*—(i) *Withholding requirements.* The (write in name of Federal agency or the loan or grant recipient) must, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for the full amount of wages required by the clause set forth in paragraph (a)(1) of this section and monetary relief for violations of paragraph (a)(11) of this section of this contract, including interest, or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon labor standards, that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon prevailing wage requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency. In the event of a contractor's failure to pay any laborer or mechanic, including any apprentice or helper working on the site of the work (or otherwise working in construction or development of the project under a development statute) all or part of the wages required by the contract, or upon the contractor's failure to submit the required records as discussed in paragraph (a)(3)(iv) of this section, the (Agency) may on its own initiative and after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph (a)(2)(i) or (b)(3)(i) of this section, or both, over claims to those funds by:

(A) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(B) A contracting agency for its reprocurement costs;

(C) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(D) A contractor's assignee(s);

(E) A contractor's successor(s); or

(F) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

(3) *Records and certified payrolls*—(i) *Basic record requirements*—(A) *Length of record retention.* All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.

(B) *Information required.* Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.

(C) *Additional records relating to fringe benefits.* Whenever the Secretary of Labor has found under paragraph (a)(1)(v) of this section that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(D) *Additional records relating to apprenticeship.* Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

(ii) *Certified payroll requirements*—(A) *Frequency and method of submission.* The contractor or subcontractor must submit weekly for each week in which any DBA- or Related Acts-covered work is performed certified payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the certified payrolls to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the (write in name of agency). The prime contractor is responsible for the submission of copies of certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system.

(B) *Information required.* The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph (a)(3)(i) of this section, except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead the payrolls need only include an individually identifying number for each worker (*e.g.,* the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH–347, or in any other format desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division website at *https://www.dol.gov/files/WHD/legacy/files/wh347.pdf* or its successor site. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the sponsoring government agency (or the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records).

(C) *Statement of Compliance.* Each certified payroll submitted must be accompanied by a ''Statement of Compliance,'' signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

(*1*) That the certified payroll for the payroll period contains the information required to be provided under paragraph (a)(3)(ii) of this section, the appropriate information and basic records are being maintained under paragraph (a)(3)(i) of this section, and such information and records are correct and complete;

(*2*) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in part 3 of this subtitle; and

(*3*) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.

(D) *Use of Optional Form WH–347.* The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 will satisfy the requirement for submission of the ''Statement of Compliance'' required by paragraph (a)(3)(ii)(C) of this section.

(E) *Signature.* The signature by the contractor, subcontractor, or the contractor's or subcontractor's agent, must be an original handwritten signature or a legally valid electronic signature.

(F) *Falsification.* The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729.

(iii) *Contracts, subcontracts, and related documents.* The contractor or subcontractor must maintain this contract or subcontract, and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

(iv) *Required disclosures and access*—(A) *Required record disclosures and access to workers.* The contractor or subcontractor must make the records required under paragraphs (a)(3)(i) through (iii) of this section and any other documents that the (write the name of the agency) or the Department of Labor deems necessary to determine compliance with the labor standards provisions of any of the applicable statutes referenced by § 5.1, available for inspection, copying, or transcription by authorized representatives of the (write the name of the agency) or the Department of Labor, and must permit such representatives to interview workers during working hours on the job.

(B) *Sanctions for non-compliance with records and worker access requirements.* If the contractor or subcontractor fails to submit the required records or to make them available, or to permit worker interviews during working hours on the job, the Federal agency may, after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, that maintains such records or that employs such workers, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available, or to permit worker interviews during worker hours on the job, may be grounds for debarment action pursuant to § 5.12. In addition, any contractor or other person that fails to submit the required records or make those records available to WHD within the time WHD requests that the records be produced, will be precluded from introducing as evidence in an administrative proceeding under part 6 of this subtitle any of the required records that were not provided or made available to WHD. WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

(C) *Required information disclosures.* Contractors and subcontractors must maintain the full Social Security number and last known address, telephone number, and email address of each covered worker, and must provide them upon request to the (write in name of appropriate Federal agency) if the agency is a party to the contract, or to the Wage and Hour Division of the Department of Labor. If the Federal agency is not such a party to the contract, the contractor or subcontractor, or both, must upon request provide the full Social Security number and last known address, telephone number, and email address of each covered worker to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the (write in name of agency), the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or other compliance action.

(4) *Apprentices and equal employment opportunity* —(i) *Apprentices*—(A) *Rate of pay.* Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the

work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(B) *Fringe benefits.* Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.

(C) *Apprenticeship ratio.* The allowable ratio of apprentices to journeyworkers on the job site in any craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(D) *Reciprocity of ratios and wage rates.* Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyworker hourly rate specified in the applicable wage determination.

(ii) *Equal employment opportunity.* The use of apprentices and journeyworkers under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

* * * * *

(6) *Subcontracts.* The contractor or subcontractor must insert in any subcontracts the clauses contained in paragraphs (a)(1) through (11) of this section, along with the applicable wage determination(s) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and may be subject to debarment, as appropriate.

* * * * *

(10) *Certification of eligibility.* (i) By entering into this contract, the contractor certifies that neither it nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of 40 U.S.C. 3144(b) or § 5.12(a) or (b).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of 40 U.S.C. 3144(b) or § 5.12(a) or (b).

(iii) The penalty for making false statements is prescribed in the U.S. Code, Title 18 Crimes and Criminal Procedure, 18 U.S.C. 1001.

(11) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

(i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, this part, or part 1 or 3 this subtitle;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting on behalf of themselves or others any right or protection under the DBA, Related Acts, this part, or part 1 or 3 of this subtitle;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, this part, or part 1 or 3 of this subtitle; or

(iv) Informing any other person about their rights under the DBA, Related Acts, this part, or part 1 or 3 of this subtitle.

(b) * * *

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages and interest from the date of the underpayment. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1), in the sum of $29 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1).

(3) *Withholding for unpaid wages and liquidated damages*—(i) *Withholding process.* The (write in the name of the Federal agency or the loan or grant recipient) must, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for unpaid wages and monetary relief, including interest, required by the clauses set forth in paragraphs (b)(2) and (5) of this section and liquidated damages for violations of paragraph (b)(2) of this section or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon prevailing wage requirements, that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon prevailing wage requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph (a)(2)(i) or (b)(3)(i) of this section, or both, over claims to those funds by:

(A) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(B) A contracting agency for its reprocurement costs;

(C) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(D) A contractor's assignee(s);

(E) A contractor's successor(s); or

(F) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

(4) *Subcontracts.* The contractor or subcontractor must insert in any subcontracts the clauses set forth in paragraphs (b)(1) through (5) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor is responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (5). In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and associated liquidated damages, and may be subject to debarment, as appropriate.

(5) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

(i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in this part;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting on behalf of themselves or others any right or protection under CWHSSA or part 5 of this title;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or this part; or

(iv) Informing any other person about their rights under CWHSSA or this part.

(c) *CWHSSA payroll records clause.* In addition to the clauses contained in paragraph (b) of this section, in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other laws referenced by § 5.1, the Agency Head must cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor must maintain payrolls and basic payroll records during the course of the work and must preserve them for a period of 3 years after all the work on the prime contract is completed for all laborers and mechanics, including guards and watchmen, working on the contract. Such records must contain the name; last known address, telephone number, and email address; and social security number of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid; daily and weekly number of hours actually worked; deductions made; and actual wages paid. Further, the Agency Head must cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph must be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview workers during working hours on the job.

(d) *Incorporation of contract clauses and wage determinations by reference.* Although agencies are required to insert the contract clauses set forth in this section, along with appropriate wage determinations, in full into covered contracts, and contractors and subcontractors are required to insert them in any lower-tier subcontracts, the incorporation by reference of the required contract clauses and appropriate wage determinations will be given the same force and effect as if they were inserted in full text.

(e) *Incorporation by operation of law.* The contract clauses set forth in this section, along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by § 5.1 to include such clauses, and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract, unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.

■ 26. Revise § 5.6 to read as follows:

§ 5.6 Enforcement.

(a) *Agency responsibilities.* (1)(i) The Federal agency has the initial responsibility to ascertain whether the clauses required by § 5.5 and the appropriate wage determination(s) have been incorporated into the contracts subject to the labor standards provisions of the laws referenced by § 5.1. Additionally, a Federal agency that provides Federal financial assistance that is subject to the labor standards provisions of the Act must promulgate the necessary regulations or procedures to require the recipient or sub-recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency unless it ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency after the beginning of construction unless there is on file with the Federal agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5 or unless there is on file with the Federal agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.

(ii) If a contract subject to the labor standards provisions of the applicable statutes referenced by § 5.1 is entered into without the incorporation of the clauses required by § 5.5, the agency must, upon the request of the Administrator or upon its own initiative, either terminate and resolicit the contract with the required contract clauses, or incorporate the required clauses into the contract (or ensure they are so incorporated) through supplemental agreement, change order, or any and all authority that may be needed. Where an agency has not entered directly into such a contract but instead has provided Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the clauses required into its contracts. The method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable

law. Additionally, the following requirements apply:

(A) Unless the Administrator directs otherwise, the incorporation of the clauses required by § 5.5 must be retroactive to the date of contract award or start of construction if there is no award.

(B) If this incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.

(C) The contractor must be compensated for any increases in wages resulting from incorporation of a missing contract clauses.

(D) If the recipient refuses to incorporate the clauses as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required clauses into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13.

(E) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

(F) Notwithstanding the requirement to incorporate the contract clauses and correct wage determination within 30 days, the contract clauses and correct wage determination will be effective by operation of law, retroactive to the beginning of construction, in accordance with § 5.5(e).

(2)(i) Certified payrolls submitted pursuant to § 5.5(a)(3)(ii) must be preserved by the Federal agency for a period of 3 years after all the work on the prime contract is completed, and must be produced at the request of the Department of Labor at any time during the 3-year period, regardless of whether the Department of Labor has initiated an investigation or other compliance action.

(ii) In situations where the Federal agency does not itself maintain certified payrolls required to be submitted pursuant to § 5.5(a)(3)(ii), upon the request of the Department of Labor the Federal agency must ensure that such certified payrolls are provided to the Department of Labor. Such certified payrolls may be provided by the applicant, sponsor, owner, or other entity, as the case may be, directly to the Department of Labor, or to the Federal agency which, in turn, must provide those records to the Department of Labor.

(3) The Federal agency will cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes referenced in § 5.1. Investigations will be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations will include interviews with workers, which must be taken in confidence, and examinations of certified payrolls, regular payrolls, and other basic records required to be maintained under § 5.5(a)(3). In making such examinations, particular care must be taken to determine the correctness of classification(s) of work actually performed, and to determine whether there is a disproportionate amount of work by laborers and of apprentices registered in approved programs. Such investigations must also include evidence of fringe benefit plans and payments thereunder. Federal agencies must give priority to complaints of alleged violations.

(4) In accordance with normal operating procedures, the contracting agency may be furnished various investigatory material from the investigation files of the Department of Labor. None of the material, other than computations of back wages, liquidated damages, and monetary relief for violations of § 5.5(a)(11) or (b)(5), and the summary of back wages due, may be disclosed in any manner to anyone other than Federal officials charged with administering the contract or program providing Federal assistance to the contract, without requesting the permission and views of the Department of Labor.

(b) *Department of Labor investigations and other compliance actions.* (1) The Administrator will investigate and conduct other compliance actions as deemed necessary in order to obtain compliance with the labor standards provisions of the applicable statutes referenced by § 5.1, or to affirm or reject the recommendations by the Agency Head with respect to labor standards matters arising under the statutes referenced by § 5.1.

(2) Federal agencies, contractors, subcontractors, sponsors, applicants, owners, or other entities, as the case may be, must cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigations or other compliance actions.

(3) The findings of such an investigation or other compliance action, including amounts found due, may not be altered or reduced without the approval of the Department of Labor.

(4) Where the underpayments disclosed by such an investigation or other compliance action total $1,000 or more, where there is reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, or where liquidated damages may be assessed under CWHSSA, the Department of Labor will furnish the Federal agency an enforcement report detailing the labor standards violations disclosed by the investigation or other compliance action and any action taken by the contractor or subcontractor to correct the violations, including any payment of back wages or any other relief provided workers or remedial actions taken for violations of § 5.5(a)(11) or (b)(5). In other circumstances, the Federal agency will be furnished a notification summarizing the findings of the investigation or other compliance action.

(c) *Confidentiality requirements.* It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of a worker or other informant who makes a written or oral statement as a complaint or in the course of an investigation or other compliance action, as well as portions of the statement which would tend to reveal the identity of the informant, will not be disclosed in any manner to anyone other than Federal officials without the prior consent of the informant. Disclosure of such statements will be governed by the provisions of the ''Freedom of Information Act'' (5 U.S.C. 552, *see* part 70 of this subtitle) and the ''Privacy Act of 1974'' (5 U.S.C. 552a, *see* part 71 of this subtitle).

■ 27. Amend § 5.7 by revising paragraph (a) to read as follows:

§ 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments by a contractor or subcontractor total less than $1,000, where there is no reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations to the Administrator, unless the investigation or other compliance action was made at the request of the Department of Labor. In

the latter case, the Federal agency will submit a factual summary report detailing any violations including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken (such as ''letters of notice'' or remedial action taken for violations of § 5.5(a)(11) or (b)(5)), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments by a contractor or subcontractor total $1,000 or more, or where there is reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, the Federal agency will furnish within 60 days after completion of its investigation, a detailed enforcement report to the Administrator.

* * * * *

■ 28. Revise § 5.9 to read as follows:

§ 5.9 Suspension of funds.

(a) *Suspension and withholding.* In the event of failure or refusal of the contractor or any subcontractor to comply with the applicable statutes referenced by § 5.1 and the labor standards clauses contained in § 5.5, whether incorporated into the contract physically, by reference, or by operation of law, the Federal agency, upon its own action or upon written request of an authorized representative of the Department of Labor, must take such action as may be necessary to cause the suspension of the payment, advance, or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate workers for the wages to which they are entitled, any monetary relief due for violations of § 5.5(a)(11) or (b)(5), and to cover any liquidated damages and pre-judgment or post-judgment interest which may be due.

(b) *Cross-withholding.* In addition to the suspension and withholding of funds from the contract under which the violation(s) occurred, the necessary funds also may be withheld under any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon prevailing wage requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency.

(c) *Cross-withholding from different legal entities.* Cross-withholding of funds may be requested from contracts held by other entities that may be considered to be the same prime contractor as that term is defined in § 5.2. Such cross-withholding is appropriate where the separate legal entities have independently consented to it by entering into contracts containing the withholding provisions at § 5.5(a)(2) and (b)(3). Cross-withholding from a contract held by a different legal entity is not appropriate unless the withholding provisions were incorporated in full or by reference in that entity's contract. Absent exceptional circumstances, cross-withholding is not permitted from a contract held by a different legal entity where the labor standards were incorporated only by operation of law into that contract.

■ 29. Revise § 5.10 to read as follows:

§ 5.10 Restitution, criminal action.

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b) of this section where violations of the labor standards clauses contained in § 5.5 and the applicable statutes referenced by § 5.1 result in underpayment of wages to workers or monetary damages caused by violations of § 5.5(a)(11) or (b)(5), the Federal agency or an authorized representative of the Department of Labor will request that restitution be made to such workers or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of 40 U.S.C. 3141(2)(B), including interest from the date of the underpayment or loss. Interest on any back wages or monetary relief provided for in this part will be calculated using the percentage established for the underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the matter will be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator will be informed simultaneously of the action taken.

■ 30. Revise § 5.11 to read as follows:

§ 5.11 Disputes concerning payment of wages.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, proper classification, or monetary relief for violations of § 5.5(a)(11) or (b)(5). The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor, if any, by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that either the contractor, the subcontractor, or both, should also be subject to debarment under the Davis-Bacon Act or any of the other applicable statutes referenced by § 5.1, the notification will so indicate.

(2) A contractor or subcontractor desiring a hearing concerning the Administrator's investigation findings must request such a hearing by letter or by any other means normally assuring delivery, sent within 30 days of the date of the Administrator's notification. The request must set forth those findings which are in dispute and the reasons therefor, including any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, with an attached copy of the notification from the Administrator and the response of the contractor or subcontractor, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearings will be conducted in accordance with the procedures set forth in part 6 of this subtitle.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 5.12, the Administrator will notify the contractor and subcontractor, if any, by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings, and will issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor or subcontractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor or subcontractor must advise the Administrator by letter or by any other means normally assuring delivery, sent within 30 days of the date of the Administrator's notification. In the response, the contractor or

subcontractor must explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator will examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator will refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator will so rule and advise the contractor and subcontractor, if any, accordingly.

(3) If the contractor or subcontractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (2) of this section, the contractor or subcontractor must file a petition for review thereof with the Administrative Review Board within 30 days of the date of the ruling, with a copy thereof the Administrator. The petition for review must be filed in accordance with part 7 of this subtitle.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings or ruling will be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator will advise the Comptroller General of the Administrator's recommendation in accordance with § 5.12(a)(2). If a timely response or petition for review is filed, the findings or ruling of the Administrator will be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board.

■ 31. Revise § 5.12 to read as follows:

§ 5.12 Debarment proceedings.

(a) *Debarment standard and ineligible list.* (1) Whenever any contractor or subcontractor is found by the Secretary of Labor to have disregarded their obligations to workers or subcontractors under the Davis-Bacon Act, any of the other applicable statutes referenced by § 5.1, this part, or part 3 of this subtitle, such contractor or subcontractor and their responsible officers, if any, and any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer has an interest will be ineligible for a period of 3 years to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator will transmit to the Comptroller General the name(s) of the contractors or subcontractors and their responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest, who have been found to have disregarded their obligations to workers or subcontractors, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. In cases arising under contracts covered by any of the applicable statutes referenced by § 5.1 other than the Davis-Bacon Act, the Administrator determines the name(s) of the contractors or subcontractors and their responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest, to be debarred. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who will be ineligible for a period of 3 years (from the date of publication by the Comptroller General of the name(s) of any such person or firm on the ineligible list) to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.

(b) *Procedure.* (1) In addition to cases under which debarment action is initiated pursuant to § 5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed violations which constitute a disregard of its obligations to workers or subcontractors under the Davis-Bacon Act, the labor standards provisions of any of the other applicable statutes referenced by § 5.1, this part, or part 3 of this subtitle, the Administrator will notify by registered or certified mail to the last known address or by any other means normally assuring delivery, the contractor or subcontractor and responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest of the finding.

(i) The Administrator will afford such contractor, subcontractor, responsible officer, and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under paragraph (a) of this section. The Administrator will furnish to those notified a summary of the investigative findings.

(ii) If the contractor, subcontractor, responsible officer, or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request must be made by letter or by any other means normally assuring delivery, sent within 30 days of the date of the notification from the Administrator, and must set forth any findings which are in dispute and the basis for such disputed findings, including any affirmative defenses to be raised.

(iii) Upon timely receipt of such request for a hearing, the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, with an attached copy of the notification from the Administrator and the responses of the contractor, subcontractor, responsible officers, or any other parties notified, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(iv) In considering debarment under any of the statutes referenced by § 5.1 other than the Davis-Bacon Act, the Administrative Law Judge will issue an order concerning whether the contractor, subcontractor, responsible officer, or any other party notified is to be debarred in accordance with paragraph (a) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge will issue a recommendation as to whether the contractor, subcontractor, responsible officers, or any other party notified should be debarred under 40 U.S.C. 3144(b).

(2) Hearings under this section will be conducted in accordance with part 6 of this subtitle. If no hearing is requested within 30 days of the date of the notification from the Administrator, the Administrator's findings will be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

(c) *Interests of debarred parties.* (1) A finding as to whether persons or firms whose names appear on the ineligible list have an interest under 40 U.S.C. 3144(b) or paragraph (a) of this section in any other firm, corporation, partnership, or association, may be made through investigation, hearing, or otherwise.

(2)(i) The Administrator, on their own motion or after receipt of a request for a determination pursuant to paragraph

(c)(3) of this section may make a finding on the issue of interest.

(ii) If the Administrator determines that there may be an interest, but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (c)(4) of this section.

(iii) If the Administrator finds that no interest exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(iv)(A) If the Administrator finds that an interest exists, the person or firm affected will be notified of the Administrator's finding (by certified mail to the last known address or by any other means normally assuring delivery), which will include the reasons therefore, and such person or firm will be afforded an opportunity to request that a hearing be held to decide the issue.

(B) Such person or firm will have 20 days from the date of the Administrator's ruling to request a hearing. A person or firm desiring a hearing must request it by letter or by any other means normally assuring delivery, sent within 20 days of the date of the Administrator's notification. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, must be submitted with the request for a hearing.

(C) If no hearing is requested within the time mentioned in paragraph (c)(2)(iv)(B) of this section, the Administrator's finding will be final and the Administrator will notify the Comptroller General in cases arising under the DBA. If a hearing is requested, the ruling of the Administrator will be inoperative unless and until the administrative law judge or the Administrative Review Board issues an order that there is an interest.

(3)(i) A request for a determination of interest may be made by any interested party, including contractors or prospective contractors and associations of contractors, representatives of workers, and interested agencies. Such a request must be submitted in writing to the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(ii) The request must include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the ineligible list has an interest in any firm, corporation, partnership, or association which is seeking or has been awarded a contract or subcontract of the United States or the District of Columbia, or a contract or subcontract that is subject to the labor standards provisions of any of the statutes referenced by § 5.1. No particular form is prescribed for the submission of a request under this section.

(4) The Administrator, on their own motion under paragraph (c)(2)(ii) of this section or upon a request for hearing where the Administrator determines that relevant facts are in dispute, will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who will conduct such hearings as may be necessary to render a decision solely on the issue of interest. Such proceedings must be conducted in accordance with the procedures set forth in part 6 of this subtitle.

(5) If the person or firm affected requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Administrative Review Board to render a decision solely on the issue of interest. Such proceeding must be conducted in accordance with the procedures set forth in part 7 of this subtitle.

■ 32. Revise § 5.13 to read as follows:

§ 5.13 Rulings and interpretations.

(a) All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the statutes listed in § 5.1 must be referred to the Administrator for appropriate ruling or interpretation. These rulings and interpretations are authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be submitted via email to *dba.rulingrequest@dol.gov;* by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210; or through other means directed by the Administrator.

(b) If any such ruling or interpretation is made by an authorized representative of the Administrator of the Wage and Hour Division, any interested party may seek reconsideration of the ruling or interpretation by the Administrator of the Wage and Hour Division. The procedures and time limits set out in § 1.8 of this subtitle apply to any such request for reconsideration.

■ 33. Amend § 5.15 by revising paragraphs (c)(4) and (d)(1) to read as follows:

§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

* * * * *

(c) * * *

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice comes within the definition contained in § 5.2.

(iii) The time in question does not involve productive work or performance of the apprentice's regular duties.

(d) * * *

(1) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully the unpaid wages and any back pay or other monetary relief due laborers and mechanics, with interest, and the liquidated damages due the United States, the available funds will be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, will be used for the payment of liquidated damages.

* * * * *

§ 5.16 [Removed and Reserved]

■ 34. Remove and reserve § 5.16.

§ 5.17 [Removed and Reserved]

■ 35. Remove and reserve § 5.17.

■ 36. Add § 5.18 to subpart A to read as follows:

§ 5.18 Remedies for retaliation.

(a) *Administrator request to remedy violation.* When the Administrator finds that any person has discriminated in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), or caused any person to discriminate in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), the Administrator will notify the person, any contractors for whom the person worked or on whose behalf the person acted, and any upper tier contractors, as well as the relevant contracting agency(ies) of the

discrimination and request that the person and any contractors for whom the person worked or on whose behalf the person acted remedy the violation.

(b) *Administrator directive to remedy violation and provide make whole relief.* If the person and any contractors for whom the person worked or on whose behalf the person acted do not remedy the violation, the Administrator in the notification of violation findings issued under § 5.11 or § 5.12 will direct the person and any contractors for whom the person worked or on whose behalf the person acted to provide appropriate make whole relief to affected worker(s) and job applicant(s) or take appropriate remedial action, or both, to correct the violation, and will specify the particular relief and remedial actions to be taken.

(c) *Examples of available make whole relief and remedial actions.* Such relief and remedial actions may include, but are not limited to, employment, reinstatement, and promotion, together with back pay and interest; restoration of the terms, conditions, and privileges of the worker's employment or former employment; the expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and the posting of a notice to workers that the contractor or subcontractor agrees to comply with the Davis-Bacon Act and Related Acts anti-retaliation requirements.

■ 37. Revise § 5.20 to read as follows:

§ 5.20 Scope and significance of this subpart.

The 1964 amendments (Pub. L. 88–349) to the Davis-Bacon Act require, among other things, that the prevailing wage determined for Federal and federally assisted construction include the basic hourly rate of pay and the amount contributed by the contractor or subcontractor for certain fringe benefits (or the cost to them of such benefits). The purpose of this subpart is to explain the provisions of these amendments. This subpart makes available in one place official interpretations of the fringe benefits provisions of the Davis-Bacon Act. These interpretations will guide the Department of Labor in carrying out its responsibilities under these provisions. These interpretations are intended also for the guidance of contractors, their associations, laborers and mechanics and their organizations, and local, State and Federal agencies, who may be concerned with these provisions of the law. The interpretations contained in this subpart are authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). The omission to discuss a particular problem in this subpart or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor with respect to such problem or to constitute an administrative interpretation, practice, or enforcement policy. Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.13.

■ 38. Revise § 5.22 to read as follows:

§ 5.22 Effect of the Davis-Bacon fringe benefits provisions.

The Davis-Bacon Act and the prevailing wage provisions of the statutes referenced in § 1.1 of this subtitle confer upon the Secretary of Labor the authority to predetermine, as minimum wages, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is to be performed. See the definitions of the terms ''prevailing wage'' and ''area'' in § 1.2 of this subtitle. The fringe benefits amendments enlarge the scope of this authority by including certain bona fide fringe benefits within the meaning of the terms ''wages'', ''scale of wages'', ''wage rates'', ''minimum wages'', and ''prevailing wages'', as used in the Davis-Bacon Act.

■ 39. Revise § 5.23 to read as follows:

§ 5.23 The statutory provisions.

Pursuant to the Davis-Bacon Act, as amended and codified at 40 U.S.C. 3141(2), the term ''prevailing wages'' and similar terms include the basic hourly rate of pay and, for the listed fringe benefits and other bona fide fringe benefits not required by other law, the contributions irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan, or program, and the costs to the contractor or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the affected laborers and mechanics. Section 5.29 discusses specific fringe benefits that may be considered to be bona fide.

■ 40. Amend § 5.25 by adding paragraph (c) to read as follows:

§ 5.25 Rate of contribution or cost for fringe benefits.

* * * * *

(c) Contractors must annualize all fringe benefit contributions to determine the hourly equivalent for which they may take credit against their fringe benefit obligation.

(1) *Method of computation.* To annualize the cost of providing a fringe benefit, a contractor must divide the cost of the fringe benefit by the total number of hours worked on Davis-Bacon and non-Davis-Bacon work during the time period to which the cost is attributable to determine the rate of contribution per hour. If the amount of contribution varies per worker, credit must be determined separately for the amount contributed on behalf of each worker.

(2) *Exceptions requests.* Contractors and other interested parties may request an exception from the annualization requirement by submitting a request to the WHD Administrator. Requests must be submitted in writing to the Division of Government Contracts Enforcement via email at *DBAannualization@dol.gov* or by mail to Director, Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave., NW, Room S–3502, Washington, DC 20210. A request for exception must demonstrate the fringe benefit plan in question meets the following three factors:

(i) The benefit provided is not continuous in nature; and

(ii) The benefit does not compensate both private and public work; and

(iii) The plan provides for immediate participation and essentially immediate vesting.

(3) *Previous exceptions.* In the event that a fringe benefit plan (including a defined contribution pension plan with immediate participation and immediate vesting) was excepted from the annualization requirement prior to the effective date of these regulations, the plan's exception will expire 18 months from the effective date of these regulations, unless an exception for the plan has been requested and received by that date under paragraph (c)(2) of this section.

■ 41. Revise § 5.26 to read as follows:

§ 5.26 ''* * * contribution irrevocably made * * * to a trustee or to a third person''.

(a) *Requirements.* The following requirements apply to any fringe benefit contributions made to a trustee or to a third person pursuant to a fund, plan, or program:

(1) Such contributions must be made irrevocably;

(2) The trustee or third person may not be affiliated with the contractor or subcontractor;

(3) The trustee or third person must adhere to any fiduciary responsibilities applicable under law; and

(4) The trust or fund must not permit the contractor or subcontractor to recapture any of the contributions paid in or any way divert the funds to its own use or benefit.

(b) *Excess payments.* Notwithstanding the above, a contractor or subcontractor may recover sums which it had paid to a trustee or third person in excess of the contributions actually called for by the plan, such as excess payments made in error or in order to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions is not yet known. For example, a benefit plan may provide for definite insurance benefits for employees in the event of contingencies such as death, sickness, or accident, with the cost of such definite benefits borne by the contractor or subcontractor. In such a case, if the insurance company returns the amount that the contractor or subcontractor paid in excess of the amount required to provide the benefits, this will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan. (*See* Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

■ 42. Revise § 5.28 to read as follows:

§ 5.28 Unfunded plans.

(a) The costs to a contractor or subcontractor which may be reasonably anticipated in providing benefits of the types described in the Act, pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the Act (see 40 U.S.C. 3141(2)(B)(ii)). The legislative history suggests that these provisions were intended to permit the consideration of fringe benefits meeting these requirements, among others, and which are provided from the general assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4.; *see also* S. Rep. No. 963, p. 6.)

(b) Such a benefit plan or program, commonly referred to as an unfunded plan, may not constitute a fringe benefit within the meaning of the Act unless:

(1) It could be reasonably anticipated to provide the benefits described in the Act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program;

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected; and

(5) The contractor or subcontractor requests and receives approval of the plan or program from the Secretary, as described in paragraph (c) of this section.

(c) To receive approval of an unfunded plan or program, a contractor or subcontractor must demonstrate in its request to the Secretary that the unfunded plan or program, and the benefits provided under such plan or program, are ''bona fide,'' meet the requirements set forth in paragraphs (b)(1) through (4) of this section, and are otherwise consistent with the Act. The request must include sufficient documentation to enable the Secretary to evaluate these criteria. Contractors and subcontractors may request approval of an unfunded plan or program by submitting a written request in one of the following manners:

(1) By mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave., NW, Room S–3502, Washington, DC 20210;

(2) By email to *unfunded@dol.gov* (or its successor email address); or

(3) By any other means directed by the Administrator.

(d) Unfunded plans or programs may not be used as a means of avoiding the Act's requirements. The words ''reasonably anticipated'' require that any unfunded plan or program be able to withstand a test of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the Act, an unfunded plan or program must be ''bona fide'' and not a mere simulation or sham for avoiding compliance with the Act. To prevent these provisions from being used to avoid compliance with the Act, the Secretary may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet future obligations under the plan. Such an account must be preserved for the purpose intended. (S. Rep. No. 963, p. 6.)

■ 43. Amend § 5.29 by revising paragraph (e) and adding paragraph (g) to read as follows:

§ 5.29 Specific fringe benefits.

* * * * *

(e) Where the plan is not of the conventional type described in the preceding paragraph (d) of this section, the Secretary must examine the facts and circumstances to determine whether fringe benefits under the plan are ''bona fide'' in accordance with requirements of the Act. This is particularly true with respect to unfunded plans discussed in § 5.28. Contractors or subcontractors seeking credit under the Act for costs incurred for such plans must request specific approval from the Secretary under § 5.5(a)(1)(iv).

* * * * *

(g) For a contractor or subcontractor to take credit for the costs of an apprenticeship program, it must meet the following requirements:

(1) The program, in addition to meeting all other relevant requirements for fringe benefits in this subpart, must be registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship (''OA''), or with a State Apprenticeship Agency recognized by the OA.

(2) The contractor or subcontractor may only take credit for the actual costs incurred for the apprenticeship program, such as instruction, books, and tools or materials; it may not take credit for voluntary contributions beyond the costs actually incurred for the apprenticeship program.

(3) Costs incurred for the apprenticeship for one classification of laborer or mechanic may not be used to offset costs incurred for another classification.

(4) In applying the annualization principle to compute the allowable fringe benefit credit pursuant to § 5.25, the total number of working hours of employees to which the cost of an apprenticeship program is attributable is limited to the total number of hours worked by laborers and mechanics in the apprentice's classification. For example, if a contractor enrolls an employee in an apprenticeship program for carpenters, the permissible hourly Davis-Bacon credit is determined by dividing the cost of the program by the total number of hours worked by the contractor's carpenters and carpenters' apprentices on covered and non-covered projects during the time period to which the cost is attributable, and such credit may only be applied against the contractor's prevailing wage obligations for all carpenters and carpenters' apprentices for each hour worked on the covered project.

■ 44. Revise § 5.30 to read as follows:

§ 5.30 Types of wage determinations.

(a) When fringe benefits are prevailing for various classes of laborers and mechanics in the area of proposed construction, such benefits are includable in any Davis-Bacon wage determination. The illustrations contained in paragraph (c) of this section demonstrate how fringe benefits

may be listed on wage determinations in such cases.

(b) Wage determinations do not include fringe benefits for various classes of laborers and mechanics whenever such benefits do not prevail in the area of proposed construction. When this occurs, the wage determination will contain only the basic hourly rates of pay which are prevailing for the various classes of laborers and mechanics. An illustration of this situation is contained in paragraph (c) of this section.

(c) Illustrations:

Classification	Rate	Fringes
Bricklayer	$21.96	$0.00.
Electrician	47.65	3%+$14.88.
Elevator mechanic	48.60	$35.825+a+b. a. Paid Holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, Christmas Day and the Friday after Thanksgiving. b. Vacations: Employer contributes 8% of basic hourly rate for 5 years or more of service; 6% of basic hourly rate for 6 months to 5 years of service as vacation pay credit.
Ironworker, structural	32.00	12.01.
Laborer: Common or general	15.21	4.54.
Operator: Bulldozer	15.40	1.90.
Plumber (excludes HVAC duct, pipe and unit installation).	38.38	16.67.

Note 1 to paragraph (c): (This format is not necessarily in the exact form in which determinations will issue; it is for illustration only.)

■ 45. Revise § 5.31 to read as follows:

§ 5.31 Meeting wage determination obligations.

(a) A contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge their minimum wage obligations for the payment of both straight time wages and fringe benefits by paying in cash, making payments or incurring costs for ''bona fide'' fringe benefits of the types listed in the applicable wage determination or otherwise found prevailing by the Secretary of Labor, or by a combination thereof.

(b) A contractor or subcontractor may discharge their obligations for the payment of the basic hourly rates and the fringe benefits where both are contained in a wage determination applicable to their laborers or mechanics in the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for ''bona fide'' fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination. For example, the obligations for ''Laborer: common or general'' in the illustration in § 5.30(c) will be met by the payment of a straight time hourly rate of not less than $15.21 and by contributions of not less than a total of $4.54 an hour for ''bona fide'' fringe benefits; or

(2) By paying in cash directly to laborers or mechanics for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, they would meet their obligations for ''Laborer: common or general'' in the illustration in § 5.30(c), by paying directly to the laborers a straight time hourly rate of not less than $19.75 ($15.21 basic hourly rate plus $4.54 for fringe benefits); or

(3) As stated in paragraph (a) of this section, the contractor or subcontractor may discharge their minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in paragraphs (b)(1) through (2) of this section. Thus, for example, their obligations for ''Laborer: common or general'' may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less than $19.75 ($15.21 basic hourly rate plus $4.54 for fringe benefits).

■ 46. Add § 5.33 to read as follows:

§ 5.33 Administrative expenses of a contractor or subcontractor.

Administrative expenses incurred by a contractor or subcontractor in connection with the administration of a fringe benefit plan are not creditable as fringe benefits. For example, a contractor or subcontractor may not take credit for the cost of an office employee who fills out medical insurance claim forms for submission to an insurance carrier.

■ 47. Add subpart C, consisting of § 5.40, to read as follows:

Subpart C—Severability

§ 5.40 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event the provision is severable from this part and will not affect the remaining provisions.

Signed this 9th day of March, 2022.

Jessica Looman,

Acting Administrator, Wage and Hour Division.

[FR Doc. 2022–05346 Filed 3–17–22; 8:45 am]

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Part IV

Department of Defense

Defense Acquisition Regulations System

48 CFR Parts 204, 208, 209, et al.

Defense Federal Acquisition Regulations; Final Rules and Proposed Rule

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 215, 216, 233, and 252

[Docket DARS–2021–0010]

RIN 0750–AJ73

Defense Federal Acquisition Regulation Supplement: Postaward Debriefings (DFARS Case 2018–D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides enhanced postaward debriefing rights under negotiated contracts, task orders, and delivery orders.

DATES: Effective March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 27354 on May 20, 2021, to implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). Section 818 amends 10 U.S.C. 2305 to enhance postaward debriefing rights for competitive negotiated contracts, task orders, and delivery orders that exceed $10 million and to provide offerors the opportunity, upon receiving a postaward debriefing, to submit follow-up questions related to the debriefing and to receive agency responses. Section 818 also amends 31 U.S.C. 3553(d)(4) to delay the beginning of the timeframe during which the contracting officer shall immediately suspend contract performance or terminate the awarded contract if a protest is filed. These changes may also impact the timeframe for filing a timely protest. Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

Edits were made to the proposed rule to clarify the time periods for requesting, delivering, and completing the postaward debriefing, including the impact of additional questions on the timely submission of protests to the Government Accountability Office (GAO). Conforming edits were made to the time periods associated with protests to the GAO and in the solicitation provision and contract clause.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Some respondents supported the rule.

Response: DoD acknowledges the support.

2. Clarification of Protest Timeline

Comment: Some respondents requested that DoD clarify the timelines for additional questions as it pertains to the protest window.

Response: DoD has simplified the text throughout the final rule to address potential confusion and adopt the plain language interpretation in *Nika Technologies Inc.* v. *United States*, United States Court of Appeals for the Federal Circuit, decided February 4, 2021. The final rule is revised to clarify that, for DoD, the 5-day protest window at Federal Acquisition Regulation (FAR) 33.104 begins on the date that the postaward debriefing is offered, unless additional questions are received within 2 business days after the debriefing date. If the agency receives timely additional questions from the offeror, the agency will respond in writing within 5 business days. Upon delivery of the agency response, the 5-day protest window will begin.

3. Expansion to Successful Offerors

Comment: One respondent expressed concerns that the proposed rule expands the requirement to provide a postaward debriefing to successful offerors, although section 818 only requires a debriefing of disappointed offerors.

Response: The proposed rule does not expand the requirement for postaward debriefings to successful offerors, because the FAR already provides for postaward debriefings to both successful and unsuccessful offerors at FAR 15.506(b).

4. Untimely Additional Questions

Comment: One respondent recommended that additional questions be permitted more than 2 days after the debriefing and answered voluntarily without impacting the process.

Response: While contracting officers have the discretion to voluntarily answer questions received after the postaward debriefing is concluded, the statute requires a response to only those questions received within 2 business days after the postaward debriefing.

5. Source Selection Decision Document Release

Comment: One respondent recommended DoD provide the source selection decision document prior to the postaward debriefing, because it may result in more relevant questions and fewer requests for debriefings.

Response: The statute provides that certain offerors requesting a debriefing in accordance with FAR 15.506 are eligible to receive a redacted source selection decision document as part of the postaward debriefing. As a result of section 818, debriefed offerors will have the opportunity to submit additional follow-up questions about the debriefing, including questions about the source selection decision document.

6. Document Redaction Standards

Comment: One respondent expressed concerns that the quality of redactions is inconsistent and suggested that strict standards be set for redacting source selection documentation to protect proprietary information before implementing this policy change.

Response: Establishing additional redaction guidelines beyond those already in the FAR is outside scope of this rule.

C. Other Changes

The final rule also—

- Corrects the location of the online annual representations and certifications in the System for Award Management at DFARS 212.301(f) to reflect *https://www.sam.gov*;
- Redesignates DFARS 216.506 paragraph (S–70) as 216.506–70 paragraph (a); and
- At 215.570 and 216.506–70 clarifies that the prescriptions for the new DFARS provision and clause apply to acquisitions valued at $10 million or more.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This final rule creates one new solicitation provision at 252.215–7016, Notification to Offerors—Postaward Debriefings, for use in competitive

negotiated solicitations, and one new contract clause at 252.216–7010, Postaward Debriefings for Task Orders and Delivery Orders, for use in multiple-award contracts. DoD is not applying the rule to contracts and subcontracts valued at or below the SAT. DoD is applying the rule to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT)

41 U.S.C 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD did not make that determination. Therefore, this rule does not apply below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items and for the Acquisition of Commercial Services

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services, and is intended to limit the applicability of laws to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial product contracts and commercial service contracts, the provision of law will apply to contracts for the acquisition of commercial products and commercial services. Due to delegations of authority from USD(A&S), the Principal Director, DPC is the appropriate authority to make this determination. DoD has made that determination. Therefore, this rule does apply to the acquisition of commercial products including COTS items and to the acquisition of commercial services, if otherwise applicable.

C. Determination

Given that the requirements of section 818 apply to contracts valued at $10 million or higher, DoD will not apply the requirements of section 818 to contracts valued at or below the SAT. However, DoD will apply the requirements of section 818 to negotiated procurements and contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

It is not in the best interest of the Federal Government to exempt application of this rule to commercial products including COTS items and to commercial services, for the following reasons. Implementation of section 818 affords offerors the opportunity for enhanced postaward debriefings for contracts, task orders, and delivery orders that exceed $10 million. Implementation provides offerors the opportunity, upon receiving a postaward debriefing, to submit follow-up questions related to the debriefing and to receive an agency response. These enhanced postaward debriefing requirements will assist in developing small business capabilities, provide increased participation, and promote competition. Properly conducted postaward debriefings with this enhanced transparency may minimize the number of unnecessary protests filed while strengthening relationships between DoD and industry.

Applying these requirements to the acquisition of commercial products and commercial services does not increase the burden on offerors, since the rule only enhances existing requirements concerning postaward debriefings. Exclusion of acquisitions of commercial products including COTS items and of commercial services would greatly limit access to the benefits afforded to successful and unsuccessful offerors by the section 818 requirements.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the DFARS to implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91), which provides offerors and contractors with significantly enhanced written or oral debriefing information for negotiated contracts and task orders or delivery orders that exceed $100 million, and the opportunity for small entities and nontraditional defense contractors to obtain such information for awards that exceed $10 million but do not exceed $100 million.

The objective of the rule is to ensure offerors are provided a standard written or oral postaward debriefing at the dollar thresholds in the statute, while protecting the confidential and proprietary information of other offerors. The statute also provides direction to contracting officers when notified that a protest has been received by the Government Accountability Office.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule is not expected to have a significant economic impact on a substantial number of small entities, because the enhanced ability to obtain source selection information for actions over $10 million by submitting questions is voluntary. However,

obtaining such additional information may be helpful to entities competing on future actions.

Data obtained from the Federal Procurement Data System for FYs 2018, 2019, and 2020 indicate that DoD awarded an average of approximately 5,534 negotiated awards and delivery orders or task orders per year valued between $10 and $100 million. Of those actions, an average of 3,994 were awarded to approximately 1,543 unique small entities and 1,311 nontraditional defense contractors. Based upon that data, approximately 1,543 unique small entities will have the opportunity to request and obtain enhanced debriefing information if desired.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the requirements of the statute.

VII. Paperwork Reduction Act

The rule does not contain information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 215, 216, 233, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 215, 216, 233, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 215, 216, 233, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by—

■ a. In paragraph (f) introductory text, removing ''*https://www.acquisition.gov*'' and adding ''*https://www.sam.gov*'' in its place;

■ b. Adding paragraph (f)(vi)(F);

■ c. Redesignating paragraphs (f)(vii) through (xviii) as paragraphs (f)(viii) through (xix); and

■ d. Adding new paragraph (f)(vii).

The additions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vi) * * *

(F) Use the provision at 252.215–7016, Notification to Offerors—Postaward Debriefings, as prescribed in 215.570, to comply with section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91).

(vii) *Part 216—Types of Contracts.* Use the clause at 252.216–7010, Postaward Debriefings for Task Orders and Delivery Orders, as prescribed in 216.506–70(b), to comply with section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91).

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

■ 3. Amend section 215.506 by adding paragraphs (b) and (d) to read as follows:

215.506 Postaward debriefing of offerors.

(b) Notwithstanding FAR 15.506(b), when requested by a successful or unsuccessful offeror, a written or oral debriefing is required for contract awards valued at $10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91)).

(d) In addition to the requirements of FAR 15.506(d), the minimum debriefing information shall include the following:

(i) For award of a contract in excess of $10 million and not in excess of $100 million with a small business or nontraditional defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For award of a contract in excess of $100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

* * * * *

■ 4. Add section 215.506–70 to read as follows:

215.506–70 Opportunity for follow-up questions.

When providing a required postaward debriefing to successful and unsuccessful offerors, contracting officers shall—

(a) Provide an opportunity to submit additional written questions related to the required debriefing not later than 2 business days after receiving the postaward debriefing;

(b) Respond in writing to timely submitted additional questions within 5 business days after receipt of the questions; and

(c) Not consider the postaward debriefing to be concluded until the later of—

(1) The date that the postaward debriefing is delivered, orally or in writing; or

(2) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

■ 5. Add section 215.570 to read as follows:

215.570 Solicitation provision.

Use the provision at 252.215–7016, Notification to Offerors—Postaward Debriefings, in competitive negotiated solicitations for contract awards valued at $10 million or more, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

PART 216—TYPES OF CONTRACTS

■ 6. Amend section 216.505 by adding paragraphs (b)(6) introductory text and (b)(6)(ii) to read as follows:

216.505 Ordering.

* * * * *

(b) * * *

(6) *Postaward notices and debriefing of awardees for orders exceeding $6 million.* In addition to the notice required at FAR 16.505(b)(6), a written or oral postaward debriefing of successful and unsuccessful awardees is required for task orders and delivery orders valued at $10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91)).

(ii) Follow the procedures at 215.506 and 215.506–70 when providing the postaward debriefing to successful and unsuccessful awardees for task orders or delivery orders valued at $10 million or more.

■ 7. Revise section 216.506 to read as follows:

216.506 Solicitation provisions and contract clauses.

■ 8. Add section 216.506–70 to read as follows:

216.506–70 Additional solicitation provisions and contract clause.

(a) Use the provisions at 252.215–7007, Notice of Intent to Resolicit, and 252.215–7008, Only One Offer, as prescribed at 215.371–6 and 215.408(3), respectively.

(b) Use the clause at 252.216–7010, Postaward Debriefings for Task Orders and Delivery Orders, in competitive negotiated solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when a multiple-award contract is contemplated and task orders or delivery orders placed under the contract may be valued at $10 million or more.

PART 233—PROTESTS, DISPUTES, AND APPEALS

233.102 [Amended]

■ 9. Amend section 233.102 by removing ''Government Accountability Office'' and adding ''Government Accountability Office (GAO)'' in its place.

■ 10. Add section 233.104 to read as follows:

233.104 Protests to GAO.

(c) *Protests after award.* (1) In lieu of the time periods in FAR 33.104(c)(1), contracting officers shall immediately suspend performance or terminate the awarded contract, task order, or delivery order upon notice from the GAO of a protest filed within the time periods listed in paragraphs (c)(1)(A) through (D) of this section, whichever is later, except as provided in FAR 33.104(c)(2) and (3)—

(A) Within 10 days after the date of contract award;

(B) Within 10 days after the date a task order or delivery order is issued, where the value exceeds $25 million (10 U.S.C. 2304c(e));

(C) Within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with FAR 15.506 regardless of whether the protestor rejected the offered debriefing date, unless an earlier debriefing date is negotiated as a result; or

(D) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with 215.506–70(b).

233.171 [Amended]

■ 11. Amend section 233.171 by removing ''Government Accountability Office'' and adding ''GAO'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Add section 252.215–7016 to read as follows:

252.215–7016 Notification to Offerors—Postaward Debriefings.

As prescribed in 215.570, use the following provision:

Notification to Offerors—Postaward Debriefings (Mar 2022)

(a) *Definition.* As used in this provision—

Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

(b) *Postaward debriefing.*

(1) Upon timely request, the Government will provide a written or oral postaward debriefing to successful or unsuccessful offerors for contract awards valued at $10 million or more, while protecting the confidential and proprietary information of other offerors. The request is considered timely if received within 3 days of notification of contract award.

(2) When required, the minimum postaward debriefing information will include the following:

(i) For contracts in excess of $10 million and not in excess of $100 million with a small business or nontraditional defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For contracts in excess of $100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(3) If a required postaward debriefing is provided—

(i) The debriefed Offeror may submit additional written questions related to the debriefing not later than 2 business days after the date of the debriefing;

(ii) The agency will respond in writing to timely submitted additional questions within 5 business days after receipt by the contracting officer; and

(iii) The postaward debriefing will not be considered to be concluded until the later of—

(A) The date that the postaward debriefing is delivered, orally or in writing; or

(B) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

(c) *Contract performance.* The Government may suspend performance of or terminate the awarded contract upon notice from the Government Accountability Office of a protest filed within the time periods listed in paragraphs (c)(1) through (3) of this provision, whichever is later:

(1) Within 10 days after the date of contract award.

(2) Within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with Federal Acquisition Regulation (FAR) 15.506 unless an earlier debriefing date is negotiated as a result.

(3) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with Defense Federal Acquisition Regulation Supplement 215.506–70(b).

(End of provision)

■ 13. Add section 252.216–7010 to read as follows:

252.216–7010 Postaward Debriefings for Task Orders and Delivery Orders.

As prescribed at 216.506–70(b), use the following clause:

Postaward Debriefings for Task Orders and Delivery Orders (Mar 2022)

(a) *Postaward debriefing.*

(1) Upon timely request, the Government will provide a written or oral postaward debriefing for task orders or delivery orders valued at $10 million or more to the Contractor, regardless of whether the Contractor's offer for the task order or delivery order was successful or unsuccessful, while protecting the confidential and proprietary information of other contractors. The request is considered timely if received within 3 days of notification of task order or delivery order award.

(2) If a required postaward debriefing is provided—

(i) The debriefed Contractor may submit additional written questions related to the required and provided debriefing within 2 business days after the date of the debriefing;

(ii) The agency will respond in writing to timely submitted additional questions within 5 business days after receipt; and

(iii) The postaward debriefing will not be considered to be concluded until the later of—

(A) The date that the postaward debriefing is delivered, orally or in writing; or

(B) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

(b) *Task order or delivery order performance.* The Government may suspend performance of or terminate the awarded task order or delivery order upon notice from the Government Accountability Office of a protest filed within the time periods listed in paragraphs (b)(1) through (3) of this clause, whichever is later:

(1) Within 10 days after the date a task order or delivery order is issued, where the value exceeds $25 million (10 U.S.C. 2304c(e)).

(2) Within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with Federal Acquisition Regulation (FAR) 15.506 unless an earlier debriefing date is negotiated as a result.

(3) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with Defense Federal Acquisition Regulation Supplement 215.506–70(b).

(End of clause)

[FR Doc. 2022–05531 Filed 3–17–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 204

[Docket DARS–2021–0017]

RIN 0750–AL48

Defense Federal Acquisition Regulation Supplement: Contract Closeout Authority for DoD Services Contracts (DFARS Case 2021–D012)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021.

DATES: Effective March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 48366 on August 30, 2021, to implement section 820 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 820 authorizes DoD contracting officers to close out certain physically complete contracts or groups of contacts through modification of such contracts, without completing the requirements of Federal Acquisition Regulation (FAR) 4.804–5(a)(3) through (15) based upon the age of the contract action.

Two respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no changes from the proposed rule as a result of public comments.

B. Analysis of Public Comments

1. Support for the Rule

Comment: The respondent supported the rule and requested DoD publish the final rule expeditiously.

Response: DoD acknowledges the support.

2. Expansion of the Statutory Criteria

Comment: The respondent expressed concern that the rule, as well as the current DFARS text that implemented the statutory direction in the NDAA for FY 2017, reflects the language in section 820 of the FY 2021 NDAA. The respondent asserts that the statutory language will not achieve the intent of Congress without further clarification.

Response: This final rule implements the statutory authority provided in section 820 of the NDAA for FY 2021. There is nothing in the statute to indicate Congress had any intent other than the plain language meaning of that section as stated. DoD previously published a final rule at 84 FR 18153 on April 30, 2019, to implement section 836 of the NDAA for FY 2017.

3. Additional Guidance for the Workforce

Comment: The respondent recommends DoD develop Procedures, Guidance, and Information (PGI) for the acquisition workforce that includes additional guidance on the application of the eligibility criteria and establishment of costs.

Response: DoD has no indication that the acquisition workforce requires an update to the PGI on contract closeout.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses.

IV. Expected Impact of the Rule

DFARS 204.804(3)(i) currently provides for the expedited closeout of contracts or groups of contracts without completion of a reconciliation audit or other corrective actions required by FAR 4.804–5(a)(3) through (15) if certain criteria are met. If a contract was entered into at least 17 years prior to the current fiscal year, is physically complete, and has been determined not reconcilable, the contracting officer may close the contract through a negotiated settlement.

This final rule reduces the age requirement from 17 years to 10 years for military construction and shipbuilding and 7 years for all other contract actions. The rule adds a new requirement that these contracts must be physically complete at least 4 years prior to the current fiscal year.

The expanded authority will apply to more recent contracts, subject to the other criteria in DFARS 204.804(3)(i), to reduce the current backlog and administration requirements for contracts eligible for closeout.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because this rule implements requirements primarily for the Government. However, a final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement

(DFARS) to implement section 820 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 820 expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017, implemented at DFARS 204.804(3)(i)(A), to certain contracts or groups of contracts that were awarded at least 7 to 10 FYs before the current FY and have completed performance or delivery at least 4 years prior to the current FY. The new 10-year standard will apply to contracts or groups of contracts for military construction, as defined in 10 U.S.C. 2801, or shipbuilding, while the 7-year standard will apply to all other contracts.

The objective of the rule is to implement the requirements of section 820, which expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017 to more recent, physically complete contracts. The legal basis of the rule is section 820 of the NDAA for FY 2021.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will likely affect small entities that have been or will be awarded DoD contracts, including those under FAR part 12 procedures for the acquisition of commercial products, including commercially available off-the-shelf items, and commercial services. Data was obtained from the Electronic Data Access module of the Procurement Integrated Enterprise Environment for contracts that were physically completed at least 4 years ago and are eligible for closeout between the new standard of 7 or 10 years and the previous standard of at least 17 fiscal years after award. These numbers were then compared to the Federal Procurement Data System (FPDS) to estimate the number of contracts awarded to small entities. Contracts subject to the previous standard of 17 years are included in this estimate.

As of April 2021, the FPDS data indicate that approximately 29,200 contracts, eligible for expedited closeout under the 7-year standard, were awarded to an estimated 4,490 unique small entities. An additional estimated 1,775 contracts, subject to the 10-year standard, were awarded to approximately 576 small entities. As a result, DoD estimates that approximately 5,066 small entities will have the opportunity to benefit from the expanded expedited contract authorities provided in this rule.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

There are no practical alternatives that will accomplish the objectives of the statute.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 204

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 204 is amended as follows:

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 1. The authority citation for 48 CFR part 204 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 204.804 by revising paragraph (3)(i) to read as follows:

204.804 Closeout of contract files.

* * * * *

(3)(i) In accordance with section 836 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), section 824 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91), and section 820 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), contracting officers may close out contracts or groups of contracts through issuance of one or more modifications to such contracts without completing a reconciliation audit or other corrective action in accordance with FAR 4.804–5(a)(3) through (15), as appropriate, if each contract—

(A)(*1*) For military construction (as defined at 10 U.S.C. 2801) or shipbuilding, was awarded at least 10 fiscal years before the current fiscal year; or

(*2*) For all other contracts, was awarded at least 7 fiscal years before the current fiscal year;

(B) The performance or delivery was completed at least 4 years prior to the current fiscal year; and

(C) Has been determined by a contracting official, at least one level above the contracting officer, to be not otherwise reconcilable, because—

(*1*) The contract or related payment records have been destroyed or lost; or

(*2*) Although contract or related payment records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

* * * * *

[FR Doc. 2022–05532 Filed 3–17–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

48 CFR Parts 215 and 252

[Docket DARS–2022–0005]

RIN 0750–AL31

Defense Federal Acquisition Regulation Supplement: Evaluation Factor for Employing or Subcontracting With Members of the Selected Reserve (DFARS Case 2021–D013)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021.

DATES: Effective March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, Telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283) that removes the burden of proof at 10 U.S.C. 2305 note when using an evaluation factor for employing or subcontracting with members of the Selected Reserve. Accordingly, this rule removes DFARS solicitation provision 252.215–7005, Evaluation Factor for Employing or Subcontracting with Members of the Selected Reserve, and makes conforming changes to the associated provision and clause prescriptions at DFARS 215.370–3.

DFARS provision 252.215–7005 is included in solicitations that contain an evaluation factor that considers whether an offeror intends to perform the contract using employees or individual subcontractors who are members of the Selected Reserve. If an offeror intends to use such employees or subcontractors, the provision requires the offeror to submit certain documentation as proof

of its intent with its response to the solicitation.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule is merely removing an unneeded solicitation provision from the DFARS. The rule primarily impacts internal operating procedures and has no significant cost or administrative impact on contractors or offerors.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule removes DFARS provision 252.215–7005, Evaluation Factor for Employing or Subcontracting with Members of the Selected Reserve, and the associated prescription at DFARS 215.370–3. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, or for commercial services.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and to the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1, and 41 U.S.C. 1707 does not require publication for public comment.

VII. Paperwork Reduction Act

This rule removes the information collection requirements associated with the provision at DFARS 252.215–7005, Evaluation Factor for Employing or Subcontracting with Members of the Selected Reserve, currently approved under Office of Management and Budget (OMB) Control Number 0704–0446, entitled ''Defense Federal Acquisition Regulation Supplement (DFARS) Evaluation Factor for Use of Members of the Armed Forces Selected Reserve''. Accordingly, DoD submitted, and OMB approved, the following reduction of the annual reporting burden and OMB inventory of hours under OMB Control Number 0704–0446 as follows:

Respondents: 13.
Responses per respondent: 1.
Total annual responses: 13.
Hours per response: 20.
Total response burden hours: 260.

List of Subjects in 48 CFR Parts 215 and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Revise section 215.370–1 to read as follows:

215.370–1 Definition.

As used in this section—

Selected Reserve has the meaning given that term in 10 U.S.C. 10143. Selected Reserve members normally attend regular drills throughout the year and are the group of Reserves most readily available to the President.

■ 3. Revise section 215.370–3 to read as follows:

215.370–3 Contract clause.

Use the clause at 252.215–7006, Use of Employees or Individual Subcontractors Who Are Members of the Selected Reserve, in solicitations and resulting contracts that include an evaluation factor considering whether an offeror intends to perform the contract using employees or individual subcontractors who are members of the Selected Reserve.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.215–7005 [Removed and Reserved]

■ 4. Remove and reserve section 252.215–7005.

■ 5. Amend section 252.215–7006 by—

■ a. In the introductory text, removing ''215.370–3(b)'' and adding ''215.370–3'' in its place; and

■ b. Revising the clause date and paragraph (a).

The revisions read as follows:

252.215–7006 Use of Employees or Individual Subcontractors Who Are Members of the Selected Reserve.

* * * * *

Use of Employees or Individual Subcontractors Who Are Members of the Selected Reserve (Mar 2022)

(a) *Definition.* As used in this clause—

Selected Reserve has the meaning given that term in 10 U.S.C. 10143. Selected Reserve members normally attend regular drills throughout the year and are the group of Reserves most readily available to the President.

* * * * *

[FR Doc. 2022–05533 Filed 3–17–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2022–0006]

RIN 0750–AL63

Defense Federal Acquisition Regulation Supplement: New Qualifying County—Lithuania (DFARS Case 2022–D012)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add Lithuania as a qualifying country.

DATES: Effective March 18, 2022.

FOR FURTHER INFORMATION CONTACT: Monica Wideman, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to add Lithuania as a qualifying country. A qualifying country is a country that has a reciprocal defense procurement agreement or memorandum of understanding with the United States in which both countries agree to remove discriminatory barriers to purchases of supplies produced in the other country or services performed by sources of the other country. The agreement or memorandum must comply, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776), which addresses reports and certifications to Congress on military exports, and with 10 U.S.C. 2457, which addresses standardization of equipment with North Atlantic Treaty Organization members. For purposes of the Buy American Act (DFARS 225.1) and the Balance of Payments Program (DFARS 225.75), supplies and components produced in qualifying countries are treated the same as supplies and components produced in the United States.

On December 13, 2021, the Secretary of Defense and the Ministry of National Defense of the Republic of Lithuania signed a Reciprocal Defense Procurement Agreement. The Secretary of Defense also signed, on that day, a determination and findings that it is inconsistent with the public interest to apply the restrictions of the Buy American Act to the acquisition of articles, materials, and supplies produced or manufactured in the Republic of Lithuania. The Reciprocal Defense Procurement Agreement removes discriminatory barriers to procurements of supplies and services produced by industrial enterprises of Lithuania to the extent mutually beneficial and consistent with national laws, regulations, policies, and international obligations. This agreement does not cover construction or construction material. Lithuania is already a designated country under the World Trade Organization Government Procurement Agreement.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it does not constitute a significant DFARS revision within the meaning of FAR 1.501–1 and does not have a significant cost or administrative impact on contractors or offerors. Lithuania is added to the list of 27 other countries that have similar reciprocal defense procurement agreements with DoD. These requirements affect only the internal operating procedures of the Government.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule only updates the list of qualifying countries in the DFARS by adding the newly qualifying country of Lithuania. The definition of ''qualifying country'' is updated in each of the following clauses: DFARS 252.225–7001, Buy American and Balance of Payments Program; DFARS 252.225–7002, Qualifying Country Sources as Subcontractors; DFARS 252.225–7012, Preference for Certain Domestic Commodities; DFARS 252.225–7017, Photovoltaic Devices; DFARS 252.225–7021, Trade Agreements; and DFARS 252.225–7036, Buy American-Free Trade Agreements-Balance of Payments Program. However, this rule does not change the clause prescriptions or applicability to contracts at or below the SAT, for commercial products including COTS items, or for commercial services.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1, and 41 U.S.C. 1707 does not require publication for public comment.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under Office of Management and Budget (OMB) Control Number 0704–0229, entitled ''DFARS Part 225, Foreign Acquisition.''

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

225.003 [Amended]

■ 2. Amend section 225.003 in the definition of ''Qualifying country'' by adding, in alphabetical order, the country of ''Lithuania''.

225.872–1 [Amended]

■ 3. Amend section 225.872–1 in paragraph (a) by adding, in alphabetical order, the country of ''Lithuania''.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.225–7001 by—
■ a. In the clause heading, removing the date ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place;
■ b. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''; and
■ c. In Alternate I—
■ i. In the clause heading, removing the date ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''.

■ 5. Amend section 225.225–7002 by—
■ a. Revising the section heading and date of the clause; and
■ b. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''.

The revisions read as follows:

252.225–7002 Qualifying Country Sources as Subcontractors.

* * * * *

Qualifying Country Sources as Subcontractors (MAR 2022)

* * * * *

■ 6. Amend section 252.225–7012 by—
■ a. Revising the section heading and date of the clause; and
■ b. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''.

The revisions read as follows:

252.225–7012 Preference for Certain Domestic Commodities.

* * * * *

Preference for Certain Domestic Commodities (MAR 2022)

* * * * *

252.225–7017 [Amended]

■ 7. Amend section 252.225–7017 by—
■ a. In the clause heading, removing the date ''(JAN 2022)'' and adding ''(MAR 2022)'' in its place; and
■ b. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''.

252.225–7021 [Amended]

■ 8. Amend section 252.225–7021 by—
■ a. In the clause heading, removing ''(SEP 2019)'' and adding ''(MAR 2022)'' in its place;
■ b. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''; and
■ c. In Alternate II—
■ i. In the clause heading, removing the date of ''(SEP 2019)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''.

252.225–7036 [Amended]

■ 9. Amend section 252.225–7036 by—
■ a. In the clause heading, removing the date ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place;
■ b. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania'';
■ c. In Alternate I—
■ i. In the clause heading, removing the clause date of ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania'';
■ d. In Alternate II—
■ i. In the clause heading, removing the clause date of ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania'';
■ e. In Alternate III—
■ i. In the clause heading, removing the clause date of ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania'';
■ f. In Alternate IV—
■ i. In the clause heading, removing the clause date of ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''; and
■ g. In Alternate V—
■ i. In the clause heading, removing the clause date of ''(DEC 2017)'' and adding ''(MAR 2022)'' in its place; and
■ ii. In the paragraph (a), in the definition of ''Qualifying country'', adding, in alphabetical order, the country of ''Lithuania''.

[FR Doc. 2022–05534 Filed 3–17–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 208, 209, 211, 212, 213, 216, 225, 227, 232, 236, 241, 246, and 252

[Docket DARS–2022–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to provide needed editorial changes.

DATES: Effective March 17, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION: This final rule makes the following changes:

1. Updates office designations and a hyperlink at DFARS 204.604 and 232.1004.

2. Updates hyperlinks at: DFARS 204.7302, 208.602–70, 213.301, 225.7003–2, 252.204–7019, 252.204–7020, 252.211–7003, and 252.211–7007.

3. Removes obsolete text at DFARS 209.104–1, paragraph (g)(i). The final rule for DFARS Case 2014–D014, published at 79 FR 73488, revised section 209.104–1, paragraph (g)(i), because the coverage was relocated to DFARS subpart 225.7. Several subordinate paragraphs to paragraph (g)(i) that should have been removed at

that time were inadvertently retained in the Code of Federal Regulations (CFR). This technical amendment corrects that error and removes the obsolete text at DFARS 209.104–1, paragraphs (g)(i)(*1*) and (*2*), from the eCFR.

4. Reinstates DFARS subpart 211.70 and section 211.7001, which points to procedures provided in DFARS Procedures, Guidance, and Information (PGI) 211.7001.

5. DFARS 212.207(b)(i), adds a missing parenthesis.

6. DFARS 216.402–2(2)(ii), corrects a typographical error in the electronic Code of Federal Regulations.

7. DFARS 225.7700(e), corrects a typographical error in a statutory section reference.

8. DFARS 241.102(b)(7)(C), updates a statutory reference pursuant to the National Defense Authorization Act for Fiscal Year 2006 (section 2851, Pub. L. 109–364).

9. DFARS 246.870–2, removes obsolete language. The final rule was published at 81 FR 72738 to amend DFARS 246.870–2(a)(2) introductory text by removing ''(b)(3)(ii) through (b)(3)(iv)'' and adding ''(b)(3)(ii)'' in its place, but DFARS 204.870–2 was referenced instead of DFARS 246.870–2. According to a CFR Editorial Note, the change is not reflected in the Code of Federal Regulations due to inaccurate amendatory instruction. This rule provides the correct amendatory instruction.

10. DFARS 252.225–7013, updates an updated mailing address at paragraph (e)(2)(iv)(A).

11. Updates statutory redesignations made by the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232):

- Section 808(b)(12) redesignates 10 U.S.C. 7317 as 10 U.S.C. 8687 at DFARS 212.301, 227.7100, 227.7102–1, 227.7103–1, 252.227–7013, and 252.227–7015; and
- Section 808(d) redesignates 10 U.S.C. 4540 as 10 U.S.C. 7540 and section 807(d)(1) redesignates 10 U.S.C. 7212 as 10 U.S.C. 8612 at DFARS 236.606–70.

List of Subjects in 48 CFR Parts 204, 208, 209, 211, 212, 213, 216, 225, 227, 232, 236, 241, 246, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 208, 209, 211, 212, 213, 216, 225, 227, 232, 236, 241, 246, and 252 are amended as follows:

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 1. The authority citation for 48 CFR part 204 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 204.604 by revising paragraph (3) to read as follows:

204.604 Responsibilities.

* * * * *

(3) By December 15th of each year, the chief acquisition officer of each DoD component required to report its contract actions shall submit to the Principal Director, Defense Pricing and Contracting, its annual certification and data validation results for the preceding fiscal year in accordance with the DoD Data Improvement Plan requirements at *https://www.acq.osd.mil/asda/dpc/ce/cap/index.html.* The Principal Director, Defense Pricing and Contracting, will submit a consolidated DoD annual certification to the Office of Management and Budget by January 5th of each year.

204.7302 [Amended]

■ 3. Amend section 204.7302 in paragraph (a)(3) by removing ''*https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html*'' and adding ''*https://www.acq.osd.mil/asda/dpc/cp/cyber/safeguarding.html#nistSP800171*'' in its place.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 4. The authority citation for 48 CFR part 208 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

208.602–70 [Amended]

■ 5. Amend section 208.602–70 in paragraph (b) by removing ''*http://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#federal_prison*'' and adding ''*https://www.acq.osd.mil/asda/dpc/cp/policy/other-policy-areas.html#fpi*'' in its place.

PART 209—CONTRACTOR QUALIFICATIONS

■ 6. The authority citation for 48 CFR part 209 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 7. Amend section 209.104–1 by—

■ a. Revising paragraph (g)(i); and

■ b. Removing paragraphs (g)(i)(*1*) introductory text, (g)(i)(*1*)(*i*) and (*ii*), (g)(i)(*2*), and (g)(i)(B) and (C).

The revision reads as follows:

209.104–1 General standards.

* * * * *

(g)(i) *Ownership or control by the government of a country that is a state sponsor of terrorism.* See 225.771.

* * * * *

PART 211—DESCRIBING AGENCY NEEDS

■ 8. The authority citation for 48 CFR part 211 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 9. Add subpart 211.70 to read as follows:

SUBPART 211.70—PURCHASE REQUESTS

211.7001 Procedures.

Follow the procedures at PGI 211.7001 for developing and distributing purchase requests, except for the requirements for Military Interdepartmental Purchase Requests (DD Form 448) addressed in 253.208–1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 10. The authority citation for 48 CFR part 212 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

212.207 [Amended]

■ 11. Amend section 212.207 in paragraph (b)(i) by removing ''(41 U.S.C. 103'' and adding ''(41 U.S.C. 103)'' in its place.

212.301 [Amended]

■ 12. Amend 212.301 in paragraphs (f)(xi)(A) and (B) by removing ''10 U.S.C. 7317'' and adding ''10 U.S.C. 8687'' in its place.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 13. The authority citation for 48 CFR part 213 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

213.301 [Amended]

■ 14. Amend section 213.301 in paragraph (4) by removing ''*https://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html*'' and adding ''*https://www.acq.osd.mil/asda/dpc/ce/pc/docs-guides.html*'' in its place.

PART 216—TYPES OF CONTRACTS

■ 15. The authority citation for 48 CFR part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

216.402–2 [Amended]

■ 16. Amend section 216.402–2 in paragraph (2)(ii) by removing ''faile'' and adding ''failure'' in its place.

PART 225—FOREIGN ACQUISITION

■ 17. The authority citation for 48 CFR part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 18. Amend section 225.7003–2 by—
■ a. Designating the introductory text as paragraph (a);
■ b. Further redesignating newly redesignated paragraph (a)(1)(a) introductory text as as paragraph (a)(1) introductory text; and
■ c. Revising paragraph (b).

The revision reads as follows:

225.7003–2 Restrictions.

* * * * *

(b) For more information on specialty metals restrictions and reporting of noncompliances, see *https://www.acq.osd.mil/asda/dpc/cp/ic/specialty-metals-restrictions.html.*

225.7700 [Amended]

■ 19. Amend section 227.7700 in paragraph (e) by removing ''Section 216'' and adding ''Section 1216'' in its place.

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 20. The authority citation for 48 CFR part 227 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

227.7100 [Amended]

■ 21. Amend section 227.7100 in paragraph (a)(6) by removing ''10 U.S.C. 7317'' and adding ''10 U.S.C. 8687'' in its place.

227.7102–1 [Amended]

■ 22. Amend section 227.7102–1 in paragraph (c) by removing ''10 U.S.C. 7317'' and adding ''10 U.S.C. 8687'' in its place.

227.7103–1 [Amended]

■ 23. Amend section 227.7103–1 in paragraph (g) by removing ''10 U.S.C. 7317'' and adding ''10 U.S.C. 8687'' in its place.

PART 232—CONTRACT FINANCING

■ 24. The authority citation for 48 CFR part 232 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 25. Amend section 232.1004 by revising paragraph (b)(ii) introductory text to read as follows:

232.1004 Procedures.

(b) * * *

(ii) The contracting officer shall analyze the performance-based payment schedule using the performance-based payments (PBP) analysis tool. The PBP analysis tool is on the DPC website in the Price, Cost and Finance section. The PBP analysis tool and Performance Based Payments Guidebook are available at *https://www.acq.osd.mil/asda/dpc/pcf/pricing-topics.html#pdp.*

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT–ENGINEER CONTRACTS

■ 26. The authority citation for 48 CFR part 236 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

236.606–70 [Amended]

■ 27. Amend section 236.606–70 in paragraph (a) by removing ''10 U.S.C. 4540, 7212,'' and adding ''10 U.S.C. 7540, 8612,'' in its place.

PART 241—ACQUISITION OF UTILITY SERVICES

■ 28. The authority citation for 48 CFR part 241 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

241.102 [Amended]

■ 29. Amend section 241.102 in paragraph (b)(7)(C) by removing ''10 U.S.C. 2689'' and adding ''10 U.S.C. 2917'' in its place.

PART 246—QUALITY ASSURANCE

■ 30. The authority citation for 48 CFR part 246 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 31. Amend section 246.870–2 by revising paragraph (a)(2) introductory text to read as follows:

246.870–2 Policy.

(a) * * *

(2) The Government requires contractors and subcontractors to comply with the notification, inspection, testing, and authentication requirements of paragraph (b)(3)(ii) of the clause at 252.246–7008, Sources of Electronic Parts, if the contractor—

* * * * *

■ 32. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

252.204–7019 [Amended]

■ 33. Amend section 252.204–7019 by—
■ a. Removing the clause date of ''(NOV 2020)'' and adding ''(MAR 2022)'' in its place; and
■ b. In paragraph (b), removing ''*https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html*'' and adding ''*https://www.acq.osd.mil/asda/dpc/cp/cyber/safeguarding.html#nistSP800171*'' in its place.

252.204–7020 [Amended]

■ 34. Amend section 252.204–7020 by—
■ a. Removing the clause date of ''(NOV 2020)'' and adding ''(MAR 2022)'' in its place; and
■ b. In paragraphs (c) and (g)(2), removing ''*https://www.acq.osd.mil/dpap/pdi/cyber/strategically_assessing_contractor_implementation_of_NIST_SP_800-171.html*'' and adding ''*https://www.acq.osd.mil/asda/dpc/cp/cyber/safeguarding.html#nistSP800171*'' in its place.

252.211–7003 [Amended]

■ 35. Amend section 252.211–7003 by—
■ a. Removing the clause date of ''(MAR 2016)'' and adding ''(MAR 2022)'' in its place; and
■ b. In paragraph (a):
■ i. In the definition of ''DoD recognized unique identification equivalent'', removing ''*http://www.acq.osd.mil/dpap/pdi/uid/iuid_equivalents.html*'' and adding ''*https://www.acq.osd.mil/asda/dpc/ce/ds/unique-id.html*'' in its place; and
■ ii. In the definition of ''Unique item identifier type'', removing ''*http://www.acq.osd.mil/dpap/pdi/uid/uii_types.html*'' and adding ''*https://www.acq.osd.mil/asda/dpc/ce/ds/unique-id.html*'' in its place.

252.211–7007 [Amended]

■ 36. Amend section 252.211–7007 by—
■ a. Removing the clause date ''(AUG 2012)'' and adding ''(MAR 2022)'' in its place; and
■ b. In paragraph (f), removing ''*http://www.acq.osd.mil/dpap/pdi/uid/data_submission_information.html*'' and adding ''*https://dodprocurementtoolbox.com/cms/sites/default/files/resources/2021–09/GFP%20Reporting%20Guide_Vendors_June%202018.pdf*'' in its place.

■ 37. Amend section 252.225–7013 by—
■ a. Revising the section heading;
■ b. Removing the clause date ''(APR 2020)'' and adding ''(MAR 2022)'' in its place; and
■ c. Revising paragraph (e)(2)(iv)(A).

The revision reads as follows:

252.225–7013 Duty-Free Entry.

* * * * *

(e) * * *

(2) * * *

(iv)(A) For direct shipments to a U.S. military installation, the notation: ''UNITED STATES GOVERNMENT, DEPARTMENT OF DEFENSE Duty-Free Entry to be claimed pursuant to Section XXII, Chapter 98, Subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United States. Upon arrival of shipment at the appropriate port of entry, District Director of Customs, please release shipment under 19 CFR part 142 and notify Commander, Defense Contract Management Agency (DCMA), St. Louis, MO, ATTN: Duty Free Entry Team, 1222 Spruce Street, Room 9.300, St. Louis, MO 63103–2812, for execution of Customs Form 7501, 7501A, or 7506 and any required duty-free entry certificates.''

* * * * *

252.227–7013 [Amended]

■ 38. Amend section 252.227–7013 in the Alternate II clause by—
■ a. Removing the clause date ''(MAR 2011)'' and adding ''(MAR 2022)'' in its place; and
■ b. In paragraph (a)(17), removing ''10 U.S.C. 7317'' and adding ''10 U.S.C. 8687'' in its place.

252.227–7015 [Amended]

■ 39. Amend section 252.227–7015 in the Alternate I clause by—
■ a. Removing the clause date ''(DEC 2011)'' and adding ''(MAR 2022)'' in its place; and
■ b. In paragraph (a)(6), removing ''10 U.S.C. 7317'' and adding ''10 U.S.C. 8687'' in its place.

[FR Doc. 2022–05535 Filed 3–17–22; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203, 204, 205, 207, 208, 211, 212, 213, 215, 216, 217, 219, 222, 223, 225, 226, 227, 232, 234, 237, 239, 242, 243, 244, 245, 246, 247, and 252

[Docket DARS–2022–0004]

RIN 0750–AK31

Defense Federal Acquisition Regulation Supplement: Revision of Definition of ''Commercial Item'' (DFARS Case 2018–D066)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the revised definition of ''commercial item'' in accordance with two sections of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 17, 2022, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D066, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2018–D066.'' Select ''Comment'' and follow the instructions to submit a comment. Please include ''DFARS Case 2018–D066'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D066 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Snyder, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 836 and section 837(b) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 836 modified 41 U.S.C. 103 by bifurcating the definition of ''commercial item'' into ''commercial product'' and ''commercial service'' at 41 U.S.C. 103 and 41 U.S.C. 103a, respectively, and made conforming changes to other sections in Title 41. In addition, section 836 made conforming changes to several sections in Title 10, including 10 U.S.C. 2302 and 2375. Section 837(b) implements this revision at 10 U.S.C. 2533a and 2533b. This rule proposes to align the DFARS with the revised definition of ''commercial item''.

These statutory changes implement a recommendation made by the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), an independent commission Congress chartered to streamline the Defense Acquisition System. See the recommendation on pages 29–30 of Volume 1 of 3 dated January 2018 of the Report of the Advisory Plan on Streamlining and Codifying Acquisition Regulations at *https://section809panel.org/wp-content/uploads/2018/04/Sec809Panel_Vol1-Report_Jan18_REVISED_2018-03-14.pdf.* The new definitions were effective January 1, 2020.

II. Discussion and Analysis

DoD is proposing to amend the DFARS to replace all instances of ''commercial item(s)'' with ''commercial product(s)'', ''commercial service(s)'', or ''commercial product(s) and/or commercial service(s)'', as appropriate within the context of the DFARS text, and to conform with the final rule for Federal Acquisition Regulation (FAR) Case 2018–018, published at 86 FR 61017 on November 4, 2021.

The following summarizes the proposed changes to the DFARS:

1. Replace all instances of ''commercial item(s)'' with ''commercial product(s)'' and/or ''commercial service(s)'', as appropriate within the context of the DFARS text.

2. Replace all instances of ''non-commercial item'' and ''noncommercial item'' with ''other than commercial product and/or commercial service'', as appropriate within the context of the DFARS text.

3. Several subpart headings are updated to accommodate the revised nomenclature: DFARS subparts 212.1, 212.2, 212.3, 212.5, 212.6, 212.70, 213.5, 232.1, 232.2, 232.4, 234.70, and 244.4.

4. Other minor editorial changes are made to conform to DFARS drafting conventions, such as revising references to ''task and delivery orders'' to read ''task orders and delivery orders''.

III. Applicability to Contract at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions, contract clauses, or prescriptions for provisions or clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

This proposed rule does not create new requirements or modify any existing requirements. This rule merely proposes to replace the term ''commercial item'' with ''commercial product,'' ''commercial service,'' ''commercial product or commercial service,'' or ''commercial product and commercial service.'' In addition, the proposed rule replaces all instances of ''noncommercial item'' and ''non-commercial item'' with ''other than commercial product and/or commercial service'' as appropriate within the context of DFARS text, including existing solicitation provisions or contract clauses, as appropriate. These revisions do not modify commercial acquisition procedures, nor do they modify Government or industry operations; therefore, the proposed rule does not add any new burdens. This proposed rule is expected to resolve the issue the Section 809 Panel cited, which is that the acquisition workforce has faced issues with inconsistent interpretations of policy and confusion over how to identify eligible commercial products and commercial services. Bifurcating the definition of ''commercial item'' into ''commercial product'' and ''commercial service'' is a way to provide clarity for the acquisition workforce, which may result in greater engagement with the commercial marketplace.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* as it merely replaces all instances of the terms ''commercial item,'' ''noncommercial item,'' and ''non-commercial item'' within the DFARS with updated terms. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to implement section 836 and section 837(b) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 836 replaces the definition of commercial item at 41 U.S.C. 103 with a definition of commercial product at 41 U.S.C. 103 and a definition of commercial service at 41 U.S.C 103a. Section 837(b) implements this revision at 10 U.S.C. 2533a and 2533b. This rule proposes to amend the DFARS to conform with the revision of the definition of commercial item by replacing all instances of ''commercial item'' with ''commercial product'' and/or ''commercial service'', as appropriate within the context of the DFARS text. In addition, this rule proposes to replace all instances of ''noncommercial item'' and ''non-commercial item'' with ''other than commercial product and/or commercial service'', as appropriate within the context of the DFARS text.

The objective of this proposed rule is to implement sections 836 and 837(b) of the John S. McCain NDAA for FY 2019 to align the text of the DFARS with the new statutory definitions of commercial product and commercial service. The legal basis for this rule is section 836 and section 837(b) of the John S. McCain NDAA for FY 2019.

The proposed rule impacts all entities that do business with DoD, including the over 327,458 small business registrants in the System for Award Management. However, DoD does not expect this proposed rule to have a significant impact, because the rule is not implementing any requirements with which small entities must comply. This proposed rule provides clarity for the acquisition workforce by replacing all instances of ''commercial item'' with ''commercial product'' and/or ''commercial service'', as appropriate within the context of the DFARS text.

This proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D066), in correspondence.

VIII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203, 204, 205, 207, 208, 211, 212, 213, 215, 216, 217, 219, 222, 223, 225, 226, 227, 232, 234, 237, 239, 242, 243, 244, 245, 246, 247, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203, 204, 205, 207, 208, 211, 212, 213, 215, 216, 217, 219, 222, 223, 225, 226, 227, 232, 234, 237, 239, 242, 243, 244, 245, 246, 247, and 252 are proposed to be amended as follows:

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 1. The authority citation for part 203 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

203.171–4 [Amended]

■ 2. Amend section 203.171–4 by—
■ a. In paragraph (a), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place; and
■ b. In paragraph (b), removing ''commercial items'' and ''task and delivery orders'' and adding ''commercial products and commercial services'' and ''task orders and delivery orders'' in their places, respectively.
■ 3. Revise section 203.570 to read as follows:

203.570 Prohibition on persons convicted of fraud or other defense-contract-related felonies.

203.570–3 [Amended]

■ 4. Amend section 203.570–3 by removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

203.1004 [Amended]

■ 5. Amend section 203.1004 by—
■ a. In paragraph (a), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place; and
■ b. In paragraph (b)(2)(ii), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

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

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

204.804–70 [Amended]

■ 7. Amend section 204.804–70 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.
■ 8. Revise the heading for subpart 204.21 to read as follows:

Subpart 204.21—Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

204.2105 [Amended]

■ 9. Amend section 204.2105 by removing from paragraphs (a), (b), and (c) ''commercial items'' and ''task and delivery orders'' and adding

''commercial products and commercial services'' and ''task orders and delivery orders'' in their places, respectively.

204.7103–1 [Amended]

■ 10. Amend section 204.7103–1 by removing from paragraph (g) ''commercial items'' and adding ''commercial products'' in its place.

204.7203 [Amended]

■ 11. Amend section 204.7203 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

204.7301 [Amended]

■ 12. Amend section 204.7301 in the definition of ''Technical information'' by removing ''Non Commercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

204.7304 [Amended]

■ 13. Amend section 204.7304 by removing from paragraphs (a), (b), (c), (d), and (e) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

204.7403 [Amended]

■ 14. Amend section 204.7403 by removing from paragraphs (a) and (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

■ 15. Amend section 204.7503 by—

■ a. Revising the introductory text; and

■ b. In paragraphs (a) and (b), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

The revision reads as follows:

204.7503 Contract clause.

Use the clause at 252.204–7021, Contractor Compliance with the Cybersecurity Maturity Model Certification Level Requirements, as follows:

* * * * *

PART 205—PUBLICIZING CONTRACT ACTIONS

■ 16. The authority citation for part 205 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

205.470 [Amended]

■ 17. Amend section 205.470 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 207—ACQUISITION PLANNING

■ 18. The authority citation for part 207 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

207.102 [Amended]

■ 19. Amend section 207.102 by removing from paragraph (a)(1) ''commercial item'' and ''Part 12'' and adding ''commercial product or commercial service'' and ''part 12'' in their places, respectively.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

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

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

208.7401 [Amended]

■ 21. Amend section 208.7401 in the definition of ''Enterprise software agreement'' by removing ''related services'' and adding ''commercial software services'' in its place.

208.7402 [Amended]

■ 22. Amend section 208.7402 by removing in paragraph (1) ''related services'' wherever it appears and ''website at *http://www.don-imit.navy.mil/esi*'' and adding ''commercial software services'' and ''*https://www.esi.mil/*'' in their places, respectively.

208.7403 [Amended]

■ 23. Amend section 208.7403 by removing ''related services'' and adding ''commercial software services'' in its place.

PART 211—DESCRIBING AGENCY NEEDS

■ 24. The authority citation for part 211 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

211.104 [Amended]

■ 25. Amend section 211.104 by removing from paragraph (2) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

211.170 [Amended]

■ 26. Amend section 211.170 by—

■ a. In paragraph (1), removing ''or,'' and adding ''or'' in its place; and

■ b. In paragraph (2), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

211.274–2 [Amended]

■ 27. Amend section 211.274–2 by removing from paragraph (b)(2) ''commercial item'' and ''part 12 or part 8'' and adding ''commercial product or commercial service'' and ''part 12 or 8'' in their places, respectively.

211.274–6 [Amended]

■ 28. Amend section 211.274–6 by removing from paragraphs (a)(1) and (c) introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

211.275–3 [Amended]

■ 29. Amend section 211.275–3 by removing ''*252.211–7006*'', ''commercial items'', and ''*211.275–2*'' and adding ''252.211–7006'', ''commercial products and commercial services'', and ''211.275–2'' in their places, respectively.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 30. The authority citation for part 212 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 31. Revise the heading for part 212 to read as set forth above.

■ 32. Revise the heading for subpart 212.1 to read as follows:

Subpart 212.1—Acquisition of Commercial Products and Commercial Services

■ 33. Amend section 212.102 by—

■ a. In paragraph (a)(i) heading, removing ''*Commercial item*'' and adding ''*Commercial product or commercial service*'' in its place;

■ b. In paragraph (a)(i)(A), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place;

■ c. In paragraph (a)(i)(C), removing ''commercial item'', ''subsections'', and '' ''commercial item'' '' and adding ''commercial product or commercial service'', ''paragraph'', and '' ''commercial product or commercial service'' '' in their places, respectively;

■ d. In paragraph (a)(i)(D), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place;

■ e. In paragraph (a)(ii) heading, removing ''*commercial item*'' and adding ''*commercial product or commercial service*'' in its place;

■ f. In paragraph (a)(ii)(A), removing ''commercial item'', ''the Department'', and ''noncommercial items'' and adding ''commercial product or commercial service'', ''DoD'', and ''other than commercial products or commercial services'' in their places, respectively;

■ g. In paragraph (a)(ii)(B), removing ''commercial item'' wherever it appears

and adding ''commercial product or commercial service'' in its place;
■ h. Revising paragraph (a)(iii)(A);
■ i. In paragraph (a)(iii)(B), removing ''commercial items'' and adding ''commercial services'' in its place; and
■ j. In paragraph (a)(iii)(C), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

212.102 Applicability.

(a) * * *

(iii) * * *

(A) Except as provided in paragraph (a)(iii)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial products or commercial services. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire products or services that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current other than commercial products or commercial services; however, when appropriate, contracting officers may consider applying commercial product or commercial service procedures to the procurement of supplies and services from business segments that meet the definition of ''nontraditional defense contractor'' (see 202.101) even though they have been established under traditional defense contractors. The decision to apply commercial product or commercial service procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial product or commercial service determination and does not mean the product or service is commercial;

* * * * *

■ 34. Revise the heading for subpart 212.2 to read as follows:

Subpart 212.2—Special Requirements for the Acquisition of Commercial Products and Commercial Services

212.203 [Amended]

■ 35. Amend section 212.203 by removing from paragraph (1) ''commercial items'' and adding ''commercial products and commercial services'' in its place.
■ 36. Amend section 212.207 by—
■ a. In paragraph (b) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. In paragraph (b)(i), removing ''commercial item'', ''paragraph (5)'', ''*commercial item*'', and ''(41 U.S.C. 103'' and adding ''commercial product'', ''paragraph (1)'', ''*commercial service*'' and ''(41 U.S.C. 103a)'' in their places, respectively; and
■ c. In paragraph (b)(iii)(A), removing ''paragraph (6)'', ''*commercial item*'', and ''(41 U.S.C. 103)'' and adding ''paragraph (1)'', ''*commercial service*'', and ''(41 U.S.C. 103a)'' in their places, respectively.

212.209 [Amended]

■ 37. Amend section 212.209 by—
■ a. In paragraph (a) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. In paragraph (a)(1), removing ''systems items'' and ''commercial items'' and adding ''systems'' and ''commercial products'' in their places, respectively; and
■ c. In paragraph (b), removing ''section,'' and ''commercial items'' and adding ''section'' and ''commercial products or commercial services'' in their places, respectively.

212.211 [Amended]

■ 38. Amend 212.211 by removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.
■ 39. Revise section 212.270 to read as follows:

212.270 Major weapon systems as commercial products.

The DoD policy for acquiring major weapon systems as commercial products is in subpart 234.70.
■ 40. Revise the heading for section 212.272 to read as follows:

212.272 Preference for certain commercial products and commercial services.

212.301 [Amended]

■ 41. Amend section 212.301 by—
■ a. In the section heading and paragraph (f) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. In paragraph (f)(xi)(A), removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place;
■ c. In paragraph (f)(xi)(B), removing ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place; and
■ d. In paragraph (f)(xvi), removing ''Commercial Items'' and adding ''Commercial Products and Commercial Services'' in its place.
■ 42. Revise the heading for subpart 212.5 to read as follows:

Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Products, Commercial Services, and Commercially Available Off-the-Shelf Items

212.503 [Amended]

■ 43. Amend section 212.503 by—
■ a. In the section heading, removing ''executive'' and ''commercial items'' and adding ''Executive'' and ''commercial products and commercial services'' in their places, respectively; and
■ b. In paragraphs (a) introductory text, (a)(x), and (c) introductory text, removing ''commercial items'' and adding ''commercial products or commercial services'' in their places, respectively.

212.504 [Amended]

■ 44. Amend section 212.504 by—
■ a. In the section heading, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ b. In paragraph (a) introductory text, removing ''commercial items or commercial components'' and adding ''commercial products or commercial services'' in its place;
■ c. In paragraph (a)(xvi), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place; and
■ d. In paragraph (b) introductory text, removing ''commercial items or commercial components'' and adding ''commercial products or commercial services'' in its place.
■ 45. Revise the heading for subpart 12.6 to read as follows:

Subpart 212.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Products and Commercial Services

■ 46. Revise the heading for subpart 212.70 to read as follows:

Subpart 212.70—Limitation on Conversion of Procurement From Commercial Product and Commercial Service Acquisition Procedures

212.7001 [Amended]

■ 47. Amend section 212.7001 by—
■ a. In paragraph (a)(1) introductory text, removing ''commercial item'' and ''commercial acquisition procedures to noncommercial acquisition procedures'' and adding ''commercial product or commercial service'' and ''commercial product and commercial service acquisition procedures to other than commercial product and commercial service acquisition procedures'' in their places, respectively;

■ b. In paragraph (a)(1)(i), removing ''commercial acquisition procedures'' and adding ''commercial product and commercial service acquisition procedures'' in its place;
■ c. In paragraph (a)(1)(ii), removing ''item or service using commercial acquisition procedures'' and adding ''product or service using commercial product and commercial service acquisition procedures'' in its place; and
■ d. In paragraph (b)(2), removing ''noncommercial acquisition procedures'' and adding ''other than commercial product or commercial service acquisition procedures'' in its place.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 48. The authority citation for part 213 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

213.106–2–70 [Amended]

■ 49. Amend section 213.106–2–70 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

213.301 [Amended]

■ 50. Amend section 213.301 by removing from paragraph (2)(i)(B) ''commercial item'' and adding ''commercial product or commercial service'' in its place.

213.402 [Amended]

■ 51. Amend section 213.402 by removing from paragraph (a)(i) ''Brand-name'' and adding ''Brand-name commercial product'' in its place.
■ 52. Revise the heading for subpart 213.5 to read as follows:

Subpart 213.5—Simplified Procedures for Certain Commercial Products and Commercial Services

PART 215—CONTRACTING BY NEGOTIATION

■ 53. The authority citation for part 215 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

215.371–6 [Amended]

■ 54. Amend section 215.371–6 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

215.402 [Amended]

■ 55. Amend section 215.402 by removing from paragraph (a)(ii) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

■ 56. Amend section 215.403–1 by—
■ a. Revising paragraph (c)(3) heading;
■ b. In paragraph (c)(3)(A), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place; and
■ c. In paragraph (c)(3)(B), removing ''commercial item'' wherever it appears and adding ''commercial product or commercial service'' in its place.

The revision reads as follows:

215.403–1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(3) *Commercial products or commercial services.* * * *

* * * * *

■ 57. Amend section 215.403–3(c) by—
■ a. Revising the heading; and
■ b. Removing ''commercial items'' and adding ''commercial products'' in its place.

The revision reads as follows:

215.403–3 Requiring data other than certified cost or pricing data.

* * * * *

(c) *Commercial products or commercial services.* * * *

215.404–1 [Amended]

■ 58. Amend section 215.404–1 by—
■ a. In paragraph (b) heading, removing ''*for commercial and noncommercial items*'';
■ b. In paragraph (b)(ii), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place; and
■ c. In paragraph (b)(vii), removing ''commercial item'' and adding ''commercial product or commercial service determinations'' in its place.

215.404–71–4 [Amended]

■ 59. Amend section 215.404–71–4 by removing from paragraph (g)(3)(i)(A) ''commercial item lines'' and adding ''commercial product lines'' in its place.

215.404–71–5 [Amended]

■ 60. Amend section 215.404–71–5 by removing from paragraph (b)(7) ''commercial items'' and adding ''commercial products or commercial services'' in its place.

215.408 [Amended]

■ 61. Amend section 215.408 by—
■ a. In paragraphs (2)(i)(A)(*1*) introductory text and (2)(i)(A)(*2*), removing ''DFARS 252.215–7010'' and ''commercial items'' and adding ''252.215–7010'' and ''commercial products and commercial services'' in their places, respectively;
■ b. In paragraph (2)(i)(B), removing ''DFARS''; and
■ c. In paragraphs (2)(ii)(A)(*1*) introductory text, (2)(ii)(A)(*2*), (2)(ii)(A)(*3*)(*i*), (3), and (5)(i) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 216—TYPES OF CONTRACTS

■ 62. The authority citation for part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

216.601 [Amended]

■ 63. Amend section 216.601 by—
■ a. In paragraph (d)(i)(B)(*3*), removing ''noncommercial items'' and adding ''other than commercial products or commercial services'' in its place; and
■ b. In paragraph (e), removing ''Non-Commercial Item'' and ''non-commercial items'' and adding ''Other Than Commercial'' and ''other than commercial products or commercial services'' in their places, respectively.

PART 217—SPECIAL CONTRACTING METHODS

■ 64. The authority citation for part 217 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

217.7302 [Amended]

■ 65. Amend section 217.7302 by removing from paragraph (b)(1) ''commercial items'' and adding ''commercial products'' in its place.

PART 219—SMALL BUSINESS PROGRAMS

■ 66. The authority citation for part 219 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

219.270–3 [Amended]

■ 67. Amend section 219.270–3 by removing ''commercial items'' and adding ''commercial services'' in its place.

219.309 [Amended]

■ 68. Amend section 219.309 by removing from paragraph (1) introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

219.708 [Amended]

■ 69. Amend section 219.708 by removing from paragraphs (b)(1)(A) introductory text and (b)(1)(B) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 70. The authority citation for part 222 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

222.7403 [Amended]

■ 71. Amend section 222.7403 by removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

222.7405 [Amended]

■ 72. Amend section 222.7405 by removing ''task or delivery orders'' and ''commercial items'' and adding ''task orders or delivery orders'' and ''commercial products or commercial services'' in their places, respectively.

PART 223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

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

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

223.570–2 [Amended]

■ 74. Amend section 223.570–2 by removing from paragraph (b)(1) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

223.7201 [Amended]

■ 75. Amend section 223.7201 by removing from paragraph (b)(1) ''commercial item'' and adding ''commercial product'' in its place.

223.7306 [Amended]

■ 76. Amend section 223.7306 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 225—FOREIGN ACQUISITION

■ 77. The authority citation for part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

225.302–6 [Amended]

■ 78. Amend section 225.302–6 by removing from the introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.371–5 [Amended]

■ 79. Amend section 225.371–5 by removing from paragraph (a) introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.372–2 [Amended]

■ 80. Amend section 225.372–2 introductory text by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.771–5 [Amended]

■ 81. Amend section 225.771–5 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.772–5 [Amended]

■ 82. Amend section 225.772–5 by removing from paragraph (b) ''including solicitation'' and ''commercial items'' and adding ''including solicitations'' and ''commercial products and commercial services'' in their places, respectively.

225.1101 [Amended]

■ 83. Amend section 225.1101 by—
■ a. In paragraphs (1) introductory text, (2)(i) introductory text, (5) introductory text, (6) introductory text, (9) introductory text, and (10)(i) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place; and
■ b. In paragraph (10)(ii)(B), removing ''commercial item'' and ''Section'' and adding ''commercial product'' and ''section'' in their places, respectively.

225.7002–3 [Amended]

■ 84. Amend section 225.7002–3 by removing from paragraphs (a), (b), and (c) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7003–3 [Amended]

■ 85. Amend section 225.7003–3 by—
■ a. In paragraph (b)(2)(i)(D)(*2*), removing ''commercial item'' and ''subsection'' and adding ''commercial product'' and ''section'' in their places, respectively; and
■ b. In paragraph (b)(3), removing ''commercial items'' and adding ''commercial products'' in its place.

225.7003–5 [Amended]

■ 86. Amend section 225.7003–5 by—
■ a. In paragraph (a) introductory text, removing ''subsection'' and adding ''section'' in its place; and
■ b. In paragraphs (a)(1) introductory text, (a)(2) introductory text, and (b) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7006–4 [Amended]

■ 87. Amend section 225.7006–4 by removing from paragraphs (a) introductory text and (b) introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7009–3 [Amended]

■ 88. Amend section 225.7009–3 by removing ''commercial items'' and adding ''commercial products'' in its place.

225.7009–5 [Amended]

■ 89. Amend section 225.7009–5 by—
■ a. In the introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place; and
■ b. In paragraph (a), removing ''commercial items'' and adding ''commercial products'' in its place.

225.7017–4 [Amended]

■ 90. Amend section 225.7017–4 by removing from paragraphs (a)(1) and (2) and (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7018–5 [Amended]

■ 91. Amend section 225.7018–5 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7202 [Amended]

■ 92. Amend section 225.7202 by removing ''commercial items'' and adding ''commercial products, commercial services'' in its place.

225.7307 [Amended]

■ 93. Amend section 225.7307 by removing from paragraphs (a) and (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7501 [Amended]

■ 94. Amend section 225.7501 by removing from paragraph (a)(2)(vi) ''commercial item'' and ''Section'' and adding ''commercial product'' and ''section'' in their places, respectively.

225.7503 [Amended]

■ 95. Amend section 225.7503 by removing from paragraphs (a) introductory text and (b) introductory text ''commercial items or components'' and adding ''commercial products, including commercial components'' in its place.

225.7605 [Amended]

■ 96. Amend section 225.7605 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

225.7703–4 [Amended]

■ 97. Amend section 225.7703–4 by removing from paragraphs (a), (b), (c) introductory text, and (d) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

■ 98. The authority citation for part 226 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

226.104 [Amended]

■ 99. Amend section 226.104 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

226.7203 [Amended]

■ 100. Amend section 226.7203 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 101. The authority citation for part 227 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

227.7101 [Amended]

■ 102. Amend section 227.7101 by removing from paragraph (b) ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.
■ 103. Revise section 227.7102 to read as follows:

227.7102 Commercial products, including components, commercial services, or commercial processes.

227.7102–1 [Amended]

■ 104. Amend section 227.7102–1 by—
■ a. In paragraph (a) introductory text, removing ''commercial item or process'' and adding ''commercial product, commercial service, or commercial process'' in its place;
■ b. In paragraph (a)(2), removing ''commercial items or processes'' and ''commercial item'' and adding ''commercial products or commercial processes'' and ''commercial product'' in their places, respectively;
■ c. In paragraph (b) introductory text, removing ''subsection'' and adding ''section'' in its place; and
■ d. In paragraphs (b)(1) and (2), removing ''commercial items or processes'' and adding ''commercial products, commercial services, or commercial processes'' in its place.

227.7102–2 [Amended]

■ 105. Amend section 227.7102–2 by removing from paragraph (a) ''Commercial Items'', ''commercial items or processes'', and ''commercial items'' and adding ''Commercial Products and Commercial Services'', ''commercial products, commercial services, or commercial processes'' and ''commercial products'' in their places, respectively.

227.7102–3 [Amended]

■ 106. Amend section 227.7102–3 by—
■ a. In the section heading, removing ''challenge'' and adding ''challenge,'' in its place; and
■ b. Removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.
■ 107. Amend section 227.7102–4 by—
■ a. Revising paragraph (a)(1);
■ b. In paragraph (a)(2), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;
■ c. In paragraph (b), removing ''Noncommercial Items'' and ''commercial item'' wherever it appears and adding ''Other Than Commercial Products and Commercial Services'' and ''commercial product or commercial service'' in their places, respectively; and
■ d. In paragraph (c), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

The revision reads as follows:

227.7102–4 Contract clauses.

(a)(1) Except as provided in paragraph (b) of this section, use the clause at 252.227–7015, Technical Data–Commercial Products and Commercial Services, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the contractor will be required to deliver technical data pertaining to commercial products including commercial components, commercial services, or commercial processes.

* * * * *

■ 108. Revise section 227.7103 to read as follows:

227.7103 Other than commercial products, commercial services, or commercial processes.

227.7103–3 [Amended]

■ 109. Amend section 227.7103–3 by—
■ a. In the section heading, removing ''reproduction'' and adding ''reproduction,'' in its place; and
■ b. In paragraph (b), removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.
■ 227.7103–5
■ 110. Amend section 227.7103–5 by removing from the introductory text ''Noncommercial Items'' and ''subsection'' and adding ''Other Than Commercial Products and Commercial Services'' and ''section'' in their places, respectively.
■ 111. Amend section 227.7103–6 by—
■ a. Revising paragraph (a); and
■ b. In paragraphs (b)(1) introductory text and (b)(2), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

The revision reads as follows:

227.7103–6 Contract clauses.

(a) Use the clause at 252.227–7013, Rights in Technical Data–Other Than Commercial Products and Commercial Services, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the successful offeror(s) will be required to deliver to the Government technical data pertaining to other than commercial products or commercial services, or pertaining to commercial products or commercial services for which the Government will have paid for any portion of the development costs (in which case the clause at 252.227–7013 will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed in any part at Government expense, and the clause at 252.227–7015 will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense). Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.72), commercial products or commercial services developed exclusively at private expense (see 227.7102–4), existing works (see 227.7105), special works (see 227.7106), or when contracting under the Small Business Innovation Research Program (see 227.7104). Except as provided in 227.7107–2, do not use the clause in architect-engineer and construction contracts.

* * * * *

227.7103–9 [Amended]

■ 112. Amend section 27.7103–9 by removing from paragraph (a)(1) ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7103–10 [Amended]

■ 113. Amend section 227.7103–10 by removing from paragraphs (a)(3) and (b) introductory text ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7103–11 [Amended]

■ 114. Amend section 227.7103–11 in paragraph (a) by removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7103–12 [Amended]

■ 115. Amend section 227.7103–12 by removing from paragraph (a)(1) ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

■ 116. Amend section 227.7103–13 by—

■ a. In paragraph (c)(1), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place;

■ b. In paragraph (c)(2) introductory text, removing ''commercial items'' and adding ''commercial products or commercial services'' in its place;

■ c. In paragraph (c)(2)(i):

■ i. Revising the heading; and

■ ii. Removing ''commercial item'' and adding ''commercial product or commercial service'' in its place; and

■ d. In paragraphs (c)(2)(ii)(A)(*1*) and (*2*), removing ''commercial item'' and adding ''commercial product'' in its place.

The revision reads as follows:

227.7103–13 Government right to review, verify, challenge, and validate asserted restrictions.

* * * * *

(c) * * *

(2) * * *

(i) *Commercial products and commercial services.* * * *

* * * * *

227.7103–15 [Amended]

■ 117. Amend 227.7103–15 by—

■ a. In paragraph (a), removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place;

■ b. In paragraph (c) introductory text, removing ''non-commercial items'' and adding ''other than commercial products or commercial services'' in its place; and

■ c. In paragraphs (c)(1) and (d), removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7103–16 [Amended]

■ 118. Amend section 227.7103–16 by removing from paragraph (b) ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7103–17 [Amended]

■ 119. Amend section 227.7103–17 by removing from paragraph (a) ''Noncommercial Items'' and ''release or'' and adding ''Other Than Commercial Products and Commercial Services'' and ''release, or'' in their places, respectively.

227.7104 [Amended]

■ 120. Amend section 227.7104 by removing from paragraph (a) ''Noncommercial Technical'' and adding ''Other Than Commercial Technical'' in its place.

227.7106 [Amended]

■ 121. Amend section 227.7106 by removing from paragraph (a)(1) ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7201 [Amended]

■ 122. Amend section 227.7201 by removing from paragraph (b) ''Noncommercial'' wherever it appears and adding ''Other Than Commercial'' in its place.

■ 123. Revise the heading for section 227.7203 to read as follows:

227.7203 Other than commercial computer software and other than commercial computer software documentation.

* * * * *

227.7203–2 [Amended]

■ 124. Amend section 227.7203–2 by removing from the section heading ''noncommercial'' and adding ''other than commercial'' in its place.

227.7203–3 [Amended]

■ 125. Amend section 227.7203–3 by—

■ a. In the section heading, removing ''reproduction'' and adding ''reproduction,'' in its place; and

■ b. In paragraph (a), removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7203–4 [Amended]

■ 126. Amend section 227.7203–4 by removing from paragraph (b) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7203–5 [Amended]

■ 127. Amend section 227.7203–5 by—

■ a. In the introductory text, removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and ''subsection'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' and ''section'' in their places, respectively; and

■ b. In paragraph (c)(1), removing ''noncommercial'' and adding ''other than commercial'' in its place.

227.7203–6 [Amended]

■ 128. Amend section 227.7203–6 by—

■ a. In paragraph (a)(1), removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'', ''commercial items'', and ''(see 227.7104),'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'', ''commercial products and commercial services'' and ''(see 227.7104).'' in their places, respectively; and

■ b. In paragraph (f), removing ''noncommercial'' and adding ''other than commercial'' in its place.

227.7203–9 [Amended]

■ 129. Amend section 227.7203–9 by—

■ a. In paragraph (a)(1), removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place; and

■ b. In paragraph (a)(2), removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place.

227.7203–10 [Amended]

■ 130. Amend section 227.7203–10 by removing from paragraphs (a)(3) and (b) introductory text ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7203–11 [Amended]

■ 131. Amend section 227.7203–11 by removing from paragraph (a) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial

Computer Software Documentation'' in its place.

227.7203–12 [Amended]

■ 132. Amend section 227.7203–12 by removing from paragraph (a)(1) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7203–15 [Amended]

■ 133. Amend section 227.7203–15 by removing from paragraphs (c)(1) and (d) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7203–16 [Amended]

■ 134. Amend section 227.7203–16 by removing from paragraph (b) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7203–17 [Amended]

■ 135. Amend section 227.7203–17 by removing from paragraph (a) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

227.7205 [Amended]

■ 136. Amend section 227.7205 by removing from paragraph (a)(1) ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place.

PART 232—CONTRACT FINANCING

■ 137. The authority citation for part 232 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

232.009–2 [Amended]

■ 138. Amend section 232.009–2 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

■ 139. Revise the heading for subpart 232.1 to read as follows:

Subpart 232.1—Financing for Other Than a Commercial Purchase

■ 140. Revise the heading for subpart 232.2 to read as follows:

Subpart 232.2—Commercial Product and Commercial Service Purchase Financing

232.206 [Amended]

■ 141. Amend section 232.206 by removing from the paragraph (g) heading ''*commercial items*'' and adding ''*commercial products and commercial services*'' in its place.

■ 142. Revise the heading for subpart 232.4 to read as follows:

Subpart 232.4—Advance Payments for Other Than Commercial Acquisitions

232.908 [Amended]

■ 143. Amend section 232.908 by removing ''commercial items'' and ''Commercial Items'' and adding ''commercial products and commercial services'' and ''Commercial Products and Commercial Services'' in their places, respectively.

232.1110 [Amended]

■ 144. Amend section 232.1110 by removing from the introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

232.7004 [Amended]

■ 145. Amend section 232.7004 by—

■ a. In paragraph (a), removing ''contract or task or delivery order'' and ''commercial items'' and adding ''contract, task order, or delivery order'' and ''commercial products and commercial services'' in their places, respectively; and

■ b. In paragraph (b), removing ''contracts or task or delivery orders'' and ''commercial items'' and adding ''contracts, task orders, or delivery orders'' and ''commercial products and commercial services'' in their places, respectively.

232.7102 [Amended]

■ 146. Amend section 232.7102 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

232.7202 [Amended]

■ 147. Amend section 232.7202 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 234—MAJOR SYSTEM ACQUISITION

■ 148. The authority citation for part 234 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 149. Revise the heading for subpart 234.70 to read as follows:

Subpart 234.70—Acquisition of Major Weapon Systems as Commercial Products

234.7000 [Amended]

■ 150. Amend section 234.7000 in paragraph (b) by removing ''commercial item'' and adding ''commercial product'' in its place.

234.7002 [Amended]

■ 151. Amend section 234.7002 by—

■ a. In paragraph (a)(1) introductory text, removing ''commercial item'' and ''commercial items'' and adding ''commercial product'' and ''commercial products and commercial services'' in their places, respectively;

■ b. In paragraph (a)(1)(i)(A), removing ''commercial item'' and adding ''commercial product'' in its place;

■ c. In paragraph (b) introductory text, removing ''commercial item'' and ''commercial items'' and adding ''commercial product'' and ''commercial products and commercial services'' in their places, respectively;

■ d. In paragraph (b)(1), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;

■ e. In paragraph (b)(2), removing ''commercial item'' and adding ''commercial product'' in its place;

■ f. In paragraph (c)(1) introductory text, removing ''commercial item'' and adding ''commercial product'' in its place;

■ g. In paragraphs (c)(1)(i)(A) and (B) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;

■ h. In paragraph (c)(1)(ii), removing ''commercial item'' and adding ''commercial product'' in its place;

■ i. In paragraph (d)(1), removing ''commercial items'' and adding ''commercial products'' in its place; and

■ j. In paragraph (d)(5), removing ''commercial item'' and adding ''commercial product'' in its place.

PART 237—SERVICE CONTRACTING

■ 152. The authority citation for part 237 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

237.171–4 [Amended]

■ 153. Amend section 237.171–4 by removing from the introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

237.173–5 [Amended]

■ 154. Amend section 237.173–5 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

■ 155. The authority citation for part 239 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

239.101 [Amended]

■ 156. Amend section 239.101 by removing from paragraph (1) ''commercial items'' wherever it appears and adding ''commercial products or commercial services'' in its place.

239.7306 [Amended]

■ 157. Amend section 239.7306 by removing from paragraphs (a) and (b) ''commercial items'' and adding ''commercial products and commercial services'' in its place.

239.7604 [Amended]

■ 158. Amend section 239.7604 by removing from paragraphs (a) and (b) ''commercial item'' and adding ''commercial products and commercial services'' in its place.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 159. The authority citation for part 242 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

242.7200 [Amended]

■ 160. Amend section 242.7200 by removing from paragraph (b)(1) introductory text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

242.7204 [Amended]

■ 161. Amend section 242.7204 by removing from the introductory text ''commercial items'' and adding ''commercial products or commercial services'' in its place.

PART 243—CONTRACT MODIFICATIONS

■ 162. The authority citation for part 243 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

243.205–71 [Amended]

■ 163. Amend section 242.205–71 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

■ 164. The authority citation for part 244 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

244.303 [Amended]

■ 165. Amend section 244.303 by removing from paragraph (a) ''commercial item'' and ''definition of ''commercial item'' in FAR 2.101'' and adding ''commercial product or commercial service'' and ''definition of ''commercial product'' or ''commercial service'' in FAR 2.101'' in their places, respectively.

■ 166. Revise the heading for subpart 244.4 to read as follows:

Subpart 244.4—Subcontracts for Commercial Products and Commercial Services

244.402 [Amended]

■ 167. Amend section 244.402 by—

■ a. In paragraph (a), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place; and

■ b. In paragraph (S–70), removing ''commercial items'', ''definition of ''commercial item'' at FAR 2.101'', and ''commercial item'' and adding ''commercial products or commercial services'', ''definition of ''commercial product'' or ''commercial service'' at FAR 2.101'', and ''commercial product or commercial service'' in their places, respectively.

244.403 [Amended]

■ 168. Amend section 244.403 by removing ''Commercial Items'' and ''commercial items'' and adding ''Commercial Products and Commercial Services'' and ''commercial products and commercial services'' in their places, respectively.

PART 245—GOVERNMENT PROPERTY

■ 169. The authority citation for part 245 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 170. Amend section 245.102 by—

■ a. Revising the introductory text; and

■ b. In paragraph (4)(ii)(C) introductory text, removing ''commercial item'' and adding ''commercial product'' in its place.

The revision reads as follows:

245.102 Policy.

See the policy guidance at PGI 245.102–70.

* * * * *

PART 246—QUALITY ASSURANCE

■ 171. The authority citation for part 246 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

246.270–4 [Amended]

■ 172. Amend section 246.270–4 by removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

246.370 [Amended]

■ 173. Amend section 246.370 by removing from paragraph (a) introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

246.704 [Amended]

■ 174. Amend section 246.704 by removing from paragraph (1)(i) ''Commercial items'' and adding ''Commercial products or commercial services'' in its place.

246.706 [Amended]

■ 175. Amend section 246.706 by removing from paragraph (b)(5) ''non-commercial items'' and adding ''other than commercial products'' in its place.

246.870–3 [Amended]

■ 176. Amend section 246.870–3 by removing from paragraph (b) introductory text ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 247—TRANSPORTATION

■ 177. The authority citation for part 247 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

247.574 [Amended]

■ 178. Amend section 247.574 by—

■ a. In paragraphs (a)(1) introductory text and (b) introductory text, removing ''commercial items'' and adding ''commercial products and commercial services'' in its place;

■ b. In paragraphs (b)(1) introductory text and (b)(2) and (3), removing ''commercial items'' and adding ''commercial products'' in its place; and

■ c. In paragraphs (c), (d), and (e), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 179. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 180. Amend section 252.203–7001 by—

■ a. Revising the section heading and date of the clause; and

■ b. In paragraph (g):

■ i. Adding a heading; and

■ ii. Removing ''commercial items or components'' and adding ''commercial products or commercial services'' in its place.

The revisions and addition read as follows:

252.203–7001 Prohibition on Persons Convicted of Fraud or Other Defense-Contract-Related Felonies.

* * * * *

Prohibition on Persons Convicted of Fraud or Other Defense–Contract–Related Felonies (DATE)

* * * * *

(g) *Subcontracts.* * * *

* * * * *

■ 181. Amend section 252.203–7004 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (d), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place.

The revision reads as follows:

252.203–7004 Display of Hotline Posters.

* * * * *

Display of Hotline Posters (DATE)

* * * * *

■ 182. Amend section 252.204–7004 by—

■ a. Revising the clause heading and the date of the clause; and

■ b. In paragraph (d), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

The revisions read as follows:

252.204–7004 Antiterrorism Awareness Training for Contractors.

* * * * *

Antiterrorism Awareness Training for Contractors (DATE)

* * * * *

■ 183. Amend section 252.204–7009 by—

■ a. Revising the section heading and date of the clause;

■ b. In paragraph (a), in the definition of ''Technical information'', removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place; and

■ c. In paragraph (c), removing ''commercial items'' and adding ''commercial products and commercial services'' in its place.

The revision reads as follows:

252.204–7009 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

* * * * *

Limitations on the Use or Disclosure of Third–Party Contractor Reported Cyber Incident Information (DATE)

* * * * *

■ 184. Amend section 252.204–7012 by—

■ a. Revising the section heading;

■ b. In the introductory text, removing ''204.7304c'' and adding ''204.7304(c)'' in its place;

■ c. Revising the date of the clause;

■ d. In paragraph (a), in the definition of ''Technical information'', removing ''Noncommercial Items'' and adding ''Other Than Commercial Products and Commercial Services'' in its place; and

■ e. In paragraph (m)(1), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.204–7012 Safeguarding Covered Defense Information and Cyber Incident Reporting.

* * * * *

Safeguarding Covered Defense Information and Cyber Incident Reporting (DATE)

* * * * *

■ 185. Amend section 252.204–7014 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (f):

■ i. Revising the heading; and

■ ii. Removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revisions read as follows:

252.204–7014 Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

* * * * *

Limitations on the Use or Disclosure of Information by Litigation Support Contractors (DATE)

* * * * *

(f) *Subcontracts.* * * *

* * * * *

■ 186. Amend section 252.204–7015 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (c):

■ i. Revising the heading; and

■ ii. Removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revisions read as follows:

252.204–7015 Notice of Authorized Disclosure of Information for Litigation Support.

* * * * *

Notice of Authorized Disclosure of Information for Litigation Support (DATE)

* * * * *

(c) *Subcontracts.* * * *

* * * * *

■ 187. Amend section 252.204–7018 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (e), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.204–7018 Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

* * * * *

Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services (DATE)

* * * * *

■ 188. Amend section 252.204–7020 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (g)(1), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.204–7020 NIST SP 800–171 DoD Assessment Requirements.

* * * * *

NIST SP 800–171 DOD Assessment Requirements (DATE)

* * * * *

■ 189. Amend section 252.204–7021 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (c)(1), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.204–7021 Contractor Compliance with the Cybersecurity Maturity Model Certification Level Requirement.

* * * * *

Contractor Compliance With the Cybersecurity Maturity Model Certification Level Requirement (DATE)

* * * * *

■ 190. Amend section 252.211–7003 by—

■ a. Revising the section heading and date of the clause; and
■ b. In paragraph (g), removing ''by contract any items'' and ''commercial items'' and adding ''by subcontract any item(s)'' and ''commercial products or commercial services'' in their places, respectively.

The revisions read as follows:

252.211–7003 Item Unique Identification and Valuation.

* * * * *

Item Unique Identification and Valuation (DATE)

* * * * *

■ 191. Amend section 252.215–7009 by revising the section heading, the date of the provision, and item 18 of the table to read as follows:

252.215–7009 Proposal Adequacy Checklist.

* * * * *

Proposal Adequacy Checklist (DATE)

* * * * *

PROPOSAL ADEQUACY CHECKLIST

References	Submission item	Proposal page No.	If not provided EXPLAIN (may use continuation pages)
* *	* * * *	*	*
18. FAR 52.215–20 FAR 2.101, ''commercial product or commercial service''.	Has the offeror submitted an exception to the submission of certified cost or pricing data for commercial products proposed either at the prime or subcontractor level, in accordance with provision 52.215–20? a. Has the offeror specifically identified the type of commercial product claim (FAR 2.101 commercial product definition, and the basis on which the commercial product meets the definition? b. For modified commercial products (FAR 2.101 commercial product or commercial service definition; did the offeror classify the modification(s) as either— i. A modification of a type customarily available in the commercial marketplace (paragraph (3)(i)); or ii. A minor modification (paragraph (3)(ii)) of a type not customarily available in the commercial marketplace made to meet Federal Government requirements not exceeding the thresholds in FAR 15.403–1(c)(3)(iii)(B)? c. For proposed commercial products ''of a type'', or ''evolved'' or modified (FAR 2.101 commercial product definition), did the contractor provide a technical description of the differences between the proposed item and the comparison item(s)?		
* *	* * * *	*	*

* * * * *

■ 192. Amend section 252.215–7010 by—
■ a. Revising the provision date;
■ b. In paragraph (b)(1)(ii) introductory text, removing ''*Commercial item*'', ''commercial item'', ''same item'', and ''similar items'' and adding ''*Commercial product or commercial service*'', ''commercial product'', ''same product'', and ''similar products'' in their places, respectively; and
■ c. In paragraph (b)(1)(ii)(A), removing ''items'' and adding ''products'' in its place.

The revision reads as follows:

252.215–7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data–Basic (DATE)

* * * * *

■ 193. Amend section 252.215–7013 by—
■ a. Revising the provision heading and date; and
■ b. Removing ''commercial items'' and ''commercial item'' wherever they appear and adding ''commercial products or commercial services'' and ''commercial product or commercial service'' in their places, respectively.

The revisions read as follows:

252.215–7013 Supplies and Services Provided by Nontraditional Defense Contractors.

* * * * *

Supplies and Services Provided by Nontraditional Defense Contractors (DATE)

* * * * *

■ 194. Amend section 252.216–7000 by—
■ a. Revising the section heading and clause date; and
■ b. In paragraph (a), in the definition of ''Established price'', removing ''commercial item'' and adding ''commercial product'' in its place.

The revisions read as follows:

252.216–7000 Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products.

* * * * *

Economic Price Adjustment–Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products (DATE)

* * * * *

■ 195. Amend section 252.216–7001 by—
■ a. Revising the section heading and clause date; and
■ b. In paragraph (a), in the definition of ''Established price'', removing from paragraph (1) ''commercial item'' and adding ''commercial product'' in its place.

The revisions read as follows:

252.216–7001 Economic Price Adjustment–Nonstandard Steel Items.

* * * * *

Economic Price Adjustment–Nonstandard Steel Items (DATE)

* * * * *

■ 196. Amend section 252.216–7002 by revising the section heading, provision heading, and date of the provision to read as follows:

252.216–7002 Alternate A, Time-and-Materials/Labor-Hour Proposal Requirements—Other Than Commercial Acquisition with Adequate Price Competition.

* * * * *

Alternate A, Time-and-Materials/Labor–Hour Proposal Requirements–Other Than Commercial Acquisition With Adequate Price Competition (DATE)

* * * * *

■ 197. Amend section 252.217–7026 by—

■ a. Revising the section heading and provision date;

■ b. In paragraph (b)(2), removing ''list ''none.''' and adding ''list ''none''. '' in its place; and

■ c. In paragraph (b)(3), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place.

The revisions read as follows:

252.217–7026 Identification of Sources of Supply.

* * * * *

Identification of Sources of Supply (DATE)

* * * * *

■ 198. Amend section 252.222–7006 by—

■ a. Revising the clause date; and

■ b. In paragraph (a), in the definition of ''Covered subcontractor'', removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.222–7006 Restrictions on the Use of Mandatory Arbitration Agreements.

* * * * *

Restrictions on the Use of Mandatory Arbitration Agreements (DATE)

* * * * *

■ 199. Amend section 252.223–7008 by—

■ a. Revising the clause date; and

■ b. In paragraph (d), removing ''commercial items'' and ''supplies,,'' and adding ''commercial products or commercial services'' and ''supplies,'' in their places, respectively.

The revision reads as follows:

252.223–7008 Prohibition of Hexavalent Chromium.

* * * * *

Prohibition of Hexavalent Chromium (DATE)

* * * * *

■ 200. Amend section 252.225–7001 by—

■ a. Revising the clause date;

■ b. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and

■ c. In the Alternate I clause—

■ i. Revising the clause date; and

■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively.

The revisions read as follows:

252.225–7001 Buy American and Balance of Payments Program.

* * * * *

Buy American and Balance of Payments Program–basic (DATE)

* * * * *

Buy American and Balance of Payments Program–Alternate I (DATE)

* * * * *

■ 201. Amend section 252.225–7009 by—

■ a. Revising the clause date;

■ b. In paragraph (a), in the definition of ''Commercially available off-the-shelf item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively;

■ c. In paragraph (c)(2)(i)(D)(*2*), removing ''commercial item'' and adding ''commercial product'' in its place;

■ d. In paragraph (c)(3), removing ''commercial items'' and adding ''commercial products'' in its place; and

■ e. In paragraph (e)(2), removing ''commercial items'' and adding ''commercial products'' in its place.

The revision reads as follows:

252.225–7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals.

* * * * *

Restriction on Acquisition of Certain Articles Containing Specialty Metals (DATE)

* * * * *

■ 202. Amend section 252.225–7016 by—

■ a. Revising the section heading and clause date;

■ b. In paragraph (c)(1), removing ''a noncommercial end product'' and adding ''an other than commercial end product'';

■ c. In paragraph (c)(2), removing ''noncommercial components'' and ''a noncommercial end product'' and adding ''other than commercial components'' and ''an other than commercial end product'' in their places, respectively;

■ d. In paragraph (f) introductory text, adding a heading; and

■ e. Revising paragraph (f)(1).

The revisions read as follows:

252.225–7016 Restriction on Acquisition of Ball and Roller Bearings.

* * * * *

Restriction on Acquisition of Ball and Roller Bearings (DATE)

* * * * *

(f) *Subcontracts.* * * *

(1) Commercial products; or

* * * * *

■ 203. Amend section 252.225–7021 by—

■ a. Revising the section heading and clause date;

■ b. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and

■ c. In the Alternate II clause—

■ i. Revising the clause date; and

■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively.

The revisions read as follows:

252.225–7021 Trade Agreements.

* * * * *

Trade Agreements—Basic (DATE)

* * * * *

Trade Agreements—Alternate II (DATE)

* * * * *

■ 204. Amend section 252.225–7036 by—

■ a. Revising the clause date;

■ b. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding

''commercial product'' and '' ''commercial product'' '' in their places, respectively;
■ c. In the Alternate I clause—
■ i. Revising the clause date; and
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively;
■ d. In the Alternate II clause—
■ i. Revising the clause date; and
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively;
■ e. In the Alternate III clause—
■ i. Revising the clause date; and
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively;
■ f. In the Alternate IV clause—
■ i. Revising the clause date; and
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and
■ g. In the Alternate V clause—
■ i. Revising the clause date; and
■ ii. In paragraph (a)(i)(A), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively.

The revisions read as follows:

252.225–7036 Buy American—Free Trade Agreements—Balance of Payments Program.

* * * * *

Buy American—Free Trade Agreements—Balance of Payments Program—Basic (DATE)

* * * * *

Buy American—Free Trade Agreements—Balance of Payments Program—Alternate I (DATE)

* * * * *

Buy American—Free Trade Agreements—Balance of Payments Program—Alternate II (DATE)

* * * * *

Buy American—Free Trade Agreements—Balance of Payments Program—Alternate III (DATE)

* * * * *

Buy American—Free Trade Agreements—Balance of Payments Program—Alternate IV (DATE)

* * * * *

Buy American—Free Trade Agreements—Balance of Payments Program—Alternate V (DATE)

* * * * *

■ 205. Amend section 252.225–7039 by—
■ a. Revising the clause date; and
■ b. In paragraph (f) introductory text, removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.225–7039 Defense Contractors Performing Private Security Functions Outside the United States.

* * * * *

Defense Contractors Performing Private Security Functions Outside The United States (DATE)

* * * * *

■ 206. Amend section 252.225–7044 by—
■ a. Revising the clause date;
■ b. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively;
■ c. In paragraph (b)(2), removing ''commercial item'' and adding ''commercial product'' in its place; and
■ d. In the Alternate I clause—
■ i. Revising the clause date;
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and
■ iii. In paragraph (b)(2), removing ''commercial item'' and adding ''commercial product'' in its place.

The revisions read as follows:

252.225–7044 Balance of Payments Program—Construction Material.

* * * * *

Balance of Payments Program—Construction Material—Basic (DATE)

* * * * *

Balance of Payments Program—Construction Material—Alternate I (DATE)

* * * * *

■ 207. Amend section 252.225–7045 by—
■ a. Revising the clause date;
■ b. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively;
■ c. In paragraph (c)(2), removing ''commercial item'' and adding ''commercial product'' in its place;
■ d. In the Alternate I clause—
■ i. Revising the clause date;
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and
■ iii. In paragraph (c)(2), removing ''commercial item'' and adding ''commercial product'' in its place;
■ e. In the Alternate II clause—
■ i. Revising the clause date;
■ ii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and
■ iii. In paragraph (c)(2), removing ''commercial item'' and adding ''commercial product'' in its place; and
■ f. In the Alternate III clause—
■ i. In the introductory text, removing ''(SC/CASA'' and adding ''(SC/CASA)'' in its place;
■ ii. Revising the clause date;
■ iii. In paragraph (a), in the definition of ''Commercially available off-the-shelf (COTS) item'', removing from paragraph (i)(A) ''commercial item'' and ''*commercial item*'' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and
■ iv. In paragraph (c)(2), removing ''commercial item'' and adding ''commercial product'' in its place.

The revisions read as follows:

252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.

* * * * *

Balance of Payments Program—Construction Material Under Trade Agreements—Basic (DATE)

* * * * *

Balance of Payments Program—Construction Material Under Trade Agreements—Alternate I (date)

* * * * *

Balance of Payments Program—Construction Material Under Trade Agreements—Alternate II (DATE)

* * * * *

Balance of Payments Program—Construction Material Under Trade Agreements—Alternate III (DATE)

* * * * *

■ 208. Amend section 252.225–7052 by—

■ a. Adding introductory text;

■ b. Revising the clause date;

■ c. In paragraph (a), in the definition of ''Commercially available off-the-shelf item'', removing from paragraph (1)(A) ''commercial item'' and '' ''commercial item'' '' and adding ''commercial product'' and '' ''commercial product'' '' in their places, respectively; and

■ d. In paragraph (d), removing ''commercial items'' and adding ''commercial products'' in its place.

The addition and revision reads as follows:

252.225–7052 Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten.

As prescribed in 225.7018–5, use the following clause:

Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten (DATE)

* * * * *

■ 209. Amend section 252.225–7054 by—

■ a. Revising the clause date; and

■ b. In paragraph (c), removing ''commercial items'' and adding ''commercial products'' in its place.

The revision reads as follows:

252.225–7054 Prohibition on Use of Certain Energy Sourced From Inside the Russian Federation.

* * * * *

Prohibition on Use of Certain Energy Sourced From Inside the Russian Federation (DATE)

* * * * *

■ 210. Amend section 252.226–7001 by—

■ a. Revising the section heading and clause date; and

■ b. In paragraph (f)(3), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revisions read as follows:

252.226–7001 Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns.

* * * * *

Utilization of Indian Organizations, Indian–Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (DATE)

* * * * *

■ 211. Amend section 252.227–7013 by—

■ a. Revising the section heading, clause heading, and the clause date;

■ b. In paragraph (b) introductory text, removing ''world-wide'' and ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''worldwide'' and ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in their places, respectively;

■ c. In paragraph (f)(2), removing ''to the Government purpose rights'' and ''Rights in Technical Data—Noncommercial Items'' and adding ''to the Government with government purpose rights'' and ''Rights in Technical Data—Other Than Commercial Products or Commercial Services'' in their places, respectively;

■ d. In paragraph (f)(3), removing ''Rights in Technical Data—Noncommercial Items'' and adding ''Rights in Technical Data—Other Than Commercial Products or Commercial Services'' in its place; and

■ e. In paragraph (k)(2), removing ''noncommercial items'', ''commercial items'', and ''commercial item'' wherever they appear and adding ''other than commercial products or commercial services'', ''commercial products or commercial services'', and ''commercial product or commercial service'' in their places, respectively.

The revisions read as follows:

252.227–7013 Rights in Technical Data—Other Than Commercial Products and Commercial Services.

* * * * *

Rights in Technical Data—Other Than Commercial Products or Commercial Services (DATE)

* * * * *

■ 212. Amend section 252.227–7014 by—

■ a. Revising the section heading, clause heading and date, and paragraphs (a)(14) and (a)(15) introductory text;

■ b. In paragraph (b) introductory text, removing ''world-wide'' and ''noncommercial computer software'' and adding ''worldwide'' and ''other than commercial computer software'' in their places, respectively;

■ c. In paragraphs (b)(3)(i) and (ii), removing ''noncommercial computer software'' and adding ''other than commercial computer software'' in its place;

■ d. Revising paragraph (b)(4)(i);

■ e. In paragraph (f)(2), removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place;

■ f. In paragraph (f)(3), removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place; and

■ g. In paragraph (k)(1), removing ''noncommercial computer software'' and adding ''other than commercial computer software'' in its place.

The revisions read as follows:

252.227–7014 Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

* * * * *

Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation (DATE)

(a) * * *

(14) *Other than commercial computer software* means software that does not qualify as commercial computer software under the definition of ''commercial computer software'' of this clause.

(15) *Restricted rights* apply only to other than commercial computer software and mean the Government's rights to—

* * * * *

(b) * * *

(4) * * *

(i) The standard license rights granted to the Government under paragraphs (b)(1) through (3) of this clause, including the period during which the Government shall have government purpose rights in computer software, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in computer software than are enumerated

in the definition of ''restricted rights'' of this clause or lesser rights in computer software documentation than are enumerated in the definition of ''limited rights'' of the Rights in Technical Data—Other Than Commercial Products and Services clause of this contract.

* * * * *

■ 213. Amend section 252.227–7015 by—

■ a. Revising the section heading, clause heading, and clause date;

■ b. In paragraph (a)(1), removing ''*Commercial item*'' and adding ''*Commercial product or commercial service*'' in its place;

■ c. In paragraphs (b)(2)(i) and (ii), removing ''commercial items'' and adding ''commercial products'' in its place; and

■ d. In paragraph (e)(2), removing ''commercial items'' and ''commercial item'' and adding ''commercial products or commercial services'' and ''commercial product or commercial service'' in their places, respectively.

The revisions read as follows:

252.227–7015 Technical Data–Commercial Products and Commercial Services.

* * * * *

Technical Data—Commercial Products and Commercial Services (DATE)

* * * * *

■ 214. Amend section 252.227–7016 by revising the section heading, clause date, and paragraphs (a) and (c)(2) to read as follows:

252.227–7016 Rights in Bid or Proposal Information.

* * * * *

Rights in Bid or Proposal Information (DATE)

(a) *Definitions.*

(1) For contracts that require the delivery of technical data, the terms ''technical data'' and ''computer software'' are defined in the Rights in Technical Data—Other Than Commercial Products and Commercial Services clause of this contract or, if this is a contract awarded under the Small Business Innovation Research Program, the Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause of this contract.

(2) For contracts that do not require the delivery of technical data, the term ''computer software'' is defined in the Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation clause of this contract or, if this is a contract awarded under the Small Business Innovation Research Program, the Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause of this contract.

* * * * *

(c) * * *

(2) The Government's right to use, modify, reproduce, release, perform, display, or disclose information that is technical data or computer software required to be delivered under this contract are determined by the Rights in Technical Data—Other Than Commercial Items, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, or Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause(s) of this contract.

* * * * *

■ 215. Amend section 252.227–7017 by revising the section heading, provision date, and paragraph (a) to read as follows:

252.227–7017 Identification and Assertion of Use, Release, or Disclosure Restrictions.

* * * * *

Identification and Assertion of Use, Release, or Disclosure Restrictions (DATE)

(a) The terms used in this provision are defined in the following clause or clauses contained in this solicitation—

(1) If a successful offeror will be required to deliver technical data, the Rights in Technical Data—Other Than Commercial Products and Commercial Services clause, or, if this solicitation contemplates a contract under the Small Business Innovation Research Program, the Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause.

(2) If a successful offeror will not be required to deliver technical data, the Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation clause, or, if this solicitation contemplates a contract under the Small Business Innovation Research Program, the Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause.

* * * * *

■ 216. Amend section 252.227–7018 by—

■ a. Revising the section heading, clause heading, clause date, and paragraphs (a)(17) and (a)(18) introductory text;

■ c. In paragraph (b) introductory text, removing ''world-wide'' and ''noncommercial computer software'' and adding ''worldwide'' and ''other than commercial computer software'' in their places, respectively;

■ d. In paragraph (b)(3), removing ''noncommercial computer software'' and adding ''other than commercial computer software'' in its place;

■ e. In paragraph (f)(2), removing ''Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' and adding ''Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' in its place;

■ f. In paragraph (f)(3), removing ''Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' and adding ''Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' in its place;

■ g. In paragraph (f)(4):

■ i. Revising the heading; and

■ ii. Removing ''Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' and adding ''Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' in its place; and

■ h. Revising paragraph (k)(2).

The revisions read as follows:

252.227–7018 Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

* * * * *

Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (DATE)

(a) * * *

(17) *Other than commercial computer software* means software that does not qualify as commercial computer software under the definition of ''commercial computer software'' of this clause.

(18) *Restricted rights* apply only to other than commercial computer software and mean the Government's rights to—

* * * * *

(f) *SBIR data rights markings.* * * *

* * * * *

(k) * * *

(2) Whenever any other than commercial technical data or computer

software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. The Contractor shall use the Technical Data—Commercial Products and Commercial Services clause of this contract to obtain technical data pertaining to commercial products including commercial components, commercial services, or commercial processes. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

* * * * *

■ 217. Amend section 252.227–7019 by revising the section heading, clause date, and paragraph (a)(2) to read as follows:

252.227–7019 Validation of Asserted Restrictions—Computer Software.

* * * * *

Validation of Asserted Restrictions—Computer Software (DATE)

(a) * * *

(2) Other terms used in this clause are defined in the Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation clause of this contract.

* * * * *

■ 218. Amend section 252.227–7025 by—

■ a. Revising the clause date;

■ b. In paragraph (a)(1), removing ''Rights in Technical Data-Noncommercial Items'' and adding ''Rights in Technical Data—Other Than Commercial Products and Commercial Services'' in its place;

■ c. In paragraph (a)(2), removing ''Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation'' and adding ''Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation'' in its place;

■ d. In paragraph (a)(3), removing ''Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' and adding ''Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program'' in its place; and

■ e. In paragraph (b)(4)(i), removing ''commercial item'' and ''commercial items'' and adding ''commercial product or commercial service'' and ''commercial products'' in their places, respectively.

The revision reads as follows:

252.227–7025 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

* * * * *

Limitations on the Use or Disclosure of Government-Furnished Information Marked With Restrictive Legends (DATE)

* * * * *

■ 219. Amend section 252.227–7037 by—

■ a. Revising the section heading;

■ b. In the introductory text, removing ''27.7104(e)(5)'' and adding ''227.7104(e)(5)'' in its place;

■ c. Revising the clause date;

■ d. In paragraph (a), removing ''Rights in Technical Data—Noncommercial Items'' and adding ''Rights in Technical Data—Other Than Commercial Products and Commercial Services'' in its place;

■ e. Revising paragraph (b)(1) heading;

■ f. In paragraphs (b)(1)(i) and (ii), removing ''commercial item'' and adding ''commercial product or commercial service'' in its place;

■ g. In paragraphs (b)(2)(i)(A) and (B), removing ''commercial item'' and adding ''commercial product'' in its place; and

■ h. In paragraph (l), removing ''commercial items'' and adding ''commercial products'' in its place.

The revisions read as follows:

252.227–7037 Validation of Restrictive Markings on Technical Data.

* * * * *

Validation of Restrictive Markings on Technical Data (DATE)

* * * * *

(b) * * *

(1) *Commercial products and commercial services.* * * *

* * * * *

■ 220. Amend section 252.232–7006 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (f)(1)(v), removing ''item'' wherever it appears.

The revision reads as follows:

252.232–7006 Wide Area WorkFlow Payment Instructions.

* * * * *

Wide Area Workflow Payment Instructions (DATE)

* * * * *

■ 221. Amend 252.232–7017 by—

■ a. Revising the date of the clause; and

■ b. In paragraph (c), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.232–7017 Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

* * * * *

Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration (DATE)

* * * * *

■ 222. Amend 252.236–7013 by—

■ a. Revising the section heading and date of the clause; and

■ b. In paragraph (c), removing ''commercial items'' and adding ''commercial products'' in its place.

The revisions read as follows:

252.236–7013 Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers.

* * * * *

Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers (DATE)

* * * * *

■ 223. Amend section 252.237–7010 by—

■ a. Revising the section heading and clause date; and

■ b. In paragraph (c), removing ''commercial items'' and adding ''commercial services'' in its place.

The revisions read as follows:

252.237–7010 Prohibition on Interrogation of Detainees by Contractor Personnel.

* * * * *

Prohibition on Interrogation of Detainees by Contractor Personnel (DATE)

* * * * *

■ 224. Amend section 252.237–7019 by—

■ a. Revising the clause date; and

■ b. In paragraph (c), removing ''commercial items'' and adding ''commercial services'' in its place.

The revision reads as follows:

252.237–7019 Training for Contractor Personnel Interacting With Detainees.

* * * * *

Training for Contractor Personnel Interacting With Detainees (DATE)

* * * * *

■ 225. Amend section 252.239–7010 by—

■ a. Revising the section heading and clause date; and

■ b. In paragraph (l), removing ''commercial items'' and adding ''commercial services'' in its place.

The revisions read as follows:

252.239–7010 Cloud Computing Services.

* * * * *

Cloud Computing Services (DATE)

* * * * *

■ 226. Amend section 252.244–7000 by—

■ a. Revising the section heading, clause heading, and clause date; and

■ b. In paragraphs (a), (b), (c)(1) and (2), and (d), removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revisions read as follows:

252.244–7000 Subcontracts for Commercial Products or Commercial Services.

* * * * *

Subcontracts for Commercial Products or Commercial Services (DATE)

* * * * *

■ 227. Amend section 252.246–7003 by—

■ a. Revising the clause date; and

■ b. Adding a heading to paragraph (f); and

■ c. In paragraph (f)(2) introductory text, removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision and addition read as follows:

252.246–7003 Notification of Potential Safety Issues.

* * * * *

Notification of Potential Safety Issues (DATE)

* * * * *

(f) *Subcontracts.* * * *

* * * * *

■ 228. Amend section 252.246–7007 by—

■ a. Revising the clause date; and

■ b. In paragraph (e):

■ i. Adding a heading; and

■ ii. Removing ''commercial items'' and adding ''commercial products'' in its place.

The revision and addition read as follows:

252.246–7007 Contractor Counterfeit Electronic Part Detection and Avoidance System.

* * * * *

Contractor Counterfeit Electronic Part Detection and Avoidance System (DATE)

* * * * *

(e) *Subcontracts.* * * *

* * * * *

■ 229. Amend section 252.246–7008 by—

■ a. Revising the clause date; and

■ b. In paragraph (e), removing ''commercial items'' and adding ''commercial products'' in its place.

The revision reads as follows:

252.246–7008 Sources of Electronic Parts.

* * * * *

Sources of Electronic Parts (DATE)

* * * * *

■ 230. Amend section 252.247–7003 by—

■ a. Revising the clause date; and

■ b. In paragraph (c):

■ i. Adding a heading; and

■ ii. Removing ''commercial items'' and adding ''commercial products or commercial services'' in its place.

The revision reads as follows:

252.247–7003 Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer.

* * * * *

Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer (DATE)

* * * * *

(c) *Subcontracts.* * * *

* * * * *

■ 231. Amend section 252.247–7023 by—

■ a. Revising the section heading, clause date, and paragraph (b)(2)(ii)(A);

■ b. In paragraph (b)(2)(ii)(B) introductory text, removing ''Commercial items'' and adding ''Commercial products'' in its place;

■ c. In paragraph (i) introductory text:

■ i. Adding a heading; and

■ ii. Removing ''commercial items'' and adding ''commercial products'' in its place;

■ d. In Alternate I—

■ i. Revising the clause date and paragraph (b)(2)(i);

■ ii. In paragraph (b)(2)(ii) introductory text, removing ''Commercial items'' and adding ''Commercial products'' in its place;

■ iii. In paragraph (b)(2)(ii)(B), removing ''commercial items'' and adding ''commercial products'' in its place; and

■ iv. In paragraph (i) introductory text:

■ A. Adding a heading; and

■ B. Removing ''commercial items'' and adding ''commercial products'' in its place; and

■ e. In Alternate II—

■ i. Revising the clause date and paragraph (b)(2)(i);

■ ii. In paragraph (b)(2)(ii) introductory text, removing ''Commercial items'' and adding ''Commercial products'' in its place; and

■ iii. In paragraph (i) introductory text:

■ A. Adding a heading; and

■ B. Removing ''commercial items'' and adding ''commercial products'' in its place.

The revisions read as follows:

252.247–7023 Transportation of Supplies by Sea.

* * * * *

Transportation of Supplies by Sea—Basic (DATE)

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) Other than commercial products; or

* * * * *

(i) *Subcontracts.* * * *

* * * * *

Transportation of Supplies by Sea—Alternate I (DATE)

* * * * *

(b) * * *

(2) * * *

(i) Other than commercial products; or

* * * * *

(i) *Subcontracts.* * * *

* * * * *

Transportation of Supplies by Sea—Alternate II (DATE)

* * * * *

(b) * * *

(2) * * *

(i) Other than commercial products; or

* * * * *

(i) *Subcontracts.* * * *

* * * * *

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H.R. 2471/P.L. 117–103
Consolidated Appropriations Act, 2022 (Mar. 15, 2022; 136 Stat. 49)
Last List March 16, 2022

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